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PRINCIPAL ABBREVIATIONS

AA	VATICAN II, Decree on the Apostolate of Lay People, *Apostolicam actuositatem*, November 18, 1965, *AAS* 59 (1966) 837–864
AAS	*Acta Apostolicae Sedis: commentarium officiale*
AG	VATICAN II, Decree on the Church's Missionary Activity, *Ad gentes*, December 7, 1965, *AAS* 58 (1966) 947–990
AIE	SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, Decree *Ad instituenda experimenta*, June 4, 1970, *AAS* 62 (1970) 549–550
AkK	*Archiv für katholisches Kirchenrecht*, Mainz, 1857–
Alloc.	Allocution
AP	Apostolic Penitentiary
AP	PAUL VI, motu propio *Ad pascendum*, August 15, 1972, *AAS* 64 (1972) 534–540
Ap.	Apostolic
Ap. Const.	Apostolic Constitution
Ap. Exhort.	Apostolic Exhortation
art. / arts.	article / articles
AS	PAUL VI, motu proprio *Apostolica sollicitudo*, September 15, 1965, *AAS* 57 (1965) 775–780
BB	*Benedicti Papae XIV Bullarium*, Venice 1768
Bk.	Book
BM	*Bibliographia missionaria*
BOCEE	*Boletín Oficial de la Conferencia Episcopal española*
BOEE	*Boletín Oficial del Estado español*
BRC	*Bullarii Romani Continuatio, Romae 1835–1855*
C	*Causa* (*Decreti pars secunda*)
c. / cc.	canon / canons
CA	PIUS XII, motu proprio *Crebrae allatae*, February 22, 1949, *AAS* 31 (1949) 89–117
CAd	SECRETARIAT OF STATE, Rescript *Cum admotae*, November 6, 1964, *AAS* 59 (1967) 374–378

CAn	JOHN PAUL II, Encyclical *Centesimus annus*, May 1, 1991, *AAS* 83 (1991) 793–867
CB	Congregation for bishops
CBA	Conference of bishops of Argentina
CBF	Conference of bishops of France
CBI	Conference of bishops of Italy
CBM	Conference of bishops of Mexico
CBP	Conference of bishops of Portugal
CBS	Conference of bishops of Spain
CC	Congregation for the Clergy
CC	PIUS XI, Encyclical *Casti connubii*, December 31, 1930, *AAS* 22 (1930) 539–592
CCC	*Catechism of the Catholic Church*, Canadian Conference of Catholic bishops, Ottawa, 2000
CCCL	Central Commission for the Coordination of the Work of the Council and for Interpreting the Conciliar Decrees
CCE	Congregation for Catholic Education
CCEO	*Codex canonum Ecclesiarum orientalium*, 1990
CCh	*Corpus Christianorum*: SL (Series Latina), SG (Series Graeca). Turnhout-Paris 1953 ss.
CCS	Congregation for the Causes of Saints
CD	VATICAN II, Decree on the Pastoral Office of bishops in the Church, *Christus Dominus*, October 28, 1965, *AAS* 58 (1966) 673–696
CDF	Congregation for the Doctrine of the Faith
CDRC	Commission for the Discipline of the Roman Curia
CDWDS	Congregation for Divine Worship and the Discipline of the Sacraments
CE	PAUL VI, motu proprio *Catholica Ecclesia*, October 23, 1976, *AAS* 68 (1976) 694–696
CEC	Congregation for the Eastern Churches
CEP	Congregation for the Evangelization of Peoples
cf.	confer
ch.	chapter
CIC	*Codex iuris canonici*, 1983
CIC/1917	*Codex iuris canonici*, 1917
CICLSAL	Congregation for Institutes of Consecrated Life and Societies of Apostolic Life
CICSL	Consilium for the Implementation of the Constitution on the Sacred Liturgy
CL	JOHN PAUL II, Apostolic Exhortation *Christifideles laici*, December 30, 1988, *AAS* 81 (1989) 393–521
Clem.	*Clementinae*

CM	PAUL VI, motu proprio *Causas matrimoniales*, March 28, 1971, *AAS* 63 (1971) 441–446
CMat	PAUL VI, motu proprio *Cum matrimonialium*, September 8, 1973, *AAS* 65 (1973) 577–581
CodCom	Pontifical Commission for the Authentic Interpretation of the Canons of the Code of Canon Law
col. / cols.	column / columns
Collectanea	*Collectanea S. Congregationis de Propaganda Fide*, Romae 1907
Comm	Communicationes
Communionis notio	CONGREGATION FOR THE DOCTRINE OF THE FAITH, *Letters to the bishops of the Catholic Church about Certain Aspects of the Church as Communion*, May 28, 1992, *AAS* 85 (1993) 838–850
Comp. I (II ...)	*Compilatio prima* (*secunda*, etc.)
Congr.	Congregation
Const.	Constitution
CPAC	Council for the Public Affairs of the Church
CS	PAUL VI, motu proprio *Cleri sanctitati*, June 2, 1957, *AAS* 49 (1957) 433–600
CSan	SACRED CONGREGATION FOR RELIGIOUS, Instruction *Cum Sanctissimus*, March 19, 1948, *AAS* 40 (1948) 293–297
CSEL	*Corpus scriptorum ecclesiasticorum latinorum*, Viena 1866 ss.
CT	JOHN PAUL II, Apostolic Exhortation *Catechesi tradendae*, October 16, 1979, *AAS* 71 (1979) 1277–1340
D.	*Distinctio (Decreti pars prima; De poen.; De cons.)*
DCV	*Documenta inde a Concilio Vaticano II expleto edita* (1966–1985), Vatican City 1985
De poen.	*Tractatus de poenitentia* (C. 33, q. 3)
De cons.	*De consecratione (Decreti pars tertia)*
DE	*Il Diritto ecclesiastico*
DE/1967	SECRETARIAT FOR PROMOTING CHRISTIAN UNITY, *Ecumenical Directory*, I: May 14, 1967, *AAS* 59 (1967) 574–592; II: April 16, 1970, *AAS* 62 (1970) 705–724
DE/1993	PONTIFICAL COUNCIL FOR PROMOTING CHRISTIAN UNITY, *Directory for the Application of the Principles and Norms on Ecumenism*, March 23, 1993, *AAS* 85 (1993) 1039–1119
Decl.	Declaration
Decr.	Decree
DH	VATICAN II, Declaration on Religious Liberty, *Dignitatis humanae*, December 7, 1965, *AAS* 58 (1966) 929–946
DI	*Dilexit iustitiam*, Vatican City 1984
dict. p. c.	Dictum Gratiani post capitulum
Dir.	Directory

DPM	JOHN PAUL II, Apostolic Constitution *Divinus perfectionis Magister*, January 25, 1983, *AAS* 75 (1983) 349–355
DPMB	SACRED CONGREGATION FOR BISHOPS, *Directory on the Pastoral Ministry of bishops* (*Ecclesiae imago*), February 22, 1973, Typis polyglottis Vaticanis 1973
DR	PIUS XI, Encyclical *Divini Redemptoris*, March 19, 1937, *AAS* 29 (1937) 65–106
DSD	PIUS XI, Apostolic Constitution *Deus scientiarum Dominus*, May 24, 1931, *AAS* 23 (1931) 241–262
DV	VATICAN II, Dogmatic Constitution on Divine Revelation, *Dei Verbum*, November 18, 1965, *AAS* 58 (1966) 817–835
Dz.-Sch	DENZINGER-SCHÖNMETZER, *Enchiridion Symbolorum, Definitionum et Declarationum de rebus fidei et morum*, ed. 33.ª, 1965
EcS	PAUL VI, Encyclical *Ecclesiam Suam*, August 6, 1964, *AAS* 56 (1964) 609–659
EDIL	*Enchiridion Documentorum Instaurationis Liturgicae* (R. Kaczynski, ed.), Torino-Roma 1976–1993
EFH	*Enchiridion fontium historiae ecclesiasticae antiquae* (C. Kirch, ed.)
EIC	Ephemerides iuris canonici
EM	PAUL VI, motu proprio *De Episcoporum muneribus*, June 15, 1966, *AAS* 58 (1966) 467–472
EMys	SACRED CONGREGATION FOR RITES, Instruction *Eucharisticum mysterium*, May 25, 1967, *AAS* 59 (1967) 539–573
EN	PAUL VI, Apostolic Exhortation *Evangelii nuntiandi*, December 8, 1975, *AAS* 68 (1976) 5–76
Enc.	Encyclical
EP	SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Decree *Ecclesiae Pastorum*, March 19, 1975, *AAS* 67 (1975) 281–284
ES	PAUL VI, motu proprio *Ecclesiae sanctae*, August 6, 1966, *AAS* 58 (1966) 757–787
ET	PAUL VI, Apostolic Exhortation *Evangelica testificatio*, June 29, 1971, *AAS* 63 (1971) 497–526
EV	*Enchiridion Vaticanum*. Edizioni Dehoniane, Bologna 1966–2001
Exhort.	Exhortation
Extrav. com.	*Extravagantes communes*
Extrav. Io. XXII	*Extravagantes Ioannis XXII*
FC	JOHN PAUL II, Apostolic Exhortation *Familiaris consortio*, November 22, 1981, *AAS* 74 (1982) 81–191
ff	following
Fontes	P. GASPARRI AND A. SERÉDI, eds., *Codicis Iuris Canonici Fontes*, Rome 1923–1939

GCD	SACRED CONGREGATION FOR CLERGY, *General Catechetical Directory*, April 11, 1971, *AAS* 64 (1972) 97–176
GE	VATICAN II, Declaration on Christian Education, *Gravissimum educationis*, October 28, 1965, *AAS* 58 (1966) 728–739
gen.	general
GER	*Generale Ecclesiae Rationarium*, June 28, 1988
GILH	General Instruction of the Liturgy of the Hours
GIRM (1970)	General Instruction of the Roman Missal, March 26, 1970
GIRM (2000)	General Instruction of the Roman Missal, Canadian Conference of Catholic bishops, Ottawa
gl.	*glossa*
Glos. ord.	*Glossa ordinaria*
GS	VATICAN II, Pastoral Constitution on the Church in the Modern World, *Gaudium et spes*, December 7, 1965, *AAS* 58 (1966) 1025–1115
HCW	Rite of Holy Communion and Worship of the Eucharistic Mystery Outside Mass
Hom.	Homily
HV	PAUL VI, Encyclical *Humanae vitae*, July 25, 1968, *AAS* 60 (1968) 481–503
IC	SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Instruction *Immensae caritatis*, January 29, 1973, AAS 65 (1973) 264–271
ICL	Institute of consecrated life
ID	SACRED CONGREGATION FOR SACRAMENTS AND DIVINE WORSHIP, INSTRUCTION *Inaestimabile donum*, April 3, 1980, AAS 72 (1980) 331–343
IE	*Ius Ecclesiae*
IM	VATICAN II, Decree on the Means of Social Communication, *Inter mirifica*, December 4, 1963, *AAS* 56 (1964) 145–157
Ind.	Indult
Instr.	Instruction
IOe	SACRED CONGREGATION FOR RITES, Instruction *Inter Oecumenici*, September 26, 1964, *AAS* 56 (1964) 877–900
ITC	International Theological Commission
l.s.	*Latae sententiae*
LE	*Leges Ecclesiae post Codicem iuris canonici editae* (X. Ochoa, ed.), Rome 1966–1994
LEF	*Lex Ecclesiae fundamentalis*
Let.	Letter (*epistula*)
LG	VATICAN II, Dogmatic Constitution on the Church, *Lumen gentium*, November 21, 1964, *AAS* 57 (1965) 5–75
Litt.	Letter (*litterae*)

LMR	SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, *Life and Mission of Religious in the Church* (Plenaria of SCRSI), August 20, 1980
MBR	*Magnum Bullarium Romanum*, Graz 1964–1966
MC	PIUS XII, Encyclical *Mystici Corporis*, June 29, 1943, *AAS* 35 (1943) 193–248
MD	PIUS XII, Encyclical *Mediator Dei*, November 20, 1947, *AAS* 39 (1947) 521–600
ME	Monitor ecclesiasticus
MeM	JOHN XXIII, Encyclical *Mater et Magistra* May 15, 1961, *AAS* 53 (1961) 401–464
MF	PAUL VI, Encyclical *Mysterium fidei*, September 3, 1965, *AAS* 57 (1965) 753–774
MG	PAUL VI, Allocution *Magno gaudio*, May 23, 1964, *AAS* 56 (1964) 565–571
MM	PAUL. VI, motu proprio *Matrimonia mixta*, March 31, 1970, *AAS* 62 (1970) 257–263
MP/mp	*Motu proprio*
MQ	PAUL VI, motu proprio *Ministeria quaedam*, August 15, 1972, *AAS* 64 (1972) 529–534
MR	SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES AND SACRED CONGREGATION FOR BISHOPS, Directive Notes *Mutuae relationes*, May 14, 1978, *AAS* 70 (1978) 473–506
MS	SACRED CONGREGATION FOR THE DOCTRINE OF THE FAITH, Instruction *Matrimonii sacramentum*, March 18, 1966, *AAS* 58 (1966) 235–239
NAE	VATICAN II, Declaration on the Relation of the Church to Non-Christian Religions, *Nostra aetate*, October 28, 1965, *AAS* 58 (1966) 740–744
no. / nos.	number / numbers
Notif.	Notification
NPCEM	COUNCIL FOR THE PUBLIC AFFAIRS OF THE CHURCH, *Norms for the Promotion of Candidates to the Episcopal Ministry in the Latin Church*, March 25, 1972, *AAS* 64 (1972) 386–391
NSRR	*Norms of the Tribunal of the Sacred Roman Rota*: (1934) June 29, 1934, *AAS* 26 (1934) 449–491 (1969) May 27, 1969, Typis polyglottis Vaticanis 1969 (1982) January 16, 1982, *AAS* 74 (1982) 490–517
OChr	SACRED CONGREGATION FOR CLERGY, Circular Letter *Omnes christifideles*, January 25, 1973
OE	VATICAN II, Decree on the Eastern Catholic Churches, *Orientalium Ecclesiarum*, November 21, 1964, *AAS* 57 (1965) 76–89
OR	*L'Osservatore romano*
Ord	Ordinary

OS (1966)	SECRETARY OF STATE, *Order of the Celebration of the Synod of bishops*, December 8, 1966, *AAS* 59 (1967) 91–103
OS (1969)	COUNCIL FOR THE PUBLIC AFFAIRS OF THE CHURCH, *Order of the Celebration of the Synod of bishops*, June 24, 1969, *AAS* 61 (1969) 525–539
OS (1971)	COUNCIL FOR THE PUBLIC AFFAIRS OF THE CHURCH, *Order of the Celebration of the Synod of bishops*, August 20, 1971, *AAS* 63 (1971) 702–704
OT	VATICAN II, Decree on the Training of Priests, *Optatum totius*, October 28, 1965, *AAS* 58 (1966) 713–727
PA	SACRED CONSISTORIAL CONGREGATION, Directive Notes *Postquam Apostoli*, March 25, 1980, *AAS* 72 (1980) 343–364
Paen	PAUL VI, Apostolic Constitution *Paenitemini*, February 17, 1966, *AAS* 58 (1966) 177–185
Pamplona Com	*Código de Derecho Canónico, bilingüe y anotada*, Pamplona, 5th ed. 1992; 6th ed. 2001; *Code of Canon Law Annoted*, 2nd ed., Montreal, 2004.
Part.	Particular
PB	JOHN PAUL II, Apostolic Constitution *Pastor bonus*, June 28, 1988, *AAS* 80 (1988) 841–912
PBC	Pontifical Biblical Commission
PC	VATICAN II, Decree on the Up-to-Date Renewal of Religious Life, *Perfectae caritatis*, October 28, 1965, *AAS* 58 (1966) 702–712
PCC	Pontifical Council for Culture
PCCICOR	Pontifical Commission for the Revision of the Eastern Code of Canon Law
PCCICR	Pontifical Commission for the Revision of the Code of Canon Law
PCCU	Pontifical Council *Cor unum*
PCDNB	Pontifical Council for Dialogue with Non-Believers
PCED	Pontifical Commission *Ecclesia Dei*
PCF	Pontifical Council for the Family
PCHW	Pontifical Council for Pastoral Assistance to Health Care Workers
PCID	Pontifical Council for Inter-religious Dialogue
PCIDSVC	Pontifical Commission for the Interpretation of the Decrees of the Second Vatican Council
PCILT	Pontifical Council for the Interpretation of Legislative Texts; now: Pontifical Council for Legislative Texts
PCJP	Pontifical Council for Justice and Peace
PCL	Pontifical Council for the Laity
PCPCMIP	Pontifical Council for the Pastoral Care of Migrants and Itinerant
PCPCU	Pontifical Council for Promoting Christian Unity

PCSC	Pontifical Council for Social Communications
PCSCM	Pontifical Council for Social Communications Media
PDV	JOHN PAUL II, Apostolic Exhortation *Pastores dabo vobis*, March 25, 1992, *AAS* 84 (1992) 657–804
pen	Preliminary explanatory note
Per	*De religiosis et missionariis supplementa et monumenta periodica*, 1–8 (1907–1919) *Periodica de re canonica et morali*, 9–15 (1921–1926) *Periodica de re morali, canonica, liturgica*, 16–79 (1927–1990) *Periodica de re canonica*, 80 (1991)
PF	PIUS XII, motu proprio *Primo feliciter*, March 12, 1948, *AAS* 40 (1948) 283–286
PG	*Patrologiae cursus completus*. Series graeca. (J.-P. Migne, ed.), Paris 1857–1886
PI	Instruction *Potissimum institutioni*, February 2, 1990, *AAS* 82 (1990) 472–532
PL	*Patrologiae cursus completus*. Series latina. (J.-P. Migne, ed.), Paris 1844–1864
PM	PAUL VI, motu proprio. *Pastorale Munus*, November 30, 1963, *AAS* 56 (1964) 5–12
PME	PIUS XII, Apostolic Constitution *Provida Mater Ecclesia*, February 2, 1947, *AAS* 39 (1947) 114–124
PO	VATICAN II, Decree on the Ministry and Life of Priests, *Presbyterorum ordinis*, December 7, 1965, *AAS* 58 (1966) 991–1024
Prae	Praenotanda
Principles	*Principles Governing the Revision of the Code of Canon Law*, *Communicationes* 1 (1969) 77–86
PrM	SACRED CONGREGATION FOR THE DISCIPLINE OF THE SACRAMENTS, Instruction *Provida Mater*, August 15, 1936, *AAS* 28 (1936) 313–361
PS	SACRED CONSISTORIAL CONGREGATION, Circular Letter *Presbyteri sacra*, April 11, 1970, *AAS* 62 (1970) 459–465
pt.	part
q.	question
QA	PIUS XI, Encyclical *Quadragessimo anno*, May 15, 1931, *AAS* 23 (1931) 177–228
QSR	Quaderni Studio rotale
RA	Rite of Anointing, December 7, 1972
RBaptC (1969)	Rite of Baptism of Children, June 10, 1969;
RBaptC (1973)	Rite of Baptism of Children, Ed. typica altera, August 29, 1973
RC	SACRED CONGREGATION FOR RELIGIOUS AND SECULAR INSTITUTES, Instruction *Renovationis causam*, January 6, 1969, *AAS* 61 (1969) 103–120

RCIA	Rite of Christian Initiation of Adults, January 1, 1972
RConf	Rite of Confirmation, August 22, 1971
RDCA	Rite of Dedication of a Church and an Altar, May 29, 1977
REDC	*Revista española de derecho canónico*
Rescr.	Rescript
Resol.	Resolution
Resp.	Response
REU	PAUL VI, Apostolic Constitution *Regimini Ecclesiae universae*, August 15, 1967, *AAS* 59 (1967) 885–928
RF	Rite of Funerals, August 15, 1969
RFIS	SACRED CONGREGATION FOR CATHOLIC EDUCATION, *Ratio fundamentalis institutionis sacerdotalis*, January 6, 1970, *AAS* 62 (1970) 321–384; Editio altera, March 19, 1985, Typis polyglottis Vaticanis 1985
RGCR	*Regolamento generale della Curia Romana*, February 4, 1992, *AAS* 84 (1992) 201–267
RH	JOHN PAUL II, Encyclical *Redemptor hominis*, March 4, 1979: *AAS* 71 (1979) 257–324
RM	JOHN PAUL II, Encyclical *Redemptoris Missio*, December 7, 1990, *AAS* 83 (1991) 249–340
RM (1969)	Rite of Marriage, March 19, 1969
RM (1990)	Rite of Marriage, March 19, 1990
RN	LEO XIII, Encyclical *Rerum novarum*, May 15, 1891, *Leonis XIII P.M. Acta*, XI, Rome 1892, 97–144
RomPont	Roman Pontifical
RP	Rite of Penance, December 2, 1973
RP	JOHN PAUL II, Apostolic Exhortation. *Reconciliatio et Paenitentia*, December 2, 1984, *AAS* 77 (1985) 185–275
RPE	PAUL VI, Apostolic Constitution *Romano Pontifici eligendo*, October 1, 1975, *AAS* 67 (1975) 609–645
RR	Roman Rota
rubr.	rubric
S. Cong.	Sacred Congregation
S. Th.	*Summa Theologica*
SAL	Society of Apostolic Life
Salamanca Com	*Código de Derecho Canónico, bilingüe comentada*, Salamanca, 11th ed. 1992
SAP	Sacred Apostolic Penitentiary
SapChr	JOHN PAUL II, Apostolic Constitution *Sapientia christiana*, April 15, 1979, *AAS* 71 (1979) 469–499
SArt	SACRED CONGREGATION FOR THE HOLY OFFICE, Instruction *Sacrae artis*, June 30, 1952, *AAS* 44 (1952) 542–546
SC	VATICAN II, Constitution on the Sacred Liturgy, *Sacrosanctum Concilium*, December 4, 1963, *AAS* 56 (1964) 97–138
SCB	Sacred Congregation for bishops

SCBR	Sacred Congregation for bishops and Regulars
SCC	Sacred Congregation for Clergy
SCCE	Sacred Congregation for Catholic Education
SCCong	Sacred Consistorial Congregation
SCCouncil	Sacred Congregation of the Council
SCCS	Sacred Congregation for the Causes of Saints
SCDF	Sacred Congregation for the Doctrine of the Faith
SCDS	Sacred Congregation for the Discipline of the Sacraments
SCDW	Sacred Congregation for Divine Worship
SCEC	Sacred Congregation for the Eastern Churches
SCEEA	Sacred Congregation for Extraordinary Ecclesiastical Affairs
SCEP	Sacred Congregation for the Evangelization of Peoples or for the Propagation of the Faith
SCHO	Sacred Congregation for the Holy Office
SCong	SACRED CONGREGATION FOR RELIGIOUS, Normae *Sacra Congregatio,* July 7, 1956
SCPF	Sacred Congregation for the Propagation of the Faith
SCR	Sacred Congregation for Religious
SCRit	Sacred Congregation for Rites
SCRSI	Sacred Congregation for Religious and Secular Institutes
SCSDW	Sacred Congregation for Sacraments and Divine Worship
SCSUS	Sacred Congregation for Seminaries and University Studies
SDL	JOHN PAUL II, Apostolic Constitution *Sacrae disciplinae leges,* January 25, 1983, *AAS* 75 (1983) pars II, VII–XIV
SDO	PAUL VI, motu proprio *Sacrum diaconatus ordinem,* June 18, 1967, *AAS* 59 (1967) 697–704
Secr. St.	Secretariat of State
sect.	section
sess.	session
SFS	CONGREGATION FOR CATHOLIC EDUCATION, Circular Letter *Spiritual Formation in Seminaries,* January 6, 1980, *Leges ecclesiae,* 6, col. 7857–7867
Signatura	Supreme Tribunal of the Apostolic Signatura
SMC	JOHN PAUL II, Apostolic Constitution *Spirituali militum curae,* April 21, 1986, *AAS* 78 (1986) 481–486
SN	PIUS XII, motu proprio *Sollicitudinem nostram,* January 6, 1950, *AAS* 42 (1950) 5–120
SNAS	*Special Norms to be Observed in the Supreme Tribunal of the Apostolic Signatura ad experimentum,* March 23, 1968
SNB	Secretariat for Non-Believers
SOE	PAUL VI, motu proprio *Sollicitudo omnium Ecclesiarum,* June 24, 1969, *AAS* 61 (1969) 473–484

SPC	PIUS XII, Apostolic Constitution *Sponsa Christi*, November 21, 1950, *AAS* 43 (1951) 5–24
SPCU	Secretariat for Promoting Christian Unity
SRR	Sacred Roman Rota
SRR Dec	*Sacrae Romanae Rotae Decisiones seu sententiae*, 1–40 (1908–1948) TRIBUNAL APOSTOLICUM SACRAE ROMANE ROTAE, *Decisiones seu sententiae selectae*, 41–66 (1949–1974) TRIBUNAL APOSTOLICUM ROTAE ROMANAE, *Decisiones seu sententiae selectae*, 67–72 (1975–1980) APOSTOLICUM ROTAE ROMANAE TRIBUNAL, *Decisiones seu sententiae selectae*, 73 (1981)
SRS	JOHN PAUL II, Encyclcial *Sollicitudo rei socialis*, December 30, 1987, *AAS* 80 (1988) 513–586
SS	PIUS XII, Apostolic Constitution *Sedes sapientiae*, May 31, 1956, *AAS* 48 (1956) 334–345
StC	Studia canonica
Syn. Bish.	Synod of bishops
tit.	title
TRR	Tribunal of the Roman Rota
UDG	JOHN PAUL II, Apostolic Constitution *Universi dominici gregis*, February 22, 1996, *AAS* 88 (1996)
UR	VATICAN II, Decree on Ecumenism, *Unitatis redintegratio*, November 21, 1964, *AAS* 57 (1965) 90–112
UT	SYNOD OF BISHOPS, *Ultimis temporibus*, November 30, 1971, *AAS* 63 (1971) 898–922
VI	Liber sextus
VS	SACRED CONGREGATION FOR RELIGIOUS AND SACRED INSTITUTES, Instruction *Venite seorsum*, August 15, 1969, *AAS* 61 (1969) 674–690
VSp	JOHN PAUL II, Encyclical *Veritatis splendor*, August 6, 1993, *AAS* 85 (1993) 1133–1228
X	*Liber extra* (*Decretales Gregorii IX*)
yr.	year

Presentation of the English Language Edition

Together with other North American and worldwide canonists, I had the privilege of being invited to contribute to the original edition of the *Comentario Exegético al Código de Derecho Canónico* published under the auspices of the *Instituto Martín de Azpilcueta* of the University of Navarra.[1] The first edition appeared in 1996; it required a second updated printing a year later. At the beginning of 1998 Professor Miras contacted me wondering if I thought an English language edition of the work was feasible—all five volumes, three of them of double size, for an approximate total of some 8,000 pages. His request, I presume, was triggered by my previous collaboration in editing, with my colleagues Jean Thorn and Michel Thériault, both the French and English language editions[2] of the *Código de derecho canónico, edición bilingüe y anotada.*[3]

I was much aware of the enormous task ahead. Nevertheless, my personal contact with North American canonists led me to realize the importance of the Spanish language original. It was welcomed by them, notwithstanding the language barrier, precisely because of its great variety of contributors, who represented many different countries, schools, back-

1. *Comentario exegético al Código de derecho canónico*, obra coordinada y dirigida por Á. Marzoa, J. Miras y R. Rodríguez-Ocaña, Instituto Martín de Azpilcueta, Facultad de Derecho Canónico, Universidad de Navarra, Pamplona, Ediciones Universidad de Navarra, 1996, V volumes.

2. *Code de droit canonique,* éd. bilingue et annotée sous la responsabilité de l'Institut Martín de Azpílcueta, traduction française établie à partir de la 4e éd. espagnole sous la direction de E. Caparros, M. Thériault, J. Thorn, Montréal, Wilson & Lafleur, 1990, xlii, 1500 p.; *Code de Droit Canonique, bilingue et annoté*, 2e édition révisée et mise à jour à partir de la 5e éd. espagnole sous la direction de E. Caparros, M. Thériault, J. Thorn (†), Montréal, Wilson & Lafleur, 1999, xlii, 1894 p; *Code of Canon Law Annotated,* English language translation of the 5th Spanish language edition of the commentary prepared under the responsibility of the Institute Martín de Azpilicueta, edited by E. Caparros, M. Thériault, J. Thorn, Montréal, Wilson & Lafleur, 1993, 1631 p.; 2nd edition revised and updated of the 6th Spanish language edition, edited by Ernest Caparros and Hélène Aubé, Montreal, Wilson & Lafleur, 2004.

3. A cargo del Instituto Martín de Azpilcueta, 6a edición revisada y actualizada, Pamplona, Ediciones Universidad de Navarra, 2001, 1403 pp.

grounds and points of view. Its North American readers, I found, were largely refreshed by the amount of diverse perspectives the original commentary offered, believing it to have ushered in a healthy sense of canonical pluralism on their own continent. The apparent lack of any dominating ideology behind different authors' approach to the canons was just the kind of scholarship English speaking canonists were looking for. This, I suggest, helps explain the weighty amount of references to those commentaries in the scholarly journals. Hence the reception of the original commentary among English speaking canonists, combined with the sheer depth of the commentaries themselves, in terms of historical, juridical and theological richness, finally moved me to accept the challenge of editing the present English language edition of the *Exegetical Commentary on the Code of Canon Law.*

From the very beginning I realized that funding was essential. I recommended to my good friends and colleagues from Pamplona to find a body which could offer the needed financial support. The second essential element was to find a good manager to lead a team of translators and reviewers. The Fundación Universidad de Navarra accepted to offer an important loan to finance the larger part of the project while Wilson & Lafleur accepted the challenge of publishing the work. At Midwest Theological Forum (MTF) I was lucky in convincing Reverend James Socias to accept the responsibility of managing editor. He put himself to work and soon organized a team of translators and reviewers.

The Gratianus Series was taking its first important steps, and at the beginning of the project the late Professor Michel Thériault, with his vast expertise and enduring strength, contributed greatly by determining a good number of editorial guidelines. Unfortunately, God called him to his eternal rest when we were still very much at the beginning. The seed he planted is now producing its fruits. Before Professor Thériault's death, we agreed to ask Reverend David Motiuk, now the Eparchial Auxiliary Bishop of Winnipeg, to complete some of the unfinished editorial guidelines. His support has been of great value. Soon Reverend James Socias of MTF obtained the collaboration of Reverend Patrick Lagges to help coordinate the reviewer team of English-speaking canonists. We have considered it appropriate to list the names of all the members of the translation team—especially the reviewers themselves and among them Dr. Monika Mavric for her supplementary dedicated work on adapting the Analytical Index—as a way to thank them for their work.

Any translation requires a delicate balance between the respectful rendering of the authors' original writing and the appropriate adaptation of this writing for the language of arrival. In this delicate task Professor Ángel Marzoa has made an outstanding contribution. Obviously, when translating a collective work with one hundred and fifteen different authors from a great variety of countries and professional backgrounds, the challenge is great. Besides, when the editors of the original work limited

themselves to a short list of parameters concerning the references and the footnotes, respecting the authors' choices and options, they at the same time committed themselves to a certain lack of uniformity. This is true of the original Spanish language commentary, and we have chosen to respect the variety of styles and the various ways authors chose to emphasize words or phrases in their texts (for instance some preferred italics, others, quotation marks). Moreover, in such a case it is moot to update a bibliography or even to choose the corresponding English language translation of a work or paper (assuming it exists) as the authors have constructed their arguments with particular reference to a specific edition of a book. We have only updated references to factual data such as in the *Annuario Pontificio*. We are fortunate, nevertheless, to have the 2nd revised and updated edition of the *Code of Canon Law Annotated* (2004). It provides information pertaining to the more recent Magisterial and Legislative Texts, as well as the reference to their English language publication, if it has been found.

Notwithstanding the above caveat, some adaptations to the English speaking readers have been introduced. The present edition is more than just a translation into English of the Spanish language 3rd edition of the *Comentario exegético al Código de derecho canónico*.[4] It has been adapted in more ways than one: 1) the English language translation of the *Codex iuris canonici* reproduced in this work is the one prepared by The Canon Law Society of Great Britain and Ireland; revised and updated to January 1993[5]; 2) references to Spanish or other Countries laws, or to situations dealt with by the Concordat between the Holy See and Spain or other Countries have been, in most cases, eliminated or transformed into general comments; 3) to the appendixes already included in volume V we have added appendix III; it contains the complementary norms to the Code promulgated by the thirteen English language conferences of bishops which have sent us copies of the norms that have received the *recognitio* from the Holy See and been promulgated; 4) over and above the two tables of correspondence between the 1917 and the 1983 *Codices iuris canonici*, appendix IV provides the readers with two further tables of correspondence, between the 1983 *Codex iuris canonici* and the 1990 *Codex canonum Ecclesiarum orientalium*.

Editorial decisions were difficult to make: concerns about space had to be balanced with usefulness to the readers. Here are a few of those decisions:

4. Instituto Martín de Azpilcueta, 3ª edición actualizada, Á. MARZOA, J. MIRAS, R. RODRÍGUEZ-OCAÑA (ed.), Pamplona, Ediciones Universidad de Navarra, 2002, volume I: 1115 p.; volume II: 1922 p.; volume III: 1913 p.; volume IV: 2213 p.; volume V: 669 p.

5. This translation is the one approved by the conferences of bishops of Australia, Canada, England and Wales, India, Ireland, New Zealand, Scotland and Southern Africa.

Spelling—For the most part in the commentaries, American spelling style has been employed. Nevertheless, we have respected the spelling and capitalization of the translation of the Canon Law Society of Great Britain and Ireland, which is the official translation approved by eight English language bishops' conferences.

Grammar, editing style, etc.—The contemporary trend in editing style is to simplify. Accordingly, the terms and expressions "bishop," "cardinal," "superior," "conference of bishops," etc., are lower-cased unless a specific person or institution is in question.[6] The names of parts of works, e.g., chapter, section, etc., are lower-cased. The names designating types of official documents are capitalized, even when the *incipit* is not given, e.g., Apostolic Constitution, Circular Letter, etc., as long as it refers to a specific document. Semi-colons separate canons listed one after the other, in order to avoid confusion with paragraph numbers ("cc. 643; 673-676; 691, § 2; 713, § 2"). Italics are used for the *incipit* of official documents and for words in other languages than English when used in the commentary, unless these latter words are used within a quotation.

Inclusive language—The editors have made an honest effort to choose words and expressions which are inclusive or gender-fair.[7] They are conscious, however, that improvements are still needed and welcome suggestions in this regard.

Biblical quotations—All Biblical quotations are taken from the *Revised Standard Version.*

I am deeply indebted and most grateful to all those who have collaborated in making this publication possible. My heartfelt thanks to the friends and colleagues who have incessantly encouraged all of us in this endeavour.

Ernest Caparros
General Editor
Montreal, 9 January 2004

6. However, the translators of the present work have reproduced the English language translation of the *Codex iuris canonici* as it was edited and, therefore, have respected the decisions of its editors regarding capitalization.

7. A good reference work on the subject has been R. Maggio, *The Bias-Free Word Finder: A Dictionary of Nondiscriminatory Language*, Boston, MA, Beacon Press, 1992, x, 293 p.

PRESENTATION OF THE ORIGINAL SPANISH LANGUAGE EDITION

On January 25, 1983, through the Ap. Const. *Sacrae disciplinae leges*, Pope John Paul II promulgated the *Codex Iuris Canonici* as law for the entire Latin Church. Through this Constitution, the supreme legislator exhorted all the faithful to comply "with a sincere mind and good will" with the norms of the Code, and expressed his confidence that "the careful discipline of the Church will gain new strength and it will be encouraged more and more, with the help of the Holy Virgin Mary, Mother of the Church, the salvation of souls."[1]

That date marked a milestone of singular importance in this time of the life of the Church. The prehistory of the *CIC* witnessed a task carried out "with an extremely notable *collegial* spirit,"[2] with the participation of *experts* "from every nation in the world,"[3] and its promulgation has involved a solemn exercise of the supreme power of the Church. The *in facto esse* of the new canonical codification for the Latin Church constitutes a challenge for all its recipients: its acceptance and compliance—which depends on everyone—must take the dimensions of justice of the *communio Ecclesiae* to such a high degree of appreciation and working respect, that from its place and objectives, Canon Law may truly be an effective instrument in building that common good that is "an indispensable condition for the overall development of Christian human beings."[4]

The legislative moment of the promulgation of the CIC involves a *historic option*: the legislator makes a choice. A choice, of course, that is *conditioned* by a series of factors, the main factors of which are natural and positive divine Law, as well as the very nature of the Church and that of its members, human beings whose juridical patrimony, without reducing what is given to them by nature, is ontologically enriched by their

1. *SDL*: cf., in this same volume, pp. 208–209.
2. *SDL*, ibid., pp. 202–203.
3. *SDL*, ibid.
4. JOHN PAUL II, "Discourse to the Tribunal of the S. Roman Rota," 1979, in *Insegenamenti di Giovanni Paolo II*, II/I (1979), pp. 411–412, II/I (1979), pp. 411-412.

baptismal condition. The legislative moment we are contemplating should therefore not be understood as a merely voluntaristic decision, but as an option functioning within the framework of the desire for justice, starting from the knowledge of the reality of the Church—intensely illuminated by the Const. *Lumen Gentium* and all the council teaching—and from the conditioning factors that every historical choice, if it is to be truly *historical*, must ponder. But it must accomplish all this with the notes of generality and abstraction that are characteristic of every law, and even more so if it has a universal audience.

The task of the canonist faced with the new law is *mediation*: he is situated in that space—limited but unavoidable—in which there is a transition between the legislative moment and the discretionary moment, and it consists in enlightening the shift from the generality of the norm to the concrete case, through the study of the provisions in their text and context, the parallel places, the objective and the circumstances of the law and the intent of the legislator (cf. c. 17); all information that is not easy to access immediately through a mere reading of a normative provision. In short, that work of the canonist—the mission of which is to bring to the life of the Church its *jurist vision*, that is, the vision of one who contemplates reality from the point of view of the just ordering of ecclesial society—involves the *interpretation* prior to the application of the law, but after its constituent act. This involves an intellectual process of scientific development, never meant to be a mere aesthetic contemplation of harmonies, but with an unavoidable mission for the application of Law. This process fundamentally includes two consecutive stages: the *exegesis* and the systematic construction.

With the *system*, the science of Law reaches its highest scientific level. But first, it needs the exegesis, that is, the analytical study of the juridical factors to discover its interpretation. If the canonist remained in the mere exegesis, we would have an incomplete juridical science, perhaps with the risk of falling into casuistry, and of shortening the scope of justice in the life of society. Therefore, the progressive task of systematic construction will always be necessary, with a view to completing the execution of Law that is characteristic of the discretionary level (decision in the concrete case). But the exegesis is an indispensable preliminary task; and it is particularly so in the periods when the *norms are first being used*, as the norms we are now considering would be considered—only twelve years have passed.

The medieval popes usually promulgated the great canonical collections by sending them to the universities, where they were treated as reference texts in the training of jurists, where the canonical science that clothed the application of Law in the tribunals and in the decisions of government was created. Connected to that rich tradition—so fertile for the rise of juridical science, but especially for the force of Law—the University must now receive the *Corpus*, preparing for the work of contributing

to its correct application. Now concluded is the long and rich phase *de iure condendo*, in which the canonist was called, together with experts from the other branches of ecclesial knowledge, to serve the Church through their knowledge, in the task of suggesting, proposing legislative lines, and criticizing the successive drafts. Now the law has been promulgated: the canonist has before him the normative *data*, and that constitutes an invitation to *reorganize*, to a certain extent, the habits that were perhaps acquired during that fascinating historical period in order to tackle his mission with the immediate reference of the *ius conditum*, on which he must work, from which he must serve the *communio* and the just social order in the people of God.

The Instituto Martin de Azpilcueta has attempted to contribute to that task. By presenting this work, it is pleased to give continuity to the initial idea of the oft mentioned Professor Pedro Lombardia, approaching the second phase of a broad scientific project. In the words of Prof. Lombardia, then Director of the Institute, the innovation of the *CIC* in 1983 "encouraged the organization of team studies intended for the exegesis of the new body of law of the Latin Church and the construction of an updated system of Canon Law. In fact, several drafts with varying scope were outlined and studied in various plenary sessions of the Institute, with the confidence that they could be carried out during the first decade the new Code was in force."[5] This *Exegetical Commentary* began to be developed precisely at the end of that decade and is now coming out twelve years after the promulgation of the Code of the Latin Church.

The *Annotated Edition* of the CIC left open the field of commentaries on the canons following the tradition of exegesis. Those brief notes were conceived for the purpose of offering from the beginning a minimum of keys to interpreting the newly-promulgated Code. In subsequent editions—especially after the 5th edition—they have been profoundly changed by their authors. The number of editions and reprints and their translation to various languages[6] evidence the wide coverage and esteem achieved by that work.

But if those annotations, due to their urgency, were fundamentally made by Research Members of the Institute, this work of extensive commentaries deserved greater involvement from those who throughout the world work in the study and application of canon Law. As a result, the call to participate in the project has been widespread, open to canonists from all areas where the Latin Code is in force. Certainly that ambition has suffered the shortcomings that any human undertaking inevitably involves,

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5. P. Lombardía, Presentation of the first edition of the *Code of Canon* Law, in *Pamplona Com.*, p. 23 (2nd English edition, p. xxxv).

6. To date, six editions of that work have been made, in addition to several reprints, since 1983; there is a Mexican edition and there are translations to Italian, French (Canada), English (Canada), Portuguese, and Catalan.

the most obvious one being that we have not been able to reach everyone, which is clearly impossible. In general, however, the initiative has been welcomed with enthusiasm and cordiality for which the Coordinating Commission is sincerely thankful, fully aware that that response constitutes a mature fruit of the good actions of those who have come before in the scientific work of the Instituto Martin de Azpilcueta and of the School of Canon Law of the University of Navarre. Certainly, this project has gone forward because it could rest on a now long tradition of cultivating canonical science in this University, which from the beginning had the impetus and encouragement of its Founder and first Grand Chancellor, Saint Josemaría Escriva de Balaguer, also moved in this by the desire to serve the Church.

All those invited who have been able to undertake the proposal of drafting the commentary on some canons have felt obliged to work quickly and have facilitated with much kindness and spirit of cooperation the often unpleasant task we have had of promoting, coordinating, and rushing the terms, in order to reduce as much as possible the occurrence of the inevitable delays that usually accompanies a work of this type. This is not the least of our reasons for the gratitude deserved by all the collaborators.[7]

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The result of the work is this voluminous commentary. We have deliberately wanted to use the denomination *Exegetical Commentary*, even when we were aware that the expression could be subject to imprecise interpretations due to reasons outside of the reality of things within canonical science. The intent of this work is principally to carry out the interpretation of the canonical norms contained in the Code, following the order of the organization of the *CIC*, from which derives the structure of the *Commentary* as a whole.

For that reason, each commentary is introduced with the Latin text of the corresponding canon, to which is added the Spanish version of the Spanish bishops' Conference, as approved, although, on occasion, the authors note their disagreement with some turn of phrase in the Spanish translation or—when applicable—in the version of the language of their nation of residence, also as a way of suggesting a more suitable interpretation of the text.[8]

7. A complete list of the collaborators that have participated in this *Exegetical Commentary* is included in the following pages.

8. [Editor's note] The English language translation reproduced in this work is the one prepared by the Canon Law Society of Great Britain and Ireland.

To the text of the canons is added the list of the *sources* from which they are derived. It is a transcription of the sources published by the CodCom.[9] On occasion, in the place for the sources of the canon, there is an indication "none". In these cases, it is an attempt to indicate merely that said official publication does not mention any express source for that norm, without meaning that no more or less close precedents could be found in the preceding code. With the inclusion of the *sources* section, there is no attempt, therefore, to carry out historical research on the origins of the various norms, but merely to provide readers with quick access to that fundamental interpretative criterion, as developed and published by the CodCom.

Each of the canons—except for a few necessary exceptions—is commented on separately. But taking into account the limitations involved in the exegetical commentary canon by canon, there has been an attempt to give the commentators greater flexibility in the overview in the introductions to the headings of the various books, parts, sections, and titles into which the *CIC* is divided. For the same purpose, a minimum of connections has been established, which are articulated through the section on "related canons", and the internal references.

The "related canons" that follow the sources are proposed by the author of each commentary as the information he finds it appropriate or necessary to take into account in order to properly understand a norm, either because they indicate the general principle that the norm applies to a more concrete phenomenon, or they show other practical consequences of the same principle that appears in the Code and are complementary in the interpretation, or because they lead to parallel places, suggesting shades of meaning, coincidences, and distinctions. In some cases, in the space for related canons there is a dash (—), to indicate that the author has not found it necessary to highlight any connection in particular.

The internal references, which are generally indicated with the phrase "see commentaries on c.," try to avoid as much as possible any repetition in the discussion of the subjects, instead offering the reader the opportunity to access a more detailed discussion of the aspects in the commentary on a canon that could be more collateral and therefore are given less attention. Nevertheless, those references do not necessarily imply acceptance, on the part of the author, of the content of the commentary referred to in its text, which content is usually not known when written.

In fact, a basic criterion in the reading and reference to the work as a whole should be the scientific autonomy with which each commentary has been developed with respect to the rest: each text is the merit and sole

9. CodCom, *Codex Iuris Canonici. Fontium annotatione et indice analytico-alphabetico auctus* (Vatican City 1989).

responsibility of its author, whose name appears at the beginning of the commentary. Precisely because there was not an attempt to develop an internally coordinated commentary from a unitary or "school" point of view, it is easy to perceive the logical and legitimate differences of judgment, style, and opinion between the various authors. For example, it should come as no surprise that the authors discussing canons related to the same subject would offer conflicting perspectives that, in our opinion, instead of detracting from, considerably enrich the whole, by offering a wide range of viewpoints, which also reveals the diverse preferred fields of the commentators. Thus, it is possible to note the variously blended vision of those who are ecclesiastical judges, together with that of those who hold governing offices, or closely collaborate therein, and with those who hold teaching and research positions, with all the many points of view favored by that variety of collaborators. This undoubtedly deprives the *Exegetical Commentary* of the internal unity characteristic of a treatise written by just one author, or by a few authors who agree in advance as to the content. Nevertheless, in our opinion, the advantages of the conception adopted prevail considerably over that disadvantage.

With respect to the content, the work of the Coordinating Commission has consisted in particular of unifying, as much as possible, the general style of the texts in order to adapt them to a work of this kind, introducing uniform criteria with regard to quotes, references, initials, etc.; and also in offering the collaborators, in view of the group of commentaries of each part of the code, various suggestions that have been accepted or rejected, depending on whether the authors have found them appropriate in each case.

We must state that, due to the nature and magnitude of the project, the Coordinating Commission has directed the commentary writing with very strict parameters, especially in connection with the bibliographical mechanisms and footnotes. The commentators have been urged to limit the quotes to a few bibliographical references, without using it for digressions or complementary assessments. That explains the limited scope and brevity of the footnotes, due solely to the overall necessities.

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Since the beginning of the conversations about the possibility of carrying out this initiative, which resulted in a draft intended to be proposed to the competent organs of the Instituto Martin de Azpilcueta, we had the enthusiastic acceptance of Prof. D. Javier Hervada, then Director of the Institute: his full confidence and constant encouragement have created the conditions necessary for that idea to become reality.

Obviously, the work of carrying out this project in its successive phases would have been impossible without the collaboration of numerous professors and administrative personnel. We would like to thank all the Professors of the School of Canon Law of the University of Navarre for

their generous availability in a work that has demanded a considerable number of hours of dedication to translation,[10] review, and correction of the originals, in addition to the efforts in the preparation of their own collaboration. Together with the acknowledgment due each and every one of them, the valuable scientific consulting work performed by Prof. D. Carmelo De Diego Lora deserves special mention.

The project, in its material and editorial aspects, has benefited from the experience and effective management of Prof. D. Jose Manuel Zumaquero, Secretary of the Instituto Martin de Azpilcueta. Moreover, the execution of this work in the time invested owes much to the computer work of the secretaries of the Institute, Ms. Maria Dolores Ongay Ezquer, Ms. Belen Lahuerta Dal Re and Ms. Encarnacion Lopez Lopez.

We members of this Coordinating Commission have had full autonomy in the conception and development of our work. Therefore, we can take responsibility for the defects and virtues attributable to this work, at the same time that we find it our duty to mention the facilities provided us at all times by the academic authorities of the University. As a result, we would like to express our gratitude to the current Grand Chancellor, Mons. Javier Echevarria, the Hon. Rector, Prof. D. Alejandro Llano and the Dean of the School of Canon Law and President of the Instituto Marin de Azpilcueta, Prof. D. Eduardo Molano.

Lastly, we would like to dedicate what is ours in these pages to the memory of Bishop Alvaro del Portillo y Diez de Sollano, the eminent canonist, and a very kind Pastor, who was familiar, as the Grand Chancellor of the University of Navarre, with the onset of this project and then participated with his prayers and continuing encouragement. We have turned to his intercession before the Almighty God to bring this work to a successful conclusion, because we share the conviction that he now enjoys the vision of the Triply Holy One, having served Him so faithfully in this life.

Ángel Marzoa
Jorge Miras
Rafael Rodríguez-Ocaña

NOTE ON THE SECOND EDITION

In a few months the first edition sold out. In view of the need to meet numerous requests to acquire the *Exegetical Commentary*, we have proceeded to this second edition that, due to the urgency of the time periods, incorporates only the most essential changes; among them, the division of Volumes II and III into two volumes, which will doubtless ease their handling and maintenance.

10. Professors J. Miras, C. Soler, J. Otaduy, E. Molano, Á. Marzoa, A. Viana, and J.A. Fuentes have been responsible for the translation of the originals in the different languages to Spanish.

NOTE FOR THE THIRD EDITION

The second edition has sold out and it is necessary to include in this third edition the main legislative innovations that have taken place since 1996. As a result, some authors have been asked to make the necessary corrections in their commentaries, and, later, the index volume has been updated and the references have been corrected according to the new pagination. We would like to thank everyone for their efforts and the readers for their warm acceptance.

We would like to particularly thank Prof. Jose Bernal for his valuable help in the corrections

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PROLOGUE I
INTRODUCTION TO CANON LAW*

Javier Hervada—Pedro Lombardía (†)

SUMMARY

* These introductory pages are an updated version of *El Derecho del Pueblo de Dios*, I, *Introducción* (Pamplona 1970), pp. 29–225.

I. THE JURIDICAL DIMENSION OF THE PEOPLE OF GOD

1. *Introduction*

Canon Law is the law of the Church. Law is a juridical system that organizes the social aspects of humankind. Because of its very nature there can be no law where there are no social relations or situations. A juridical system is also a dimension of social reality, to which the system is adapted and from which it receives the substantive principles that shape it. The character of each juridical system depends upon the nature and characteristics of the social environment governed by the system. For that reason the systematic organization, the content and the governing principles of canon law and its different branches should and do conform to how well the Church's social dimension and social structures are understood at each moment in time.

When the Const. *Lumen Gentium* presented to us the idea of the Church as it is presently understood—the fruit of meditating upon herself, as Vatican Council II was, according to Paul VI—it showed us an aspect of the Church that has long remained in the shadows in Catholic theology: the Church as the people of God. This analogy has deep biblical roots and has been used to bring out certain social aspects of being a Christian. To put it another way, it is a particular way of understanding the Church as a social group in the context of its larger mystery. Therefore, as a prerequisite to the study of canon law, it is a good idea to analyze the notion of the people of God and to ask what are its juridical dimensions and its characteristics.

2. *The people of God*[1]

Lumen Gentium 9 expresses the notion of the Church as the people of God in the following terms: "At all times and in every race, anyone who fears God and does what is right has been acceptable to him (cf. Acts 10:35). He has, however, willed to make men holy and save them, not as individuals without any bond or link between them, but rather to make them into a people who might acknowledge him and serve him in holiness. He therefore chose the Israelite race to be his own people and established a covenant with it. He gradually instructed this people—in its history manifesting both himself and the decree of his will—and made it holy unto himself. All these things, however, happened as a preparation and figure of that new and perfect covenant which was to be ratified in Christ, and of the fuller revelation which was to be given through the word of God made flesh ... Christ instituted this new covenant, namely the new covenant in

1. Cf. also J. HERVADA, *Elementos de Derecho Constitucional Canónico* (Pamplona 1987), pp. 42–46.

his blood (cf. 1 Cor. 11:25); he called a race made up of Jews and Gentiles which would be one, not according to the flesh, but in the Spirit, and this race would be the new people of God ... That messianic people has as its head Christ ... The state of this people is that of the dignity and freedom of the sons of God, in whose hearts the Holy Spirit dwells as in a temple. Its law is the new commandment to love as Christ loved us (cf. Jn 13:34). Its destiny is the kingdom of God which has been begun by God himself on earth and which must be further extended until it is brought to perfection by him at the end of time ..."

According to Catholic doctrine, raising a person to the supernatural order has a radical and total effect on the person as an individual and as a member of society. Just as in the natural order of things people are united among themselves by social bonds through the principle of sociality that is inherent in human nature, so also in the salvific order, Christians, who are persons regenerated in Christ, are related to each other by a connatural social dimension. This social dimension is ontologically inherent in a Christian and all Christians together form a social unit that is known under the name of the Church.

This idea has been traditionally admitted in the Church. It has been expressed in various ways, from Saint Paul's *Corpus Christi, quod est Ecclesia* or Tertullian's *Corpus de conscientia religionis* to *perfect society* in the doctrine of later centuries, or *people* by Vatican Council II. These different expressions are not incompatible with one another, nor can any one of them be substituted in total for any other. In addition to making the analogy of the Mystical Body, Vatican Council II used three different expressions—*people*, *society* and *community*—to refer in each case to different shades of meaning. The term *people*, however, is a basic notion with respect to the other two, which express two levels or modalities of the basic social unit, the people of God.

What is the meaning, then, that the Church's official and theological doctrine is trying to convey with the expression *people of God*? As Semmelroth[2] says, in using the term *people of God*, along with other theological aspects, the Church is trying to emphasize the following features: *a) Unity*: Above and beyond any diversity that can exist among them, the Christians form a single body. *b) Sociality*: We have alluded to this characteristic above. Christian faithful are not only a single entity, they are also integrated and related to each other by social bonds. *c) Equality*: Beyond any distinctions, there exists a fundamental level of equality among all the faithful which takes precedence over any differentiation. And *d) Historicity*: The Church is a social body with a historical existence as such; the Church exists through its bonds and purposes on both the atemporal and metahistorical level of divine realities and on the temporal (*time* dimension), historical

2. O. SEMMELROTH, "La Iglesia, nuevo Pueblo de Dios," in *La Iglesia del Vaticano II*, Spanish edition, I (Barcelona 1966), pp. 451ff.

and external level of human realities. The people of God, the Church, are the salvific Kingdom of God in the historical dimension of this world.

It is necessary to add here that the historical dimension of the people of God must be looked at according to its eschatological nature (*LG* chapter VII). According to Christian teaching, the historical dimension of the Church is only a *phase* or *stage* in the life of the Church, which moves towards *consummation* or perfection in a new mode at the end of time. The eschatological dimension carries with it a sense of expiration and the ephemerality of the Church's existence in time, and in some sense that dimension is present in the Church's voyage through history. It colors the Church's evolution and causes a tension in it that impels it to achieve the maximum eschatological consummation possible in the present time. Because law belongs to the earthly dimension, in that sense it is an outdated dimension of the people of God. But at the same time it is, or should be, a historical way of achieving in the present the justice and peace that are proper to the Kingdom of God to be consummated at the end of time.

Still, without this group of features, we cannot properly speak of *people* in a sense which is analogous to what we understand as people in the human context. We would only be able to speak of people in the metaphorical sense. This group of features, however, are still not the principal characteristic features of the notion of the people of God. In today's language the word *people* has a whole range of diverse meanings. However, they are not an impossible obstacle to interpreting the meaning as applied to the Church because the expression *people of God* is understood as in the Biblical use of the word, in a sense similar to how it is applied and realized in the *People of Israel*. Accordingly, the Church is a People because of the following:

a) Its members enjoy unity of origin, with common personal and vital—ontological—traits that unite them and link them together; members of the Church share the same heritage. In a biblical context, peoples are considered to be formed by the union of families with a common bloodline. Abraham is head of the Chosen People, Ishmael is head of the Ishmaelites, Ammon is head of the Ammonites, and so forth. In the old people of God, Israel, bloodlines go back to the patriarchs, and in a special way to Abraham. In the new people of God, these blood links do not exist, but there are analogous supernatural bonds that are produced by insertion in Christ, in whose divine filiation the faithful may participate through grace. Christians have been made into God's children through grace and therefore they are *brothers* one to another (the bond of fraternity).

b) Because of this nature and its own virtuality, Christians are a *cohesive* group conscious of their unity in a way analogous to how it was in the biblical context—and still is today in the Middle East—with peoples based on the *ius sanguinis*. This solidarity is essentially manifested in the bond of charity, in which the community of affection and mutual responsibility (mutual help and responsibility on the salvific level) is rooted and

should be carried out to its fullness. But solidarity is also rooted in unity of faith and goods in the supernatural order, especially the sacraments.

c) The people of God show a *unity of mission* and interests (still in the supernatural order) in the context of humanity. All the people of God, and not just the Church's hierarchical organization, have been brought together to continue Christ's mission and to be an *instrument* and *sign* of salvation and a *participant* in Christ's redemptive mission.

d) Like the People of Israel as was common in their cultural and historical context, the people of God are organized into a higher juridical unit. In the case of Israel and other peoples around them, the juridical unit was political; in the case of the Church, it is purely religious. In order to underline this characteristic, the Church has with varying degrees of correctness been called the perfect society, the primary juridical system of law, etc. All of those expressions, taken out of the cultural and historical context of the time when they were adopted, tend to accent the Church's characteristics as the superior juridical unit or body; the expressions therefore reflect the traits of an independent and juridically structured society analogous to the superior juridical units of the historical moment. This structuring as a superior juridical unit implies certain hierarchical phenomena without which it would not be possible for the Church to appear in the human context as an independent society of public law, analogous to organized, juridically superior societies. And indeed, the Church is structured not only as a community, but also as an organically formed society (*LG* 8). By the will of its Founder, it includes a hierarchy endowed with an authority that in its order—the supernatural order—is not only autonomous but *supreme*.

The analogy of the people of God points in particular to the external and historical aspect of the Church. But, as Catholic theology teaches, the Church has an internal element to which the figure of the *Mystical Body of Christ* makes special, although not exclusive, reference. This internal element also has cohesive relationships and unifying bonds; it is presided over by Christ, the invisible head of the Church, who, through the sanctifying action of his Spirit and his gifts and charisms, allows the faithful to participate in his divine life and leads them to their proper end. But the Church's external and internal elements form a single and unique reality. As Pius XII taught in the Enc. *Mystici Corporis* and *Lumen Gentium* has again repeated, the society endowed with hierarchical bodies and the Mystical Body of Christ, visible reunion and spiritual community, the Church on earth and the Church endowed with celestial goods are not to be considered as two different things. They form a complex reality made up of a human element and a divine element. In a profound analogy, the people of God are like the mystery of the Word incarnate (*LG* 8).

3. *Social bonds*

The people of God, who are the Church, are shaped by the social bonds among the members, and some of those bonds are juridical bonds. One characteristic of social bonds is that they are multiple; some appear in the strictly internal dimension of the Church, while others appear in the external dimension, and finally, some are common to both dimensions, although with subtle differences in each.

In the internal dimension the bonds of unity find one of their expressions in the relationship known by the term *communion of saints*, a community of spiritual goods. The community of faith and the bonds of charity are also reflected in the internal dimension.

In the people of God as an external social group appearing in the human historical context, in accordance with what has been said, we can distinguish various types of bonds. First there is the bond of fraternity, under which the members form a united community. This bond of unity may in turn be broken down into a community of faith, a community of worship, a community of purpose and the bonds of affection (mutual charity) that should preside over the relations among the faithful. Second, there is the hierarchical bond by which the members of the people of God are united in a relationship of authority with the proper pastors.

The Church, the people of God, therefore has a community dimension at the same time that it is organically structured by the hierarchical principle; there is a hierarchy in the Church that has capital functions granted by Christ himself.

The set of social bonds is governed by three principles. First is the *principle of fundamental equality*. According to Vatican Council II, among the faithful there is a true equality with respect to human dignity and a common action to build up the Body of Christ (*LG* 32) i.e., with respect to the *fundamental condition* of the members of the people of God and to *actions*, common to all, that are directed toward achieving their end, which is the expansion of the Kingdom of God. The principle of equality has a double foundation: first, the common dignity and freedom inherent in the condition of being a Christian, a child of God (*LG* 9), or, what amounts to the same, the common dignity and freedom of a human being who is a participant in the divine filiation; second, the fact that because of being a Christian, every member of the faithful is a living and active member of the Church and is called upon to obtain the growth of the people of God and to collaborate in achieving the Church's ends (*LG* 33).

The second principle is the *principle of variety* in the path to follow and the manner of obtaining the ends of the people of God and of carrying out their activities. Under this principle falls the principle of the distinction of functions or ministries. Because of this, "By divine institution the holy Church is ordered and governed with a wonderful diversity" (*LG* 32). This principle signifies the deeply rooted and constitutional lawfulness—a

lawfulness that cannot be violated without at the same time violating divine law—of the variety of rites, ways of life or apostolate, and it also signifies a necessary distinction among functions.

Finally, in certain spheres of activities and functions, the distinction is governed by the *institutional principle*. The people of God owe their deeply rooted existence to a divine convocation and an act of foundation by Jesus Christ, who is the true Head (*LG* 9). The people of God are, then, an institution (see below 4) whose fundamental traits were laid out by the Founder, and their history and development depend in the last analysis on divine action through His gifts (*LG* 4). The meaning of this for our purpose is that there are a number of activities and functions that are carried out by persons who do not receive the mission to fulfill them from the Christian community. Under this principle there are in the Church hierarchical functions, as we have stated, that carry with them the mission to exercise pastoral power in the service of the community and they are the framework of the entire institutional edifice of the people of God. In relation to hierarchical functions there is a *functional inequality* among the faithful. Above all, functional inequality indicates that these functions do not stem from the Christian people, but that the functions have been granted to the hierarchy directly by Christ. That is the consequence of the Church being an institution.

4. *Institution and community*

The one people of God, since it is one, is a complex reality that is structured and organized according to two factors: the institutional factor and the community factor. Both reflect the Church's two-fold character as the *medium* or instrument of salvation and as the *fruit* or result of redemption (*institutum salutis* and *fructus salutis*, in the terms used by theologians).

Christ institutionalized the salvific media in the people of God, who are the sign and instrument of salvation. The sacraments and all media and aids to achieve salvation are found in the people of God. That is why the Church is an *institution*, born of a founding act by Christ. Fundamentally, the Church's structure and organization depend upon that founding act and not upon the will of the people who compose it.

In this respect, the term "institution" means a social group based upon a special founding act and placed in the service of a specific social task that transcends the particular interests of the people who serve it and that functions as an objective and permanent end for that group.

Inequality appears in a special way in the above-mentioned institutional factor because in relation to the means of salvation, a member of the faithful may be in different positions: as *minister* and *giver* of the means, i.e., as pastor, consecrating priest, etc. (hierarchic priesthood), or as *target* and *receiver*, offering community, etc. (common priesthood).

Being a salvific institution, the Church is configured as an *organically established society*, presided over by the hierarchy. Within these institutional lines, the people of God appear with an organization of their salvific means before which the ministers are organized; the faithful are the targets of their activity. "In order to shepherd the people of God and to increase its numbers without cease", says Vatican Council II, "Christ the Lord set up in his Church a variety of offices which aim at the good of the whole body. The holders of office, who are invested with a sacred power, are, in fact, dedicated to promoting the interests of their brethren, so that all who belong to the people of God, and are consequently endowed with true Christian dignity, may, through their free and well-ordered efforts towards a common goal, attain to salvation." (*LG* 18)

At the same time the Church is the congregation or meeting (*ekklesia*) of the disciples of Christ, saved by Him. The Church is the group of men and women who have answered the call of God (*convocation*) and who, regenerated by grace and having become the children of God, meet or congregate through common bonds in a community of origin, goods and purpose that is presided over by the bond of charity and the principle of equality. The Church is the *fruit* of salvation, which also tends to be disseminated and intercommunicated (co-answerability, non-hierarchical apostolic action, Christian community of goods, etc.).

In this regard, we understand a community to be an organized social group in which there are, or at least predominate, unity of origin and of concord, which are manifested in common possessions and in common and hierarchical relationships.

An *institution* arises in the heart of a *community*. Thus it is not an issue of there being two separate levels or two water-tight compartments. There are two intercommunicating factors that partake to a certain degree in each other. At the same time and in a complex unity, the people of God contain both institution and community as proper configurative dimensions.

5. *The need for law in the people of God*

As we have just seen, the people of God are structured as an organization and a community by the will of Christ. This organization and community structure is "brought into operation through the sacraments and the exercise of virtues." (*LG* 11) In other words, the people of God are existentially realized by virtue of the dynamism which is inherent in the process of salvation—as it appears in today's economy of salvation—and in the Christian life. Organization is a dimension of those dynamics.

Indeed, through their own efficacy, some sacraments perform specific functions within the people of God. For example, by virtue of baptism the faithful are commissioned to participate actively in the life of the Church and to develop the seed of salvation received, with a specific apos-

tolic vocation. Another example is the sacrament of orders by virtue of which a member of the faithful is destined for hierarchical functions to sanctify, teach and govern the people of God. The life of the Christian, guided and driven by the virtues, tends to be achieved by works and service to others. All of that is part of the rich variety of personal vocations and charismas.

Now all of the above postulates a social order in which the people of God can find its proper balance. That social order is canon law, which is not a superstructure with respect to the supernatural roots of the life of the people of God, since it is derived from and postulated by the faithful. Nor is it, nor should it be, a unilateral expression of the will of the hierarchy since, because of the exigencies of the divine constitution of the Church, canon law must ensure that there are spheres of autonomy, which are needed so that all the faithful may participate in ecclesial tasks. Canon law is not something limited to engendering duties of obedience, but a guardian of freedom and a way to act responsibly.

But the need for law in the Church should not be translated into simple convenience, strong though that may be. The juridical dimension is *necessary* because without it the Church is not comprehensible as it was founded by Christ. It is the essence of the Christian person, as well as the configuration and structuring of the Church, that inherently require justice, which must have a juridical dimension. Being incorporated into the Church, having a hierarchical position, receiving charisms, do not rest solely on charitable relationships among the faithful, nor on a duty or responsibility toward God. They fit into relations of solidarity and service that are based on the requirements of the faithful's condition with respect to other members of the Church and on the ministerial nature and function of the hierarchy. Thus they are relationships that involve justice and they inherently assume that there will be a juridical order.

So the fact that there is a juridical dimension to the people of God is not considered to be something that, if denied, merely implies a mistaken assessment of circumstances (assessment of the suitability or unsuitability of juridical norms). It is rather a truth about the nature of the people of God, who carry the evangelical message; if the juridical dimension is denied, it may mean denying the very revealed truth.

6. *Law as a structure of the Church*

As we have said, the necessary nature of law in the people of God is based on the Church's structure. And indeed, law is not only an ordering of behavior but also a societal structure.

Frequently law has been defined generically as a *lex*, a rationale or a measurement of social life. But this truth must be interpreted more broadly than taking law as a rule of conduct, although in the last analysis, such regulation of conduct is the function of law, to which all other functions can

be referred. A somewhat external view of the juridical phenomenon could lead to restricting law to the regulation of human conduct: follow such and such a procedure, perform these or other acts in this or that manner, etc. In that sense, law would be the norms that the subjects, judges, bishops or priests, for example, would have to follow in their activities; and there would be nothing more to the juridical world.

However, such a restricted view is not tenable. Certainly the norms that regulate a judges' activity—an apropos example—are law. But is being a judge anything other than a juridical situation? Is a judge not installed as a judge (not just regulated in his activities) by the law and does he not have powers that are juridical in nature? Another example might be the figure of the Roman Pontiff. Being the Pope involves charisms such as infallibility when teaching *ex cathedra*; but a member of the faithful cannot become Pope by receiving charisms. Charisms are received because of being the Pope. It is also true that being the Roman Pontiff implies the supernatural realities of being a bishop. But being the bishop of Rome is not the result of receiving a certain sacrament. Nor can a person be Pope because of receiving a special plenitude of episcopate, something like being a kind of superbishop because of the bountiful effects of the sacrament received or of some special ontological supernatural realities. Being the Pope is a juridical situation created by divine law, with powers and faculties granted by divine law; a person has those powers because of legitimate accession to the Supreme Pontificate. And the Pope in the Church is its visible Head, who represents a bond of unity. As a last example, we can think of marriage. Being husband and wife, being married, is being united by a juridical bond which in no way excludes vital and ontological realities, for marriage is a function of those realities and assumes that they exist.

These examples could be multiplied *ad infinitum*. They show that law is not just a simple ordering of behavior. It is also a structure of societies and communities. It can even be one of their *constitutive* elements when the bonds that unite the members and make them into a cohesive unit are bonds of that nature. Law orders—it structures and organizes—a social group by creating bonds, establishing juridical situations, delimiting areas of jurisdiction and independence, granting powers and rights, etc. Canon law in relation to the people of God is no exception; law is a structure of the Church and not merely a norm for acting.

The structural function of law in the people of God has two modalities. In some cases it determines or completes the structure and organization of the Church by creating—legally, contractually, etc.—bonds, juridical situations or strictly juridical entities. These would run from figures of the Pope or the College of Bishops to figures of vicars general or judicial vicars, including religious or service contracts. Sometimes bonds or juridical situations include peculiar charisms (for example, the infallibility of the Pope, as mentioned above). They may be embodiments of a charism (for example, a foundational charism, in the case of religious), or

they may even be the *res et sacramentum*, in the case of the sacrament of marriage.

Secondly, there are certain juridical structures with a different and broader dimension of structural and organizational factors; that dimension generally closes the cycle that makes up the structure. Being a Christian, for example, involves being a member of the people of God. But neither being a Christian nor being a member of the Church is solely or fundamentally a situation or bond of a juridical nature. Christians are united in an organization and consequently conform to a social structure through bonds of grace, through the action of the Holy Spirit and through the mystery of unity that is the Eucharist. Being a Christian is participating through Christ in the divine filiation. Being a member of the people of God is being united to it by all the mysterious bonds that make up the people of God. Analogously, being a priest or bishop is something more than holding a juridical position, because it is to have in the people of God a *sacerdotal* position that is much richer than just a juridical position. But being a Christian is *also* being juridically bound to the Church. A member of the faithful is not bound to the people of God and the hierarchy by mysterious bonds alone, but also by juridical bonds of solidarity and subjection. Likewise, being a priest involves a bond to the Church and to its hierarchy, with a duty to serve that is a juridical bond. In both cases, law completes the bonding by further determinations of a very different nature.

Together with ontological elements (ontological union), in the Church there is a juridical structure without which, given the current economy of salvation, something would be lacking in the constitution and organization of the Church as a society. This does not mean that only law exists in the Church. It also means that in the current economy of salvation, ecclesial ontological realities have a complementary juridical structure that completes the structuring and constitutive cycle of the people of God as convoked and founded by Christ. Although the bonds uniting members of the faithful in a common goal and the structure of the Church as a hierarchical society are supported by ontological realities tending to move toward solidarity among the faithful and toward making and using means of salvation, both bonding and hierarchical structure receive their fullness through the juridical structure.

That is the deep meaning of the juridical Church (*Ecclesia iuris*). This theological truth implies a greater penetration of law in the Church than the mere existence of a legislative power. In that sense, the juridical system is an organizing structure that, together with ontological elements, constitutes and organizes the people of God.

From such a point of view the basic factors in the juridical structure of the Church may be reduced to three: *a) Constitutive factors*, among which are the bonds incorporating the faithful into the Church (the fundamental bond of being a member of the people of God), together with the bond to the hierarchy as a member of it, the creation of minor communities,

etc.; *b) Organizational factors* (ecclesiastical offices, for example); and *c) Norms for evaluating and developing* the activities and behavior of the faithful and the hierarchy.

With that explanation we believe we have brought out the idea that law in the Church is not a superstructure, an extrinsic, added-on organization that favors the development of the people of God but remains a supplementary element. On the contrary, the Church is a juridical Church as well as a Church of charity (*Ecclesia caritatis*); one of its constituent factors is its juridical organization and structure.

Canon law must therefore be understood as the juridical structure of the Church. In that sense, canon law is a set of norms, but not only that; it is above all a system of juridical relationships, a complex of bonds that unites the faithful and *situates* them in a certain position (a juridical position) within the social body of the Church for the Church's ends. At the same time canon law includes that set of factors which creates the above-mentioned relationships, organizes the hierarchy or simply evaluates or regulates the behavior of the faithful.

7. *Sacramental bases of canon law*

As we have just said, law is not a superstructure with respect to the supernatural roots of the people of God. We also spoke of the organizing function of the law. Taking a conciliar text as a basis, we also said that the people of God is "structured by the sacraments". Assuming that, we can then ask whether the law and the sacraments are related, or whether the structures born of the sacraments are different and diverge from the structures originating in the organizing force of the law. We must answer those questions by saying that canon law is based on the sacraments (in a special way on baptism and orders), and that the juridical system of the people of God in its primary nucleus is the juridical dimension of the *lex sacramentorum*, that is, the juridical dimension of the requirements, functions and norms of life that naturally spring from receiving the sacraments. A complete study of the subject would involve treating it especially in relation to baptism, confirmation, the Eucharist, orders and marriage. But to give an example of what we have just stated, we can refer briefly to baptism and orders, because they are the two sacraments of greatest importance with respect to canon law.

Baptism is the sacrament of becoming a member of the Church and it is the fundamental step in the personal process of salvation. Through baptism, a person is incorporated into Christ's body and with Christ shares the divine filiation, becoming a participant (*consors*) in the divine nature. By baptism a person also is incorporated into the Church as a full member, sharing all its benefits. As theologians say, the sacrament of baptism has a number of effects: sanctifying grace, character, etc. But of all its effects we are now particularly interested in the following: *a)* baptism in-

corporates a person fully into the Church; *b)* the baptized are destined for worship in the Christian religion (*LG* 11); *c)* the baptized person receives a calling to the apostolate and to participate actively in the life of the Church (*LG* 32 and 33; *AA* 3 and 10); and *d)* baptism requires living in accordance with Christ's teachings, which tends toward holiness.

All that we have been saying shows that a baptismal vocation has an inherent juridical expression: becoming a member of the Church involves a juridical bond. Baptism, with a unity of effects, makes a person a member of the people of God in all its complexity, including the juridical aspect, as the Church in its complex reality is one. A vocation for the apostolate, being destined for Christian worship, and the ability to participate actively in ecclesial life, assume that a Christian carries a juridical patrimony that consists of a set of rights and duties arising inherently (*iura nativa*) from having been baptized. In other words, the rights and duties are inherent in the efficacy of baptism, i.e., inherent in the participation in Christ which is the primordial effect of baptism. None of those juridical effects is an element superposed by a human legislator. Consequently, baptism does not act as a simple condition or requirement of a human norm that would give it juridical effect. As we have said, it is a juridical dimension inherent and innate in the radical condition of being baptized and participating in the dignity of the child of God just as natural rights are inherent in the dignity of a human being.

What are the consequences of what we have just stated? First, one of the fundamental nuclei of the Church's juridical structure as it now exists has its origin in the sacrament of baptism insofar as it generates new members of the Church and each day produces the bonds that continue to constitute the Church. Secondly, the set of human norms that governs the activities of the faithful and their position in the Church must be the realization and determination of the nucleus of juridical norms implied by the condition of a baptized person. In that sense, the norms of human law to which we have referred must tend toward developing the baptismal vocation, and that is the criterion of their justice and therefore of their juridical value. Thus human norms are not a superstructure but the cycle that completes the norms inherent in the condition of a baptized person. The rule that Saint Thomas established for human law if it conflicts with natural law would be applicable to any human norms that did not share those inherent characteristics: *non erit lex, sed legis corruptio.*

Similar reasoning can be used with respect to the sacrament of orders. This sacrament produces a unique and essentially different kind of participation in the priesthood of Christ. If all requisites are met, and that condition also applies to baptism, through the sacrament of orders, incorporation into the hierarchy is produced, a function within the people of God is received, and living in accordance with its own conditions is required. All those effects have a juridical dimension and all are the result of the efficacy of the sacrament. In the juridical sense and not only in the

mysterious sense, the sacrament of orders is a *builder* of the Church, since it adds new members to the hierarchy. That, together with its structure and functions, fulfills a mission similar to the mission of baptism in its area by producing and making real the bonds that constitute the hierarchy. To summarize, the hierarchical structure of the people of God is made real through the sacrament of orders. The set of human norms that governs the activity of the hierarchy and its position within the Church should embody and determine the nucleus of juridical norms that include the condition of being ordained and receiving a mission.

An analysis of the other sacraments would lead us to similar conclusions, if we examined the nature and effects of each sacrament. The obvious conclusion is that there is harmony between juridical norms and the *lex sacramenti*, and also that the sacraments, especially baptism and orders, are factors that—on the existential level—make the Church real and structure it; and they also structure it juridically insofar as the sacraments produce juridical effects.

The nucleus of the sacraments as inherently juridical norms points to the relationship between divine law and human law. That is the subject we shall next study.

8. *Divine law and human law*

Law is an order that does not arise solely from a human legislator. Specifically and with reference to the Church, the people of God recognize that there is a divine order within them that is the base and foundation of their whole organization. Furthermore, the ecclesiastical legislator expresses himself in a manner that is radically dependent upon divine law, also called *Christ's law,* and there are a number of historical examples that could be cited. The history of the Church, together with the human failures that may have occurred in practice gives constant witness to that fundamental idea. This dependence has been defended at the cost of persecutions, schisms and heresies, and reflected in the "non possumus" that has frequently echoed through the centuries when attempts have been made to deviate from that law.

This order, called *divine law* by doctrine insofar as it represents a just social order, can be considered to be made up of the following factors: 1) Foundational norms, given by Christ, which are collected in the New Testament or have been transmitted by tradition and which trace basic traits of the organization of the Church and fundamental guidelines for the social life of the people of God; for example, the primacy of Peter. 2) Principles and requirements of the *lex sacramentorum* and in general of the *lex gratiae*, which emanate from the order rooted in supernatural realities. These principles and requirements are distinguished from those in the preceding group, although it is not always easy to do so. The phenomenon is analogous to that of the natural law with regard to human nature;

i.e., a system of norms rooted in supernatural realities. 3) The principles and requirements of natural law that are also valid in the Church; they are integrated into the order of salvation but they are fully respected.

All of the above assumes that there are the following: *a)* Social structures (relationships, bonds, rights and duties, hierarchical bodies, etc.) established by Christ and that actually exist once the acts or facts which, by virtue of Christ's will are their causes, are carried out; *b)* Certain principles and requirements that human law must respect and consider as a point of departure because it is heavily dependent upon them.

An excessively literal application of a normativistic conception of canon law (which has been justly criticized) causes some theologians to show divine law in a rather curious manner and make the notion incomprehensible to anyone with a minimum of ecclesiological sensitivity. It appears as if divine law were a kind of code of stereotypical precepts that could be drawn up by condensing Scriptural texts and statements of the Tradition particularized in light of the Magisterium. That would give us a totally insufficient, rigid and static view of divine law. The term *divine law* signifies those aspects of Christ's founding will and divine design for the Church with consequences that can be related to what in the language of human culture we call law. In that sense divine law is in the word of God, which lives on in the Church. Revelation—insofar as it shows us a community congregated to hear the Word, celebrating the Eucharist and the other sacraments, and continuously inspired by grace—indicates the fundamental lines of ecclesial order, which is the harmony between pastoral action and liberty, obedience and autonomy. Thus, through revelation, the life of the Church calls for a consistency between law and the fullness of the Word as manifested in sacramental ontology; and also calls for a consistency between law and charismatic action. It is coherence that impels the faithful and enables them to act lawfully in the service of the community.

The divine order, however, is not the complete structure, organization and ordering of the life of the Church. Beside it there is human law, which is not only an additional or supplementary order, because relative to the divine one it has characteristic functions that are due to the participation granted to the human being in the course of the history of salvation.

First, the norms given by Christ draw only the grand lines of the Church's organization and the fundamental requirements of Christian life that are constantly being enriched through history as they meet with new realities. Second, the principles of divine law by definition do not imply a complete order because they are only principles; that order should therefore be completed by human regulatory acts.

At the same time, other facts must be kept in mind. The ecclesiastical Magisterium has the mission of clarifying, fixing and interpreting the existence, scope and content of divine law so that it may be observed. In addition, knowledge of divine law is not automatically thorough from the beginning; its contents are continually being discovered as the faithful's

awareness delves deeper into the complex meaning and depth of the Christian message and at the same time as its requirements are understood when meeting new situations. Last, regardless of recognizing the validity and imperative nature of divine law, we can scientifically wonder if the specific nature of divine law is truly juridical or are they norms of a different type. That all raises a number of questions that for our purpose may be condensed into three: a) the nature of divine law; b) the relationship between divine law and human law; and c) the need and means for positivizing divine law.

a) *The nature of divine law*

The explicit or implicit answer given by contemporary canonical doctrine to the question of the nature of divine law has not been unanimous. Following a long doctrinal tradition, most authors feel that both divine law and human law are properly and truly law. They are two types of juridical norms that flow together to govern the Church and are distinguished by their source or origin. Other authors maintain that only human law fits the concept of law and, therefore, divine law, the obligatory nature of which they do not question, has a different nature. Some of those authors ignore the question of the nature of divine norms (Del Giudice, for example). Others have held that divine norms are moral norms in matters of justice (Van Hove, Naurois), or theological-juridical rules (d'Avack), or they feel that they represent ethical requirements (Di Robilant with respect to natural law), or orders of justice with a similar nature to human law (Pérez Mier).

We believe that before we can give an answer to the question of the nature of divine law, two things must be considered. First, things are often described as divine, natural, or positive law, when, regardless of their nature, they are not. Law, imperative norms and binding structures, cannot be confused with its determining factors. Neither the nature of things (the nature of a person is another matter), nor the norms of common sense or prudence are norms of divine law; these are either physical factors or rational factors, but they cannot be considered to be true juridical norms merely by themselves. Divine law also cannot be confused with the rules of experience, the dictates of juridical awareness or doctrinal truths, no matter how universally accepted, so long as they involve only juridical *wisdom* and not an imperative social order. A truth or a wise norm is not the same as the law. In that sense, and as we have said, there are many rules or factors confused with natural or divine-positive law, without being law. True divine law is composed only of a just social order that is imperative and binding; it arises from the legislative will of God, and in the Church, by the founding will of Christ.

In the second place, now within the nucleus of norms that we call divine law, we must distinguish the elements to which we have previously referred: *norms*, given by Christ, which order and value behavior, or es-

tablish bonds and situations within the people of God. There are *principles of order and requirements of justice that are inherent* in a Christian person and in the nature of the Church. They may be immutable or they may be relative to the Church's history and the constant emergence, transformation, or disappearance of various situations.

If we look at the problem this way, there is no doubt—nor does doctrine any longer doubt—that the first group of elements of divine law is what is properly and truly law. It is an order with all the facets that belong to the notion of law: social, just, imperative, intersubjective and historical (i.e., currently in force in history). Relative to this last facet, we would like to add a few words. These norms were historically dictated by Christ, an actual man, with powers as such, although by virtue of the hypostatic union. And these norms are in force in human history because of the binding force of Christ's will, for, through the sacraments and the Church itself as the sacrament of salvation, the divine elements that constitute those norms are present and stay in history with all their original force.

As for the second group of the elements of divine law, they are also law; that is, they have a juridical nature but act as what they are: principles and requirements. In human law there are also such principles. They are either established in declarations considered to be fundamental laws or inherent in an organized State in accordance with political doctrine, ideologies or governing mentalities. They are collected as juridical principles or recognized as requirements of the current juridical order. Those principles and requirements act as informational factors and as limitations on the use of power; power can do nothing against them, from issuing laws to issuing administrative acts. But since they are not complete norms and because they are consequently general rather than specific, they do not acquire full regulatory efficacy until they are completed by legislative activity. Similarly, the principles and requirements of divine law in the Church act as *shaping factors*, as *limits* on the activity of the ecclesiastic hierarchy and as a *necessary basis* for human law; but they cannot have a greater juridical effect until they are developed into real norms because they are general and non-specific. In addition, it is advisable to note that many of those principles and requirements are not expressed by one possibility alone, but by several; thus for them to be fully effective, the legislator must opt or choose among them.

b) *The relationship between divine law and human law*

There has also not been complete agreement in doctrine concerning the relationship between divine law and human law. For the majority, divine law is the foundation of human law; divine law prevails over human law and converges with it in governing the life of the Church. Since divine law is the foundation of human law, the content of human law is determined by and is the conclusion drawn from norms or principles of a divine order. Human power receives its authority from divine law. Bellini, for his

part, has described human law as an autonomous system of law but materially and formally subordinated to divine law. Bellini holds this opinion in contrast to other authors who, whether or not they deny the juridical nature of divine law, understand human law to be constructed as a primary system of law. They consider it to be *original* (the *juridical* effect of its norms does not derive from any other system of law, not even the divine order), and *self-sufficient* (any situation or social relationships will find an applicable norm in the human system without having recourse to the divine order as such).

Divine law and human law together form a single juridical system. The principle of unity between divine and human law is threefold. First, the Church's basic juridical structure (juridical bonds among the faithful, the hierarchical organization of divine law) exists because of divine law. All other structures are derivative, complementary or historical forms developed from that basic structure. At all times in history, all other structures are integrated into the Church's basic juridical structure and together with it they form the complete structure of the people of God. Second, people have authority and that authority is one source of law, by virtue of divine law. Human authority is not original per se and does not receive its strength from the members of the Church. Lastly, all social realities within the Church, even if only inchoatively, have their own embryonic order (the law of nature in some cases, the law of grace for the rest). From that order, the human legislator, by the method of determination or of conclusion (*S. Th.*, I-II, q. 95, yr. 3), deduces a positive norm. Under these three principles, divine law and human law form a single juridical system of law.

Together with their unity, the two types of law have a hierarchical relationship. Divine law is the *fundamental law*, the *necessary basis* and the *limits* of human law. That is why human norms that conflict with divine law are disaffirmed by divine norms (true *higher canonical authorities*, in the words of Journet). Because they are of a superior rank, divine norms can cause the invalidity of human norms in some cases, and can always make them illicit; but human norms can be reformed or adapted if, without conlicting with divine law, they prove to be inadequate to it.

c) *The positivation and formalization of divine law*

The problem of the positivation of divine law has been raised only by authors who either deny the juridical nature of divine law or who hold that divine and human law are two separate systems of law. Those doctrinal stances do agree, although with some strong differences, that a divine norm is not transformed into a juridical norm in the canonical system unless it is *formally accepted* by positive human law. By the act of acceptance—*canonizatio*, according to an expression coined by Del Giudice—divine norms are transformed into law and specifically, into canon law.

Having said these things, it is superfluous to add that we do not think that this theory of positivization seems right. Divine law in the Church is not a different system of law from human law. Both divine and human law are a single juridical order. Divine law needs no approval or acceptance by ecclesiastical powers to be the law that is in effect. Rather, the opposite is true, as Bellini says; human law is objectively subordinate, both materially and formally, to divine law. This does not mean that the need to positivize divine law should be rejected out of hand. On the contrary, it seems that properly taken, positivization is true to the very nature of law because law is essentially a historical system; it is a historical and temporal dimension of human reality, and at the same time evolving. This raises a question. Only an imperative system that goes back to a historical factor in its force and immediate source can be considered to be law. Otherwise, as in the case of *lex aeterna*, it cannot be called law even if it is obligatory and binding. Therefore, divine norms cannot be called law if they cannot be traced back to a historical factor. Catholic theology has overcome that difficulty in the case of natural law. It states that natural law is *promulgated* (the passage to historical efficacy) in human nature itself in the form of first principles of practical reason and as a person's requirements. In the case of divine *positive* law, the passage toward being historical was made by Revelation, which is a truly historical event, and by the existence of those realities of which positive divine law is its juridical dimension. All that is true, but it is not the complete answer. To see the subject in all its complexity it must be studied first in relation to 1) the effective operating capacity of the norm; then 2) the perfecting and integrating function of human law; and finally 3) the types or forms of positivization of the law.

1) Whether divine or human, a juridical norm is a ruling act or mandate from the very moment it is promulgated. After promulgation, it is in force and is binding upon its subjects. But a subject is a free being and may refuse to comply with the law. If a person does not obey, the norm loses none of its force, but it has no practical force. Similarly, a member of society has an imperative order that arises from the requirements of the person's dignity (the law of nature or natural law). However, society may impose on itself a system of *laws* that are accepted as effectively functioning and valid but that are not in harmony with the natural order. In this case too, natural law is still binding and obligatory, but it is de facto ineffective. Society as such is governed by a system of norms that, even though they are contrary to divine law, are accepted and obeyed as laws governing the social relations of the members of society. In this case, divine law will in fact be outside of the *legal* system that actually governs society. In that sense, there can be no doubt that divine law by itself is effective in the life of a society if it has been accepted by the society. However, it is one thing that acceptance by society produces effective operability of the divine norms in social relationships, and a very different thing that causes them to be binding.

But such a problem cannot properly be raised in canon law. The Church is not merely a human society but an institution, the people of God, founded by Christ, who is both God and Man. It is also the Mystical Body of Christ which receives a continual and vital inflow from its Head. The will of the Church, *qua* social body considered institutionally, identifies itself with the Divine will, and it accomplishes this through a union of its own will with that of God (hence her theological claim to be the *Bride of Christ*). The Church is so by virtue of constitutional law—against which the will of those who are baptized has no powers—and it is so by virtue of the supernatural and charismatic realities of its very being. The people of God that continue Christ's mission are constitutionally and objectively ordered for the purpose of establishing the divine order in all aspects of human life. Thus all of divine law is received into the Church constitutionally and completely. It is true that human powers, because they are not infallible, can issue erroneous norms and even positively unjust norms. But as we were saying, such laws are invalidated by higher canonical instances.

There is, however, one fact that qualifies what we have just said. The constitutional reception of divine law means what we might call "the constitutional will to comply with it"; but that does not mean that divine law is totally and fully known. The same happens here as with the truths of faith. From the beginning the Church has totally accepted revealed truth; but that does not mean that there are some truths that are unknown at any given moment in history or only imperfectly understood. However, the entire deposit of faith, whether known or unknown, is radically accepted. Likewise, certain norms of divine law may be imperfectly understood or even unknown, and consequently may not be followed or are imperfectly followed. But this is always a process of *learning* or *experience* and it is not inconsistent with a radical and constitutional acceptance of these norms. Even so, this becoming aware by the Church is a phase in the passage to the historical existence of the divine norms, at least with respect to the fullness of the passage to the historical efficacy as law. It is in this sense that divine law needs to be *positivized*. By that we must understand not its radical acceptance within canon law by an act of human authority nor its transformation into law, but its passage to coming into force in history by an ecclesial awareness of its specific content. Thus a simply magisterial statement or universal reception by the *sensus fidei*—as a point of faith—is sufficient for an unknown or disputed norm in divine law to have an immediate historical efficacy; it must then be accepted by the faithful and by the hierarchy as a juridical norm. For a little-known divine norm, a magisterial statement sets the content depending upon the degree of knowledge reached at any moment in history and makes present the "constitutional will to obey it". But it does not presuppose nor require an act of reception *ex novo* by the authorities.

To understand the precise limits of the idea of positivization, we need to spend some time on clarifications. A juridical order that has already been formed is not merely a confused and scattered set of norms of equal value. The system has guiding and informing principles, different types of norms with different force, different mechanisms for applying the laws, different embodiments of each of the acts concerned, and different requirements needed for each of the factors in the system to be valid or for giving each a certain value, and so forth. This is a technically structured order that conditions and, through its technical mechanisms, shapes the force and application of the law. In sum, a juridical system that has already been formed is a *formalized* system. What does *formalization* mean? It consists of giving a technical character to the different factors and elements which make up the law by means of the granting of a particular form, the attribution of a precise efficiency, in themselves and with regard to others, the supplying of technical instruments for the fulfillment and the guarantee of its efficiency, the establishment of conditions and requisites in order for these elements and factors to be valid or efficient, etc. Through this there is a tendency toward fully seeing to the guarantee of the function and value of each juridical element or factor within the context of a concrete system of law.

In the face of this reality which originates by virtue of the need for certainty, security, and justice in the juridical order, positivization must be completed by formalization. For this reason, divine law once positivized must be integrated by means of formalization through ecclesiastical norms which complete it or which establish the mechanisms that guarantee its applications, etc. Thus, for example, the *ius conubii* (the right to marriage)—a natural right—is formalized within the canonical system of law through the establishment of its limits (capacity), requisites for its exercise, the form of the celebration of marriage and the correspondent registry attesting to its existence, nullity or separation procedures, etc. Without this opportune formalization, divine law would only imperfectly be integrated within the canonical system of law since it would be pending upon good will and a correct sense of justice on the part of those who must fulfill it and apply it for social effectiveness. By integrating divine law within the whole of the mechanisms granting it a technical character formalization places at its disposal all the resources it needs in order to be applied correctly.

From what has been said, it follows that non-positive divine law must not be confused with non-formalized divine law. Furthermore, it is possible to come across a pre-formalized divine law, that is, divine law which is lacking the adequate and desired formalization.

2) Having examined the first point, we may now pass on to the second. There are two other types of norms or principles within divine law, together with a primary nucleus of norms that completely govern a social relationship: a) norms that indicate a generic juridical relationship, that

are made concrete by human norms; b) principles and requirements inherent in the realities of Church history, in its developmental sphere and in the advent of new structures. In these new situations there is also a nucleus of divine order (natural law or the law of grace) that human law must respect (principles and requirements). In all those cases there is one constant: an order that needs to be completed by human law. That is especially true for the second case where, rather than an incomplete order, there is the first instance of an order.

Evidently in both of the above cases, the legislator's function is properly authoritative: 1) because it completes the natural or supernatural order with a positive law, without which social relations could not be fully regulated due to their indeterminateness; 2) because—and this is valid only for a new or changed situation—the hierarchy has the mission of governing and regulating social life, and consequently of recognizing or not any new situations of human origin, always in accordance with justice. These have a human origin because they are historical developments driven by human actions, although they may obey an influence from the Holy Spirit. Under that principle, the order initiated in these situations is a requirement of justice that binds the legislator at the time of regulating new situations, but it is not perfected in its nature in the juridical order except by recognizing the newly created situation. Before there is recognition, we can speak of the demands of justice, but not of fully developed norms. In those cases, positivization is required and is authoritative. But positivization *perfects* (completes the order) and *integrates* (the divine requirements or principles become integrated within the completed human norm), so that the nucleus of divine law that may exist possesses the proper force of such law (*St. Th.*, I—II, q. 95, a. 2).

3) Finally, we shall make a few brief comments on the methods of positivizing divine law. Positivization produced in the process of integrating divine law into human law is related to the sources of human positive law. These are principally law and custom, but also the integrating function of a judge in specific cases, and doctrine under c. 19 of the CIC. But positivization understood as discovery and awareness of divine law takes place in the Church in different ways, as we have repeatedly pointed out: the ecclesiastical magisterium, canonical and theological doctrine, the sense of faith and even the social dynamism of Christian life lived and proclaimed according to convictions born of having true charisms or a sense of faith.

In this regard we must point out the close connection between faith and ecclesial life. Catholic faith is essentially dynamic; it operates as the root and source of Christian life, which finds its dynamic strength, its value and justification in faith. Therefore a norm that is believed through faith is *necessarily* an operative law. A norm taught and believed by the Church is for the Church (for the social body considered as such and for its members) a norm for acting and living. A norm that was taught and not

embodied in legislation would be a *scandal*—a contradiction between faith and works; it would not accord with the essential nature of the Church as the sacrament of salvation. It would be a clear case of human law that was not law but a corruption of law (tyranny). And that is because faith is a norm of acting. Thus the discovery of a truth that involves a norm of acting (divine law) is a positivization of divine law by the very force of faith and the constitution of the Church. In the Church there can be no break between faith and the Church's juridical order. Such a break is condemned from the start to have no juridical force by the Church's constitutional and foundational norms that receive, once and forever, all of divine law.

II. The Science of Canon Law

A. *Juridical Knowledge*

1. *Preliminary considerations*

Law is a dimension of social reality that gives it order. Law is the rationale or measure of social life, presided over by the principle of justice. In part law is a given order (natural and divine-positive law), in part it is man's creation. It always requires a moment in time when it is put into practice—living in accordance with the law, which is living in accordance with justice.

In order to be created, law needs to be legislated in accordance with its nature; to be lived, it needs to be known. In both cases, although with differences, it is necessary to have *criteria*, a working *method* and a certain amount of *knowledge*. The same occurs in the other facets of the life of human beings; to obtain something, to perform an act properly, it is not enough to want to do it, it is necessary to know how to do it.

Being a jurist or, in general, living according to law is *knowing how* to do so. It assumes a specific intellectual habit (dianoetic) that consists in knowing how to make a just social order within Society. Similarly, being a canonist is having an intellectual habit directed toward establishing a just social order within the Christian community. Finally, being a canonist consists in being a technician in justice, which is a necessary dimension of the people of God.

2. *Knowledge and juridical reality*

Law and science are not and cannot be confused. Law is a reality that exists outside the mind; it is an objective order belonging to intelligent beings, and it is more than just a simple idea. But the fact that there is

an order of intelligent beings emphasizes the necessity of the participation of the human mind so that this order may exist. What is the role of this participation of intelligence? Is it pure knowledge, or is it also an operation that produces, or to put it more exactly, constructs the law?

As we were saying, the law is both a given reality, an object of knowing, and an operable reality that can be constructed, an object of action. Indeed, if we look at law in relation to its legislative phase, no one can doubt that the law is something drawn up by human beings. Laws are social regulations that humans establish according to criteria of various types (technical, juridical, political, for civil society, or pastoral, for canon law, etc.). But social reality is not itself a subject without being normative. In society there is an innate order, or also, in the case of the law of the Church, an order established by Christ. These are sectors of juridical reality that the human person knows, but does not create. In that case, reality is something that can be known.

In addition, from the point of view of applying and complying with the law, it must be known to be lived. There is, then, an indubitable cognitive dimension in this way of looking at it. Moreover, for law to be lived it must be *concretized*. What do we mean by concretized? Jurists usually also say it must be complied with, or more precisely, *applied*. A norm or a duty exists from the time it formally takes effect. Norms and duties are, nevertheless, categories that must be realized by being applied to the social reality that they are designed to shape. The process of applying the law is precisely one aspect of constructing the law in its primary sense; it is the reality justly organized, as it is understood by the doctrine of juridical realism. Consequently, living the law (in its normative sense or sense as a juridical structure) is, at the right time, a process of constructing juridical reality, a product of *knowing how*, as we previously mentioned.

3. *Science and decision*

Knowing is proper to *science*; operating or constructing requires *art* (according to the ancient classic term) or *technique* (in modern terminology). Thus, we need to distinguish the science of law in a general sense from the technique or art of law.

Theoretically and generally speaking, the concepts of science and technique or art are different. For example, there is a science of speculative knowledge of painting. A connoisseur of painting *knows* about artists, paintings, the different schools of painting and can even be a critic or make appraisals. Along with the science, there are various degrees of the art or technique of painting. Those who possess it are called artists, experts, etc., depending upon the degree and type of art or technique that they possess. They are the ones with the *skill* to paint a picture, reproduce it or restore it. This skill or talent is not called science, but art or technique.

However, the science and technique of law are not separate concepts. On the contrary, the so-called technique of law is integrated into science as one of its instrumental factors. This is so because juridical science is not a speculative science, but a practical science.

The purpose of speculative science is simply to learn about an object, and its work terminates with the knowledge obtained. Whether the object is in itself something given or whether it is also something that can be put into practice is irrelevant because in either case speculative science tends only to learn about it.

On the other hand, the purpose of practical science is to do something, something which is formally considered as such, that is, the purpose of operation. A practical science is knowledge intentionally directed to achieving the purpose. It therefore follows that in a practical science, the idea of doing something specific governs the method and the specific of investigation.

But making law at the time of producing it, applying it, is not purely knowledge nor just having a skill. It requires a *decision* to be made in which the will p lays an important role. The decision is the product of juridical prudence. The science of law is directed toward this kind of decision and enriches the cognoscitive dimension (it does not suffice to want something; as we said earlier, it is necessary to know how to do it). In addition, in the final analysis, the aforementioned technical factors come together to make a decision possible. Thus there is between juridical science and juridical prudence a connection that integrates them into an intentional unit.

Next we shall analyze the subject from a panoramic viewpoint. We shall present an overall view of juridical knowledge, together with more details of the notions of juridical science in the strict sense and juridical prudence.

4. *The formal aspect of juridical knowledge*

The Church or the people of God have a juridical dimension in which there is a juridical order that can and should be known, although it is not the only aspect of the Church. Through the juridical order we can establish a preliminary description of the specific nature of canonical science in a general sense. The object of juridical-canonical knowledge is the juridical aspect of the Church. That is the purpose of studying it and learning about it. But this is only a preliminary and negative way of delimiting juridical-canonical knowledge. It tells us that canonical science does not study other aspects of the Church as its proper objects, and it does not study the juridical aspect of civil society or of non-Christian religious communities; but it tells us nothing more. This criterion would be valid only if no other science were devoted to the juridical aspect, for from the moment that there is no juridical aspect, other criteria have to be used.

One thing we must remember. Since sciences are particularized by their typical way of conceptualizing (*modus definiendi et enunciandi*) or by the formal perspectives of conceptualization, the juridical aspect of the Church can be the exclusive object of canonical science only i if it is cognoscible or can be grasped in a single form of conceptualization, that is, from a single level of abstraction and from a single aspect. But is that the case?

It is indisputable that the juridical aspect of a society is generally not the object of a single science. Law is an object of study and learning by philosophy. Law can be studied from the sociological point of view. It can be learned about theologically (*sub ratione Deitatis* and according to the light of Revelation). It can be studied from the angle of political science, as an instrument of order and government, etc. The juridical dimension of the people of God is also the object of various sciences, although naturally in different ways. The juridical dimension may be studied by dogmatic theology, according to its own mode of conceptualization. It can be the object of morality insofar as it binds the conscience of the faithful. It can be the object of pastoral care, as an instrument of the action of pastors, etc.

However, none of these ways of studying and learning about the law of the Church gives us specifically juridical-canonical knowledge. When we say that a jurist is a man of law, or that a canonist is a technician of the ecclesial and just social order, we are referring respectively to the study of law or of canon law from a particular perspective. That perspective is *typical operativity* or the typical way in which the juridical concept operates in social life. What we have here is a consideration of the juridical dimension as something that, according to its nature, operates effectively, ordering the social life of a community of human beings. Thus typical operativity refers to the structuring and ordering action on social life by means of specific bonds, relationships, requirements and mandates.

We say *specific* because there are many bonds, requirements and mandates that are not the object of the science of law because they are not juridical. The juridical aspect is limited by the note of strict justice, equality and intersubjectivity. Intersubjectivity, or otherness, according to many authors, means the relationship of human beings with each other, a relationship that is dominated by the feature of exigency which is the binding force. This requirement arises immediately from the position of each person with respect to the others, like something inherent in the respective positions in the social environment or in the relationships among the positions. And these are not the bonds that exist between human beings and God.

Now we have described the limits of the formal aspect (formal object *quod*) of juridical knowledge: human sociality seen *sub ratione iuris*, or what amounts to the same, *sub ratione iustitiae*. In other words, we are speaking of when juridical knowledge is presented as a requirement of persons with respect to other persons, either because of their personal

condition or because of their social condition. Saying that we have delimited the formal aspect of juridical knowledge is equivalent to saying that we still need to indicate the final and specifying element: the formal perspectives of conceptualization. That is true, but since the specifying element operates at different levels of abstraction, it means that juridical-canonical knowledge in general has various degrees or levels with the common characteristics that have been indicated above.

5. *The different levels of juridical-canonical knowledge*

There are four levels of knowledge about juridical reality in the Church that we can identify in accordance with most recent philosophical-juridical doctrine: *fundamental*, *scientific* or canonical science in the strict sense, *casuistic* and *prudential*. Of these four, only the first two are science properly speaking (knowledge through cause, with general validity). The difference between the fundamental and scientific levels lies in the fact that the fundamental level operates in the plane of *ontological* abstraction, whereas the scientific level operates as a *phenomenological* abstraction.

a) The epistemological nature of the fundamental level is determined by its operating on the abstract plane of ontological knowledge, but it is illuminated by the light of Revelation and its object is the people of God's natural and supernatural social realities. The fundamental level studies ecclesial juridical reality as requirements of Christians and of the Church, because of its nature, essence and qualities, that is, in accordance with the formal object of juridical knowledge. Juridical knowledge at the fundamental level explains and includes juridical *ontology* (the most intimate being and the ultimate causes of juridical-canonical reality) and juridical *axiology* (value judgments). It takes the form of a typical degree of juridical knowledge that is different from other types of knowledge because it operates on a different plane of abstraction; therefore juridical knowledge is conceptualized, defined and expressed in its own distinctive way. That leads to the creation of concepts, to the adoption of a notional lexicon, to judgments and proposals, and to the use of a certain method, all of which are typical. Although the terms used at the fundamental level may be identical at times to the terms used at other levels, the conceptual content—that is, the idea they express—is different.

It is this formal perspective of conceptualization and the methodology that make juridical-canonical knowledge autonomous and unique. As a knowledge readily obtained it exists scattered throughout magisterial texts, theological works, writings on canon law, etc. But doctrine has not yet drawn up a scientific corpus as has, for example, the philosophy of law (with which it is not to be confused, although it takes some elements therefrom). Furthermore, there are many canonists who appear not yet to have realized that this is an autonomous type of knowledge. They have

been rightly accused of indiscriminately mixing philosophical, theological, moral and juridical elements in their works, with the consequent confusion of substance and methodology. One of the reasons supporting the accusation is that they forget the uniqueness of the fundamental level. For example, to cite Saint Thomas's definition of law or the Suárez' definition of subjective law (at an ontological level) and say that these are definitions of law or subjective law at a scientific level is to confuse cognoscitive levels; such confusion is incorrect in good gnoseology. Similarly, when a magisterial or pastoral document, such as conciliar documents, speaks, for example, of the rights or duties of the faithful, these are nearly always notions obtained at the fundamental level (requirements for a Christian life, for example), and do not always or necessarily mean a right or duty in the technical-juridical sense. They may be requirements that in good juridical technique are included in diverse technical concepts or instruments: juridically protected interests, procedural norms, guarantees, particular ways of organizing the ecclesiastical hierarchy, etc. The same caution should be used in reading the writings of many tradition-oriented canonists.

Hopefully this science, which could be called the fundamental theory of canon law, will soon find specialists in whose hands it will become a consistent and well-formed scientific body of knowledge.

We can inquire if the fundamental level is necessary for a complete knowledge of juridical reality in order to implement it. The response can be none other than affirmative. Because of its configuration, the social dimension of the people of God has inherent in it certain principles of order, requirements and values. In this sense, Christian life has requirements that arise from being the true Son of God; a Christian has a *dignitas* that implies certain personal values, and autonomy (*libertas*); a priest has a deep-seated mission to achieve; the Church has its own typical characteristics, etc. It is not therefore possible for the law to implant a truly just social order if the inherent nucleus of order is not known and respected, for the inherent nucleus is truly a just and social order. But learning about the inherent order is the proper business of the fundamental level, because we need to know the intimate essence, nature, values and order of reality, that is, juridical ontology and axiology. And it can be learned only at the abstract level of fundamental theory. The fundamental level studies both the natural and divine-positive juridical order, and also positive human law, but obviously, from its own perspective. That is why it does not study positive law *technically*, but *ontologically*, in its most deeply rooted final causes, that is, its essence, function, justification and assessment. Thus it tends to grasp the juridical reality of the people of God at the ultimate roots.

b) The second level of juridical knowledge is the *scientific* level. Here we have the *science of law* in the strict and most proper sense.

Juridical science is characterized as a *phenomenological* knowledge. Because it is a science, it asks about causes, but its purpose is not to grasp the final causes, which explain juridical reality as a whole (final causes are the purpose of the first level). Juridical science is concerned only with proximate and apparent causes ("apparent" means a cause that can be empirically grasped, for example, a promulgated law, or custom, a judicial decision, a contract, etc.). It is distinguished by the particular kind of analysis that it uses in conceptually determining juridical-canonical reality; that is, by its formal perspective of conceptualization. A little further on, its characteristics will be explained in greater detail.

c) The third level, which is not properly a science or is scarcely considered to be one, is represented by *juridical casuistry.*

Saying that it is not a science or that it is scarcely a science is not meant pejoratively. We are trying to refer to the fact that it is not very theoretical or abstract, but because it is practical, it can be a useful tool in the world of law. To say, as some authors have said, that casuistry is the grave of true science is an obvious exaggeration.

The purpose of casuistry is not to analyze juridical reality in a theoretical way, but to *synthesize* conclusions derived from the preceding levels to settle possible cases (those that have taken place or have yet to occur) with all the circumstances that make them singular. Casuistry is abstract to a certain degree, since is does not resolve real situations (as does a judge who hands down a decision), but resolves *typical* cases, past or possible situations. Casuistry is a knowledge of types (it especially studies cases as types) and of essence; it is not immediately practical and existential.

d) These three degrees or levels exhaust juridical knowledge, which, while having a practical dimension, mainly deals with pure knowledge. But, as we have said, there is another level that basically consists of decisions, although knowledge is implied. Decisions apply law to real life, to particular situations that really exist. This level of juridical knowledge concerns the act of legislating, judges' decisions, fulfilling a duty, exercising a right, or acting in accordance with justice and the law. This kind of *decision*, which is not the conclusion of a logical syllogism nor an arbitrary act of the will, is the result of a virtue (law belongs to the scope of that which is doable): juridical prudence.

The prudential level is not at all abstract or generic. It is an implementing knowledge, immediately practical, which introduces just decisions that organize society in real life. Such decisions are made at an absolutely unique moment that is irreplaceable and unsubstitutable. The characteristics of the prudential level are *immediate practicality* and *synthetic knowledge* because theoretical knowledge is applied to real-life situations with all their particular circumstances.

6. *Autonomy and interconnection among the different levels of juridical knowledge*

Each of the levels of juridical knowledge studied is characterized by its particular formal perspective of conceptualization. The prudential level must be excepted because we cannot strictly speak of conceptualization since there is no degree of abstraction. But therein lies its specific difference.

An important consequence of the different perspectives is the autonomy of each level. Scientific autonomy means that each particular science (each level) has its own method and specific conceptual apparatus that correspond to a formal perspective or manner of intellectually harmonizing with juridical reality. Each science has in itself the necessary tools to reach the truth from its own perspective. In that sense, fundamental theory and canonical science have a certain specific autonomy in relation to each other, as has prudential decision, as we shall see at the appropriate time.

But also, none of these levels of knowledge can claim to be exclusive because each is totally insufficient to know and implement the entire juridical order. Each gives us one perspective, one view—or more precisely, one version, since understanding is not purely passive; and so we have different conceptualizations—of the truth of the object, which is not the whole truth.

The basic insufficiency of each of the levels of juridical knowledge shows the need for a connection between them. The connection appears in their orientation towards applying the law, in the note of practicality that at one stage or another is proper to all levels of juridical knowledge. In all of them there is a continuity of tendency and direction. But above all, the fact that there are different levels indicates that juridical reality cannot be approached at any one level alone and that an integral implementation of the social order requires a knowledge of juridical reality at all levels, held together by the same connection and in the existential oneness of the cognoscente.

It could be thought that the connection consists of the fact that they are levels of the same knowledge and not of different kinds of knowledge. This proposal does not account for the fact that each level has its own typical method of conceptualization, its own formal perspective of conceptualization, and that is precisely what formally distinguishes each from the others and particularizes each kind of knowledge.

Thus we have distinctions and autonomy, due to the incapability of the human mind to know juridical reality in its entirety, but only from different perspectives, in different modes of conceptualization and by different methods. And we have the necessary connection, because the thing that is learned about is one and the same object. These two characteristics

must not be overlooked, just as one cannot be downplayed in favor of the other without incurring an incorrect gnoseology.

How does each level operate with respect to the others? By *data*, which are the truths that serve as the point of departure but which do not become a part of a different level from the level where they were obtained except through conceptualization and treatment in accordance with the perspective and method proper to each type of knowing.

Accordingly, there are two errors that must be avoided. The first is methodological confusion and the indiscriminate use by one science of the concepts and results obtained by another science. The second is converting the autonomy of the different levels into self-sufficiency, proposing or following a total methodological purity. On the other hand, scientific rigor and the needs of knowledge require *formal methodical purity*; it does not consist in ignoring the data from other sciences, but in not using the methods of other sciences, in not pursuing the study of the objectives belonging to other sciences, and in not indiscriminately transferring results from one science to another.

7. *Canonical science*

Science is the name given to the knowledge of something through its causes (*cognitio certa per causas*). With this meaning of the word science, few fields of knowledge merit the name better than philosophy, and within philosophy, metaphysics. But in modern times, especially from the 19th century onwards, one specific type of knowledge that has been truly developed in the last two centuries is called science by antonomasia; it is phenomenological knowledge, that is, knowledge that tends to grasp the object through its proximate causes and apparent qualifiers. The epistemological characteristics of this kind of knowledge differ substantially from ontological knowledge (which is proper to philosophy or to the fundamental level). Thus the philosophy/science contrast is frequently made, as if they were two specifically different kinds of knowledge. When in the preceding section we distinguished between the fundamental level and the scientific level, we were indicating that the fundamental level tends towards ontological knowledge, whereas the scientific level is a phenomenological type of knowledge. This implicitly allows for a scientific knowledge (*cognitio certa per causas*) that is different from ontological knowledge. At the same time it means that we can name this cognoscitive level as juridical science, the scientific level, etc., using the terms in this restricted sense.

The development of juridical science strictly speaking can be said to begin with the historical school (Savigny, Puchta, Eichhorn, etc.); it received a strong impulse with Ihering and German dogmatics (Windscheid, Giercke, Enneccerus, Laband, Jellinek, etc.). The fundamental contributions of Roman jurisconsults were the basis of continental law for centuries

and were mostly in jurisprudence, in its day a monument without peer to juridical prudence and technique. Glossators, commentators and others who were lawmakers and canonists[3] in the great medieval schools contributed important technical improvements and established ideological bases of exceptional interest, noted down how to express basic concepts and, most of all, harmonized philosophy and medieval cultural ideals with juridical technique and the application of the law. Based on Saint Thomas's reflections on the ontology of law, scholastic philosophy took a great step forward in the philosophic knowledge of the juridical system (for example, the contributions of Suárez, Vitoria, Molina, etc.) in a powerful effort to give a Christian view of juridical reality. They studied everything from the essence of law to contracts, succession problems and international relations.

But all this scientific effort operated mostly on a philosophical-theological level, with a practical tendency that imprinted upon it a preoccupation with the morality of human acts. From there efforts moved forward almost without a break in continuity to technique, casuism and jurisprudence. *Ars iuris* was the domain of jurists and canonists, although they also adopted scientific methods from philosophers, theologians or moralists, or from phenomenology, or used textual criticism. However, even though there was a not-very-developed phenomenological knowledge, until the 19th century *scientia iuris* was thought of as one of the practical parts of moral philosophy or theology. Even attempts to study natural law *methodo mathematica o scientifica* (for example, Pufendorf, Wolff) that in some way implied a rupture with the metaphysical foundation of law did not intentionally depart from the philosophical level. *Scientia iuris*, the knowledge of law as different from juridical practice and technique, as we have just said, was considered to be a subordinate science, not an independent science; it was taken to be a *part* of a branch of philosophy, or in this case (canon law) a *part* of a branch of theology.

For a set of knowledge to be considered a science proper, in addition to autonomy, it must have certain epistemological characteristics that generally can be summarized in the definition indicated above: *cognitio certa per causas*. But it must also be a systemized set. This means the subject matter must be logically arranged (external systemization). Principally, as a consequence of its epistemological nature, it must deal with knowledge obtained in accordance with its own principles and its own conclusive procedure (a line of argument). All of which yields types of knowledge

3. For a study of the origins of canonical science and its history up to Vatican Council II, cf. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, op. cit., pp. 189–225. Cf. also the following, among others: A. DE LA HERA, *Introducción a la Ciencia del Derecho canónico* (Madrid 1967); J. FORNÉS, *La ciencia canónica contemporánea (Valoración crítica)* (Pamplona 1984); E. MOLANO, *Introducción al estudio del Derecho Canónico y del Derecho Eclesiástico del Estado* (Barcelona 1984); P. ERDÖ, *Introductio in historiam scientiae canonicae*, Rome 1990 (Spanish version.: *Introducción a la historia de la ciencia canónica* (Buenos Aires 1993), Trans. M.D. Alonso o.s.b.-S. Dubrowsky).

that are linked together and become a scientific system or harmonious set of types of knowledge (the internal systemization or system in its proper sense). Then the multiplicity of knowledge can be unified in a single kind of knowledge: a science.

The birth of juridical science as an independent area of knowledge distinct from philosophy (now we are dealing with the science/philosophy distinction) took place when a system of knowledge appeared that had been obtained not from philosophy, but from phenomenology. Juridical science could legitimately claim autonomy because the epistemological level at which this knowledge was reached is different, and the formal perspective of conceptualization (the *modus enunciandi et definiendi*) is distinct. That was the origin of a juridical science that is in no way a part of moral philosophy; in our case, we can say a canonical science that is in no way a part of moral theology.

Juridical science, the *new science* of law, taken at the phenomenological level, makes the following assumptions: a) it concerns knowledge and not just technique; b) the knowledge is general and valid without being tied to the contingency of the particular; c) it has its own principles, an internal linkage of knowledge and their reduction to one unit (the juridical system); d) knowledge of juridical reality is limited to observed and observable phenomena, that is, the juridical reality in its positivity and ability to be grasped phenomenologically without the need to know them at a philosophical level. All of which implies certain *explanatory* and *interpretive* rules that are typical of and proper to this level; in other words, juridical science needs a juridical method that is free of philosophical contamination or deviations. The construction of a juridical science with these characteristics has been the work of the new juridical science begun by the Historical School and with the introduction of the modern scientific or systematic method.

However, parallel to what has happened in the natural sciences, this process has not been free of exaggeration or of the "tragic error" of which Maritain speaks. Traditional science did not know how to discover the autonomy of the scientific level—or could not, since human nature is subject to the law of progress—and reduced it to a part of philosophy or theology; but the new science confused autonomy with independence, positivity with the denial of any philosophical foundation (which some currents of thought wanted to substitute with the *Allgemeine Rechtlehre* or general theory of law) and with ignorance of natural law. All of that led to conceptualism, positivism, formalism and to overlooking juridical prudence. All of those errors explain the climate of suspicion that arose in certain sectors at the end of the last great war, but which cannot take away our confidence in the total validity of juridical science understood as phenomenological knowledge.

The epistemological characteristics of juridical science, and therefore, of canonical science, can be indicated in the following way:

a) *The subject matter or material object* that canonical science deals with is, or may be, all of juridical reality insofar as it is empirically observable. Saying all of juridical reality implies saying that the subject of canonical science includes both divine law and human law.

A comment is necessary at this juncture. Leaving aside the problems that natural law may present in civil law because they are not properly dealt with here, it is not admissible to reduce the subject of canonical science to human positive law as some authors claim. For them, juridical science would study only positive human law, and theology would be the science proper to divine law. Such a position represents a confusion between the material object and the formal object of the sciences. Those authors forget that various sciences may study the same material object, but they are differentiated by the formal perspective of conceptualization and by the formal object. Divine law is the object of theology as it is theologically comprehensible, and it is the object of juridical science to the degree that it is or can be juridically understood, that is, from the perspective of canonical science. Deducing the content or formulation of divine law as it is known at any given moment in time is not the job of the canonist *as such* (personally, a canonist may be as good a theologian as any other). It is the function of the Magisterium, of theologians and of the Christian people, each according to its own function. But the study of that content as a current law and as elements of the juridical system is proper to canonical science. An example will make this clear. Saying whether a bishop has the power of jurisdiction by divine law or not is a statement that should be scientifically established by theology, and that is the purpose of its mission. On the other hand, determining whether that norm of divine law takes the form of strictly personal powers, or if the powers belong to a bishop as an *institution* of the Church is a conceptualization that belongs to canonists. A theologian is as ill-equipped to make such a determination from his scientific perspective as a canonist is to deduce the content of Revelation from his scientific perspective. Each, the theologian and the canonist, makes a complementary contribution.

b) The *mental approach* of canonical science, which completely conditions its typical manner of conceptualizing, affirming or defining, depends upon the aspect of juridical reality that the scientific level is trying to unveil; namely, that set of data that is being observed phenomenologically. Canonical science should consider the law in its peculiarities in order to describe it analytically and exegetically. Canonical science is not limited to description but tends *to express juridical concepts* that are obtained by an increasingly broad and abstractive generalization of the contents observed while they are in force in social life. To do that, a canonist should tend to know and point out the immanent purposes of the canoni-

cal system as a principle of interpretation; only through their purposes can the norms being analyzed make sense.

Here again a few comments are in order. First, the purposes to which we have just alluded are not the ultimate or transcendent ends of canon law (what in other places we have called ultimate or mediate ends). Those ends are accounted for as *data*, but knowledge and confirmation of them do not belong to this level as they are proper to the fundamental level described above. On the other hand, immanent ends are not only juridical ends, but also cognoscible and directly comprehensible by juridical science. (By immanent ends we mean the specific organizing direction of social life as a good or value to which a norm tends with its own ends, also called immediate ends, pieces of a just social order.) Renard was correct when he said that in law the ends are a part of the same science. This is true, but the ends are a part of sciences according to the epistemological nature that is proper to each science. And in juridical science, it depends upon the degree of phenomenological abstraction. In addition, although conceptualism and formalism have fallen into the defect of making an abstraction of the ends, as have some canonists, it is no less true that Ihering defended the fact that law is produced by reason of the end or purpose. Modern teleological or finalistic methods have proved him right.

The second comment refers to concepts. These are notions obtained at the phenomenological level and they are therefore typical of that level. They are not to be confused and cannot be confused with notions obtained at the fundamental level. They show juridical reality to a certain degree of cognoscibility (see below, C, 2).

The third comment is doubtless the most important and most difficult to clarify. It refers to the note of *positivity* that the law must have in order to be scientifically studied. In good gnoseology it cannot be denied that canonical science—in general, juridical science—studies law only as positivized law. Regardless of whether we are speaking of law or of the physical or natural sciences, any scientific study is phenomenological because by definition it is applied to what is empirically observable, to what is called a *phenomenon* (the given, insofar as it can be experienced). This is not questioning the existence of natural law, for example; it is strictly an epistemological problem. From that point of view, the response presents no doubt; only *positivized* law—not to be confused with human law—can be the object of juridical science by virtue of its epistemological characteristics: only positivized law is empirically observable.

Does that mean that canonical science does not study divine positive or natural law? No, as we have said; it means only that it studies divine law after it has become *manifest* and consequently is known as divine by the Christian community. As we know, the supernatural divine order of the Church passes through three moments, two of which interest us now: the *constitutive moment* or *supernatural eternal law*, and the *manifested moment*, one of the aspects of which is the progressive ecclesial awareness of

the divine order. This awareness takes place historically and progressively as the Church and the faithful, learning to know one another, continue to unveil the mystery of salvation. So long as there is any element of divine law that has not yet become manifest, that no one is aware of, it is obvious that canonical science cannot make it an object of study. Nor is it the mission of canonical science to make it manifest. Unveiling the supernatural order, as we have said, is also not the exclusive mission of theological science. It is the task of the Magisterium, of the *sensus fidei* of the Christian people and of the work of theologians, each according to its proper function; and in juridical knowledge it is the mission of fundamental theory.

This gnoseological limitation in no way prevents canonical science from being sufficient for its object, which is the study of current law. Until the Church is aware of it, a norm of divine law is not, properly speaking, *law in force* and it is not a part of the normative social order that at any given moment in time governs the Church. Can one truly say—if the words actually mean anything—that a norm of divine law, today totally unknown and perhaps to be known after the next two hundred years, is today a part of the law in force? To reply positively would be to forget one of the essential characteristics of the law: its historicity. The law is not an ideal nor a prototype; it is a *practical and historical* system; that is, it is applicable *hic et nunc*. Everything else belongs to the law that should be, not to the law that is. And juridical science is a *practical* science, as we have said; its object is an operable order; and an unknown ideal cannot be seriously considered as such. If there is no operability or applicability, there is no law in force for juridical science, which is practical.

Positivization is the name we give to the process by which a juridical system passes into *historical existence*. But that does not mean that divine law should be included as a part of human positive law to be considered positivized. Any means available to the Church to make the progressive ecclesial awareness of divine law happen is a channel for positivization, each in its own way. Among the channels are *sensus fidei*, assent of the Christian people, magisterial acts, authors' doctrine, human legislation, juridical decisions, etc. After positivization, then divine law may be the object of canonical science.

c) The *purpose* of canonical science is to draw up a harmonious sytem of knowledge that is logically structured (all science is system; see *infra*, B, 2); thus it is possible better to grasp and arrange the juridical reality being treated, so as to facilitate comprehension, interpretation and application. This is accomplished through the use of the concepts indicated above as regulating principles. This technical and practical purpose conditions and gives sense to all theoretical analyses that are proper to this level of knowledge.

8. *The prudential level*

As we were saying, bringing about an effective just social order requires a decision. That is why the implementing moment of canon law is not limited to fundamental theory or canonical science. On the contrary, both tend toward an implementing decision, which, as a human act, is the result of a combination of will and understanding—wanting to and knowing how to achieve something. Will is oriented by justice as the good toward which the will tends; understanding is governed by prudence as a norm or virtue of doing good work.

When we previously spoke of the fundamental level and the scientific level we referred to knowing how to do something. Are not those two levels sufficient? Will the cognoscitive factors of the decisions not be the conclusions of canonical science? To both questions the answer must be no. The normative moment is not simply an application of divine law nor of the order inherent in ecclesial reality to which we have previously alluded. It is a *historical option* in which the legislator has a directive and creative function. Before the author of the norm (either the legislator or the community or anyone with a *ius statuendi),* theoretically there is a range of possibilities available because people are free to shape their destiny. Thus the act of issuing a norm involves a choice. The choice is, of course, conditioned by a number of factors, the principal ones being divine law and the nature of the things. It cannot be a voluntarist decision, as the doctrine of juridical voluntarism claims. On the contrary, it implies a knowledge of reality and of the conditioning factors, together with a desire for justice. Why a knowledge of reality? Because the ends toward which there is a tendency and the principles that must be applied make an immediate reference to a real situation. The actual situation is what must be socially and justly ordered and consequently, it must be ordered according to the nature of the situation and the moment in time. Accordingly, a legislative moment involves choice and adapting means and norms to reality. All of this is a process that does not belong to logic—speculative reason—but to practical reason; it is a *prudential* process, for the correct habit of working properly with practical reason is given the name of prudence. It is a part of political prudence that traditionally has been called *prudentia iuris*.

The same can be say of the application of law. Judicial decisions or any behavior in accordance with the law is also not the result of a logical process of speculative reason. Indeed, any norm issued by the legislator, including a *praeceptum* or *ius singulare*—has a more or less abstract nature, depending on the case. First, and this especially affects laws, the legislator deals with and regulates general cases looking at what they have in common with each other. But a particular case or a real situation is not a general case nor an abstraction; it is a singular and unique fact that has the general characteristics covered by the norm, but it also has other characteristics and may not be a hundred-percent match with those general

characteristics. Second, the legislator, or whoever issues the precept, does not plan the subject's action down to the n^{th} degree. The norms are generally incomplete and need to be completed by the subject's prudence.

The legislator's juridical prudence does not exclude the prudence of those for whom the norm is designed; on the contrary, it includes it. Every norm, no matter how abstract and general, requires more or less *adaptation* to a specific case. That adaptation, however, is not arbitrary, but prudential; that is, it must be done according to the actual situation. It therefore implies the application of established law, but the law applied according to the actual conditions of social life.

The acts that make up the process of prudential juridical decision are deliberation, judgment and imperium. Deliberation and judgment are part of decision to the degree that decision is cognoscitive. Imperium is part of the decision process to the degree that decision is preceptive. In the legislation process, possible norms are investigated with deliberation; the most suitable norm is determined with judgment, and is imposed by imperium. In turn, in applying norms the applicable norm and various possibilities for adaptation are investigated with deliberation; the most appropriate norm and its adaptation for the specific circumstances is chosen with judgment, and finally the subject of the norm, acts in accordance with the law by imperium.

Although a prudential decision has an element of will, basically it is knowledge, a cognoscitive grasp of reality and of the applicable norm. The epistemological characteristics of the prudential level have been indicated above: immediate practicality and synthetic knowledge. A good part of its connection with the fundamental and scientific levels lies in this synthetic quality. The abstract requirements grasped by the understanding at an ontological level and the truths that are also abstract and general which are obtained at a scientific level are synthesized and implemented in a specific singular situation through prudential judgment. Abstract conclusions — those stripped of any material condition of specific existence which exist on a fundamental level or on a scientific level are general in nature and thus not applicable to a specific situation without the intervention of prudential synthesis. This is not a logical conclusion like a syllogism, but a step from abstract principles to a specific decision in a synthesis of general and universal normative elements with the elements of a real and specific case. In this sense scientific construction perfects and ensures a prudential decision, but does not substitute for it.

Juridical prudence should have the following requisites, among others of lesser importance: experience, intuition, counsel, good judgment and timeliness. It also needs equity or virtue in resolving cases that go beyond common norms.

B. *The Juridical Method*

1. *Preliminary considerations*

If sciences are ultimately specified by the way they make statements and definitions, it is obvious that methods, procedures and tools of knowledge are of the greatest importance to all sciences and specifically to canonical science. It is the canonist who possesses the proper method of this science; and anyone who does not possess them is not a canonist, for even though a person may possess great juridical knowledge, that person is nothing more than an erudite. To be a canonist means above all to possess a certain mental habit, a criterion, a method.

The juridical method is distinguished by the typical way it expresses its concepts and by the way it achieves the purpose of the law. A jurist conceptualizes, reasons, judges and works in accordance with rules—with a method—that are different from those of other sciences. The method used is determined by the practical truth that the science of law tends to grasp and by the good that it is trying to achieve (a just social order).

The juridical method is not an ingenious invention; it is a strict necessity. Everything that we have been saying about the way human understanding operates demands it. The juridical aspect of human reality can only be fully and correctly grasped if understanding is sufficiently in harmony with reality and follows the rules which enable it to grasp juridical truth and contribute to building a just social order.

That necessary characteristic of the juridical method should lead canonists, and jurists in general, to a scrupulously methodical rigor. Adopting methods, modes of conceptualization, expression and procedure that are proper to other sciences (for example, philosophy or moral theology) leads only to errors and imprecisions.

This is a point which should be seriously meditated upon by canonists and moralists in ecclesiastical culture. Is it acceptable to have treatises on morality and canon law, sometimes written by the same author, where only the title is different, as we have had occasion to note? Can good juridical technique accept the application of moral probabilism to the juridical interpretation of laws as if committing or not committing a sin were the criterion for living lawfully? The juridical method is not useful to the moralist, nor is the theological-moral method useful to the canonist. The confusion between morality and law leads only to errors, sometimes tragic errors. If that path is followed, fundamental rights may be denied to a Christian, who is morally obligated to respect authority; or the possibility of exercising a right is confused with the obligation to exercise it, and the moral and ascetic rules of the gospel are forgotten. The same can be said of speculative theology.

As a condition and premise, the first thing required by the juridical method is a *juridical criterion* or the *viewpoint of a jurist*. What is this viewpoint of a jurist? It is simply considering reality from the point of view of a just ordering of society (a just social order). Therefore, a jurist observes reality and its laws to the degree that they produce and achieve order. We are not speaking of just any kind of order, but specifically of an order based on the criteria of justice. And finally, a jurist does not consider reality and its laws from the point of view of an individual, but from a social point of view.

The second premise is a *formal methodical purity*. Canonical science is an *autonomous* science at the same time that it is dependent upon data from other sciences. Canonical science studies the social reality of the Church from its own perspective—social relations with nuances of intersubjectivity and justice—which is different from the theological perspective. Canonical science is, then, a distinct and autonomous science. What does "autonomous" mean? Simply that canonical science has its own way of conceptualizing and its own method that are not taken from any other science. It is not a subordinate science; it is not a part, even a specific part, of any other science—of theology, for example. In other words, canonical science possesses sufficient tools to recognize the material object according to its formal object.

Autonomy, however, does not mean self-sufficiency nor does it preclude what is called the subordination of the sciences. On the contrary, juridical science, as we have said, requires data from other levels and other sciences because it is *insufficient* to capture all of reality.

Every human action finds its ultimate and most intimate organizational module in human beings and their ultimate purposes. That means that knowing human actions on a scientific plane sometimes requires knowing the principles that govern being and its ultimate ends. Thus philosophy, theology and, in a special way, fundamental theory must provide canonical science with the prior knowledge it needs to have. Those sciences should provide the information because juridical science, in accordance with the epistemological characterization described above, moves at an abstractive level and uses tools that do not grasp being and its ultimate ends.

Now, the *data* provided to canonical science are prepared with non-juridical tools, and the data are often obtained from a higher level of abstraction. This implies that the data have been stripped of the nuances that canonists need to take into account and that qualify conclusions when the data are applied to real life. Therefore, the *data* must be conceptualized and considered from a canonist's point of view so that a juridical conclusion may be drawn from them. This is, ultimately, an application of the normal process of knowing the science of law to the theological or philosophical data or the data from fundamental theory.

Perhaps an example will clarify what we have just said. Theology gives a notion of the sacrament of baptism that includes diverse elements such as the sign of a sacred thing, the production of grace, incorporation into the Church, instilled virtues, a sacramental character, etc. From all those elements the science of law will abstract the juridical notion of baptism: the juridical fact (or act, according to various authors) that incorporates a person into the Church. The juridical concept that explains the reality of baptism from the point of view of canonical science is not so much the sign as it is the juridical fact. The effect that interests canonists is not so much grace as it is juridical incorporation into the Church. In any case, the supernatural effect produced will interest canonists insofar as it causes—if indeed it does—any juridical effects.

Therefore canonists need the data that philosophers or theologians provide, but the data should not and cannot in good gnoseology be applied to law without being passed through the sieve of juridical criteria, and for a simple reason: they are data obtained by typical means of conceptualization that give a theological or philosophical view that is different from a juridical view, since the perspective of consideration is different.

Here it should not be forgotten that reality is one thing and the different degrees or levels of knowledge are another thing; consequently, no level or degree of knowledge is *exclusive*, only partial. It is also another thing that one person may have total knowledge of reality through different sciences and cognoscitive levels.

To be consistent with the gnoseology from which we started, we must conclude that each science works at a different abstractive level and from diverse perspectives of consideration. This implies not only the possibility, but the necessity, of pureness of method. But pureness is not total, only formal. In other words, a canonist cannot take into account only strictly juridical data (norms, decisions, rights, etc.), but often will have to have recourse to metajuridical realities and the data provided by other sciences. But those realities and data will be studied with a jurist's vision from the typical perspective of canonical science. In this way only data with *juridical relevance* will be taken, data that color or condition the juridical system or juridical acts, and they will be studied within canonical science using juridical methods—the only way that the result will also be juridical. If the data are studied using non-juridical methods, the lack of methodical rigor will invalidate or distort the results.

2. *Exegesis and construction of the system*

The process of scientifically constructing canon law includes two consecutive stages: *exegesis* and systematic construction or *systemization*.

Exegesis analytically studies laws so they can then be interpreted. Systematic or scientific construction enunciates principles, and relates, organizes and unifies the knowledge obtained.

It is in the systemization that the science of law reaches its highest level of science. As we know, the methods of construction and systematization tend to facilitate the organization of knowledge into *systems* or *theories* so that the connection of ideas matches the connection of things. When we remember that science is a set of truths that are logically linked together *in such a way as to form a coherent system*, it is easy to understand that the systematic or scientific method (systematic construction) gives canonical science its most deeply scientific quality. The purpose of the modern systematic method is not only to organize the subject matter logically (the old systematic method), but more importantly it is to unify and explicate the subject coherently by enunciating concepts and theories. The concepts and theories establish the principles, general characteristics and constants that justify the configuration of the system. That is why the scientific method is based on abstraction.

Exegesis and systemization are not incompatible with each other; on the contrary, they are complementary. Exegesis without system is a rudimentary and incomplete stage of science; systemization without exegesis is impossible.

An effort to discover the precise scope of the terms in which the legislator expressed himself and exactly what he had in mind for each norm (exegesis) is vital and must precede systemization. In this sense, the work carried out by exegetes is notably fertile; a scientist who attempts to collaborate in the task of systematic construction, far from belittling the effort of the exegetes, must keep it well in mind.

The task of constructing the system is the proper task of a scientist. The set of knowledge must be systematized and the relations that link the norms with each other must be explained by enunciating general concepts that give us the meaning of the rules and the key to making just decisions in individual cases.

3. *Scientific thought*

Because the science of law is a phenomenological science it requires a scientific spirit and a positive spirit in persons who practice it. A scientific spirit must have the following qualities: *a) Objectivity*: The scientist must scrupulously submit to the object under study and make an effort to observe it as precisely as possible. That means eliminating any prejudice (the data provided from other fields does not constitute prejudice) and using all means of information and observation available. Objectivity is reflected in intellectual probity and in the spirit of observation. *b) Rigor*: A scientist should try not to state anything that is not rigorously demonstrated according to all the exigencies of the object. At the same time,

something that has not been demonstrated by the scientific method may be accepted as true if it has been shown to be true in a higher field of knowledge (ontological knowledge). In that case methodical rigor requires that a conclusion of a different nature not be given as a scientific conclusion. *c) Critical spirit*: It is through a spirit of intellectual freedom that scientists accept that they must revisit established certainties, permit discussions and reservations, question the results of their investigations and always be ready to modify their own conclusions. One of the conditions of science is knowing how and when to doubt, for the passion for questioning increases with knowledge. It is a form of love of the truth, an awareness of the complexity of reality and of the limits of human intelligence (Jolivet).

The phenomenological nature of canonical science also calls for a positive spirit, which is determined by the following: *a) Submission to data*: Legal scientists must respect data in the sense that the objectivity that directs and organizes their studies is primarily a juridical phenomenon—juridical reality as a given and as phenomenologically observable. *b) Reduction to what is workable*: The truths that are reached must be translated into juridical formulas so they can be implemented. *c) The idea of functional intelligibility*: All juridical concepts and all theories are intelligible and valid to the degree that they are functional, meaning to the degree that they explain and facilitate the operation of the law. *d) The idea of scientific sufficiency*: The idea here is that every juridical phenomenon can be adequately explained (although not in its ultimate causes) by another juridical phenomenon. This assumes there will be no recourse to metapositives as an explanation of the phenomenon, for the proper explanation of juridical science should be phenomenological. But, as we have said, this does not prevent being open to data from ontological knowledge. On the contrary, that kind of knowledge is a *guide and contrast* for the scientific task. What we mean is that philosophical or theological explanations cannot be given as a scientific explanation. The scientific reduction to a systematic unity of juridical knowledge requires that *explanations* of the principles, of the relationship between consequences and constants, be obtained at the phenomenological level. That is the only way there can be a scientific system; otherwise it would be another type of system or no system at all—only a mere aggregation of different kinds of knowledge.

At first sight it may seem paradoxical that the application of the scientific approach to the continuous progress of different fields of knowledge through research should have found the university to be the best place to preserve it and stimulate it. We cannot forget, though, that universities are institutions designed for the continuous investigation of new scientific findings by applying rigorous and adequate methods. By their very nature, universities are a favorable environment for a continuing exchange of the most diverse ideas, for free expression of the most varied concerns,

for raising the most open-ended questions. This could lead us to believe that the *scientific approach* and the *university spirit* are in contrast.

But the paradox is only apparent. Only someone open to any problem of interest presented by the broad field of human culture can really be dedicated to a specific scientific project and willingly accept a limited field of investigation with a rigorous scientific method as a personal occupation. If this combination of object and method is not the fruit of a voluntary decision to contribute new findings to the broad panorama of human culture, but is only the result of an inability to see beyond a minuscule piece of work, then the scientific investigation will scarcely be valid.

In addition, a preoccupation with cultural problems or a perhaps generous feeling for the more serious problems of humanity are no more than a sterile diversion for amateurs if the person completely lacks specific and rigorous experience with the scientific method. A balance between the two is perhaps the most glorious constant in the history of universities.

With regard to the subject of canon law and, generally speaking, all disciplines concerned with the Church, it is perhaps not superfluous to note that the great ideals of freedom and openness that seem to be bursting forth so vigorously in our times can be little served unless the rigor of scientific method is effectively applied in their service.

C. *Tools of the Juridical Method*

Now that the basic principles of method have been established, in the following pages we will try to give a succinct overall view of the tools used in the juridical method. As there are many, we shall limit ourselves to a significant few.

1. *Abstraction in legislative technique and in juridical science*

Legislative technique is based on abstraction. The task of the legislator would be unthinkable without abstraction; without it there would have to be a regulation for each individual case. Laws are possible because human understanding is capable of grasping and abstracting the common qualities in certain groups of beings, individual facts or acts, reducing them to a representative form and making a judgment about them that is applicable to all of them. For example, from all individual marriages, taken together, there is born the concept of "marriage." From the inherent value of each human being, the idea of "human dignity" is deduced.

This is the process that makes laws possible. The legislator takes the common characteristics of groups of acts, social structures or things, and regulates them in a law through a judgment about them. Thus every law is always a general and abstract norm that must be prudently applied.

In the same way, because the science of law is a science (knowledge with general validity), it acts by abstraction. It studies office, marriage, parish priests, sale of property, or the various types of associations.

What are the qualities of abstraction? First, there are the qualities that are common to all types of abstraction (we are referring to the predicamental abstraction). Depending upon the degree, abstraction is a more or less intense process of separation from the material conditions of the particular existence of an object. Knowing a set of objects, the mind separates out the qualities that are predicable of each one, and keeps only the ones that are predicable of all. From a set of acts of worship with common characteristics comes the notion of sacrament, for example. In that sense, each abstract notion "impoverishes" the object because abstraction takes from it that which makes it specific. That is how the concept arises; it is made up of the set of qualities that the mind collects together into a single idea, after discarding the other qualities that are not relevant to this case. What is the criterion that causes the interest for these qualities and so for this type of concept? For our purposes we can say that the interest is based upon the formal aspect in which we are operating and the perspective that illuminates the object. For example, man is a living being, an animal, a human composed of a body and soul, a citizen, a faithful Christian, a friend, a sick person, etc. Each of these concepts is applicable to a human being, but all of them indicate only a few of the characteristics. The greater the degree of abstraction, the "poorer" the concept; that is, the fewer qualities the concept takes from the abstracted object. However, at the same time, it applies to a greater number of objects. Thus "man" can be applied to every human person, but "faithful Christian", a richer concept because it includes the concept of man plus the fact of belonging to the Church, is predicable of a smaller number of people. The process of abstraction is applicable to juridical science, which also acts through abstraction because it indicates specific qualities of reality.

Second, as we have said, the degree of abstraction in canonical science is not strongly *philosophical* (ontological or substantial); it is an empiriological or accidental abstraction inherent to science (the scientific level to which we have referred). This kind of abstraction, by using a procedure that compares phenomenologically observed aspects, tries to enunciate the unified concepts or outlines that are needed to achieve the technical purpose being pursued: the best organization, comprehension and application of the law (Ferrer Arellano). However, at this level there is also a gradation of abstraction; thus, as we have said, concepts of varying breadth may be accommodated.

Finally, the concepts, judgments and statements obtained by canonical science are law-specific; that means that jurists abstract the elements from reality that reflect the mode of reality that belongs to the order of law and that is different from other sectors of reality. Thus arise the juridical concepts, judgments or statements that reflect a certain *aspect* of the

truth—the aspect that must be known in order to establish a just social order. If a jurist or legislator issues a judgment ("such and such an action is lawful", for example), the lawfulness refers to behavior that can be juridically evaluated and not exactly to a moral evaluation, which might be different. Saying moral evaluation is also saying technical evaluation of another type.

2. *Juridical concepts*

Because the science of law operates with abstractions, it normally makes use of concepts (intellectual representations of things). Many of its concepts are taken from other sciences or from everyday thinking (for example, baptism, man). In those cases the content and value of the concepts are the same as in the original sources.

But at other times, juridical science creates its own concepts, which are *juridical concepts*. How are these concepts formed?

— Some simply come from delimiting or fixing concepts taken from other sources for technical-juridical needs. Take, for example, the term "domicile", a notion that theoretically means the place where a person lives with a certain degree of permanence. But domicile is a concept without fixed contours; using it indiscriminately would cause considerable difficulties in applying laws that refer to it or that involve it. Therefore, juridical technique delimits the concept and gives it some fixed qualities, even distinguishing between domicile and quasi-domicile.

— Other concepts that may not come from juridical science are typically conceptualized in law. They are stripped of irrelevant connotations and other connotations may be added; for example, good faith.

When the concepts listed heretofore pass into juridical science, they retain their original qualities—except of course, for those that are stripped away when they are conceptualized by juridical science—regardless of the degree of abstraction with which they were obtained. Thus concepts with a value that is translated into requirements preserve their normative content and may serve as the basis for decisions, as Coing states, although always according to the nature and technique of law.

— Finally, there are a number of juridical concepts that originate in juridical thinking and knowledge, although they have passed into other sciences or into the common language (contract, subject of law, declaration of wishes, local Ordinary, administrative act, etc.). Scientific construction is mainly based on this type, which may be called the *basic concepts* of juridical science. Those concepts are the ones that are construed in full accordance with the level of abstraction at which the science of law works. They may thus be considered to be pure juridical concepts; all others are concepts that have been adopted.

All juridical concepts, pure or adopted, may be classified as follows:

1) Essential concepts based on ethical values; for example, good faith or scandal in canon law.

2) Essential concepts based on social phenomena of given value, such as a person, or the conjugal community of life.

3) General empirical concepts of things or facts that are important in social life; immovable goods, for example.

4) Concepts that are empirical (because of the level at which juridical science operates) but also have a technical-juridical nature; for example, an object of law or an administrative act.

As we have said, value concepts have a normative content; others, such as general empirical and purely juridical concepts, have only a delimiting value.

Like all concepts, from the point of view of their connotations, juridical concepts can be classified as *higher* or *lower*. Lower concepts are contained in higher concepts; thus the subject of law is a higher concept that also contains the physical person and the moral or juridical person; juridical business includes contracts, wills, etc. Higher concepts have fewer features than lower concepts and therefore have greater scope.

Logically, all features included in a higher concept are predicable from the lower concepts. In juridical science, however, that is not always the case because of the epistemological nature of the concepts, which are obtained more by generalizing than by universalizing. In many cases, a certain feature may express the general characteristics of a group of facts or acts that may at times contain exceptions. Still, often the exception reveals a defect in systematization. This is a correctable error in scientific work, but not in laws that are in force, unless they are amended. Thus an interpreter must keep this anomaly in mind because excessively conceptualizing a generality could lead to unsatisfactory results that are contrary to the spirit of the laws.

Here we can point out the error sometimes incurred by using defective concepts in an argument either in the juridical description of facts or acts or in applying certain features to them. An illustrative example might be the argument used by some authors when describing marriage as a contract or not. Sometimes the features t hat show it is a contract and do not make it a marriage are actually features of the "contract", but they express a concept that is merely a type of juridical act and is different from the type applicable to marriage. On the other hand there are a good number of theologians or canonists who forget that the concept of contract they are dealing with was substituted some years ago in general theory by juridical act or transaction, and they call a juridical transaction a contract. Some are using a lower concept and some a higher concept. The result is a dialogue of the deaf.

One quality common to all juridical concepts is their technical and instrumental nature. In adopted concepts this quality is limited to aspects that are the object of juridical conceptualization; in pure juridical concepts it includes all features.

The technical and instrumental nature of juridical concepts is a consequence of the nature and purpose of juridical science. Juridical science does not tend to tell us what things are, in an ontological sense, but what they presuppose or what function they have in the juridical system. It does not try to learn what a human being is, for example, or what a sacrament or a temple is; that is a task for philosophy, theology, liturgy or architecture. Juridical science tries to learn what these realities represent or what function they have in the world of historical and current law. When canonists write about a concept, for example, the rights of a subject, or moral person, they make no reference to the ultimate and basic ontology of any realities (that is a function of philosophy or the fundamental level, in the case of canon law); they refer to a living social system, to technical tools or modes of organizing that are based on criteria of truth and justice and that presuppose a historical option and a creative factor in the human mind. This is especially true for concepts that are not proper to or usable by legislation, but only by science, which tends, through the concepts, to organize and explain a certain juridical order. Concepts that are not useful for this technical purpose should not be constructed, nor should concepts that have lost their use be retained.

Pure juridical concepts are, or should be, true, but the truth they manifest is, after all, a technical truth; thence arise their relative and instrumental qualities. The qualities are relative because they reveal not the intimate essence of things but what they are and what they represent in a given juridical system, according to the technical criteria of organization proper to the system.

Does that mean there is no permanently valid juridical knowledge? No, it means that *absolute*, not relative, juridical knowledge is proper to the fundamental level; and, because of the degree of abstraction used and the purpose, the scientific level creates concepts that, together with features that may be absolute and permanent, contain other features that belong to specific legislation and are therefore variable, although in fact they do not vary. Here we must keep in mind that if a feature changes, the concept changes, although only with respect to the feature. It also means that the scientific level is a science mainly because it has developed methods that obtain rationally demonstrable knowledge (it is a science especially because of its method). This has been held by many modern authors (Larenz, De Castro, etc.). And finally it means that complete juridical knowledge requires several levels of knowledge.

3. *Hypotheses and theories*

If juridical science involves reduction to a single unity, it cannot be limited to studying data nor, therefore, to conceptualizing data. It must find explanations and connections among the different kinds of data. In this task of explicating and constructing unity there arise *hypotheses* and *theories*.

A *hypothesis* is a provisional explanation of observed phenomena; its function is to coordinate known data (its systematic function) and to direct a scientist's work (its heuristic function). The sources of hypotheses are the following: intuition, dissociation and association of groups of data, and deduction. To be valid, a hypothesis must be simple, and suggested and verifiable by the data (Jolivet).

Strictly speaking, *theory* includes the explanations that unify other partial explanations. The whole juridical order, or great sections of it, is systematically constructed under the light of theory; examples are Kelsen's pure theory of law or the theory of juridical systems with which Italian constitutionalists have constructed their science. A theory is frequently based on a concept or a hypothesis. Theories coordinate and unify knowledge, and they are investigative tools.

Hypotheses and theories in juridical science are both instrumental and relative. They neither express nor explain the ultimate reality of law; they explain only the juridical phenomenon. That is why they cannot be directly translated nor applied to ontological explanations (philosophy, theology, fundamental theory). And that is why it is meaningless to criticize them from the wrong perspectives; they do not adequately serve those sciences. Such is the case, for example, of theologians who admit the institutional aspect of ecclesiastical jurisdiction but reject the applicability of the theory of the ecclesiastical body. Their arguments clearly show that they have fallen into this error. In effect, organic theory does not ontologically explain the intimate essence of the titularity of ecclesiastical jurisdiction; but that is because organic theory is a scientific theory, proper to canonical science and obtained phenomenologically. Consequently it explains, not the ultimate essence of the subject, but the reality of the juridical phenomenon. That reality escapes ontology, where theologians work when they raise the question and study it. It is quite a different matter not to admit organic theory because of not accepting the institutional aspect of jurisdiction or because of viewing it differently. And that is a point into which we shall not delve here.

4. *Juridical types*

Another technical resource in juridical science is the use and delimitation of *types*. A type in juridical technique can be *a)* a means of designating the suppositions of fact in norms; *b)* a form of comprehension and presentation of juridical relationships (Larenz).

This procedure has been taken by juridical science from general systems of thought. It is derived from either a generalization of the characteristics related to the frequency with which they occur (for example, a typical Frenchman, a typical Spaniard) or from an expression of a normative ideal (an ideal figure or type of Christian, religious, etc.) or from an expression of a representative average (the typical diligence of a good paterfamilias), etc.

a) To designate suppositions of fact, juridical technique uses frequently occurring types, which should be interpreted as such and not as they are expressed in other sciences or techniques. Juridical technique also uses normative average types, as in the case of determining the negligence of an officeholder; in those cases, the starting point is not the ideal diligence of a parish priest, for example, but the diligence of an average priest, whose behavior is considered as a point of contrast for the purpose of interpreting the law.

Normative ideal types, examples or archetypes such as the ideal of a Christian, a bishop, a parish priest, etc., as Larenz says, represent a *meta-image*. It is necessary to tend toward them, even though the ideal can never be reached in its full purity. The types become *criteria for assessment* in all kinds of behavior and situations. As ideal types they are metajuridical, although they may be described in a law (of higher rank and especial solemnity, otherwise it would make no sense); but they may also be used as criteria for the legitimacy of the content of laws and as criteria for assessing and applying laws.

b) The types of greatest interest for both legislative technique and scientific construction are the types that refer to the structure and configuration of actions, institutions and juridical relationships. How are these types treated? By virtue of some of the forms of "typification" that we have mentioned, from the great variety of actions, institutions or relationships in real life some are chosen that are considered typical at a given moment in time. The juridical structuring (the legislative moment) of those actions, relationships or institutions, or their explanation and systematic construction (scientific creation) are carried out accordingly. That is, legislation indicates the principal characteristics of the types and in accordance therewith regulates the realities with which it is dealing. With this procedure a "legal type" is created and shaped; for purposes of recognition and regulation, a type serves as a juridical channel for the entire set of realities that answer to that type.

The "legal type" typifies and configures the structure of certain actions, institutions or relationships and thus belongs to the class of types called *structural*. It is clearly distinguishable from frequently occurring types and the normative average types already cited. The legal type fulfills an instrumental technical function—being a channel for recognition and regulation—thus, it is not absolute in nature; that is, it serves to regulate the realities that answer to the type, but does not exclude others.

An epistemological nature is characteristic of the legal type, but it should not be confused with the epistemological nature of juridical concepts. The legal type, rather than being a juridical concept, is an *empirical outline*, a schematic reproduction of the structure of a reality that is considered to be "typical". In other words, to form a type, the mind does not conceptualize, it schematizes, making a prescientific abstraction. Therefore, the degree of abstraction is very slight and an immediate and proximate reference to reality is retained. That has an important consequence. As Larenz says, types must be created and interpreted in accordance with the substantial elements of reality (the nature and real content of the sector or form of regulated social life) that the type is schematizing.

That epistemological characteristic of types explains their use in juridical technique. When an action, relationship or institution fully answers to the characteristics of a type, it is recognized and regulated on that basis alone. If that does not happen because some of the characteristics are not the same, it is still recognized and regulated in accordance with the type, but at the same time there is recourse to specific law or to other technical resources so as to respect the differences.

The instrumental nature of types is significantly demonstrated in their use to give juridical viability to realities that—according to some established principle but not because of the technique of using types which is never exclusive—could not be juridically viable unless they fell into one of the types configured by the law. Thus, for example, given the principle of not admitting new forms of religious orders, which was in force for several centuries in the Church, the device used was to give the new forms juridical viability and approve them as associations of the faithful and grant them certain privileges. Thus to know the nature of a specific and singular reality, it is not enough to start with the legal type that enabled the new forms to be approved; specific law also has great importance. Of course, it should not be necessary to say that outside the world of law, what must be kept in mind is real substance. For example, for a theological study of religious life, the use of legal types is valid only to the degree that, as we have said, legal types schematize substantial elements. But it must not be forgotten that a legal type does not schematize all the realities found in a single concept, but only those realities that, either because they are so frequent, or through their characteristics or for other reasons, are at a given time considered as typical. Here indeed a theologian who tried to schematize them all could be called "juridistic" because this is a confusion of different methods and logically can lead only to unsatisfactory results. So long as theological and juridical methods are confused, the ecclesiastical sciences will have a great deal of confusion of language.

Juridical relationships, acts or institutions that can not be contained within the types configured by the law or by science are called *atypical* and are distinguished from typical forms or normal types. Atypical forms

are not outside the law; they are regulated by any general norms there may be, by special laws or simply by specific norms.

Atypical acts, relationships and institutions are recognized as a normal phenomenon in social life and in juridical technique. However, in canonical doctrine—but not by the authorities—they are a phenomenon that has been scarcely taken into account or used. Possibly this is due to the persistence of a mentality that can be translated into a phrase attributed to Gasparri: "quod non est in Codice non est in mundo." This phrase evidently has nothing to do with either law or juridical science. The same is also valid for *CIC.*

Legal types may be *open* or *closed.* Open types include only some partial characteristics. Closed types completely delimit a figure and all its characteristics.

Delimitation of a legal type, as we have said, is based on a schematization of realities that under various criteria are considered as typical at a moment in time. Now, apart from the evolution that is natural to all law, there is a special evolution in the case of types. They can pass from open to closed, or be delimited in accordance with realities that become typical at another given moment. That may cause a substantial change or partial modification in the type. What then happens with realities that persist and are recognized and regulated according to a certain type? Normal technique gives an option to change the figure by which they are regulated. When that is not possible, the principles of acquired rights and the non-retroactiveness of the laws are taken into account. All of this concerns the technique of types. It is different when a change or modification obeys other criteria; for example, when an attempt is made to modify substantial reality. But this attempt is only possible, obviously, if the authorities are competent to make it; that is not the case, for example, if the fundamental rights of the faithful are at stake. To close, let us make clear that it is one thing to change or modify a type and something else to change or modify the norms that regulate the evolution of the realities that are included therein.

5. *Simplifying by reduction*

This tool of the juridical method consists of substituting a quantity for a quality.

Social reality sometimes has fluctuating boundaries and does not obey set rules, but it has qualities that should be taken into account by the law. Then it is necessary to adopt fixed criteria that are both just—suitable for reality—and sure. In those cases one of the resources used by juridical technique is to reduce a quality to a quantity.

The Decr. *Christus Dominus,* for example, includes the resignation of bishops "if due to advanced age they become less able to fulfill their duties". If the norm had remained in that form, the difficulties and contro-

versy that each case could lead to are evident. What would the criteria be for measuring the diminished capabilities of each bishop? Would they be related to the time of appointment? Would they depend upon the average capability of all the bishops in the world, all the bishops on a continent or in a country, etc.? How would "advanced age" be determined? As a just and prudent norm it is virtually inapplicable, unless the decision were left to the bishop in question, as the Decree finally actually did. In cases like this, the process of simplifying by reduction comes into play. Advanced age and diminished capability, which are qualities, are transformed into a quantity, which is the seventy-five years of age found in c. 401. Thus any questions that could be raised are eliminated from the start. Other examples of the principle are majority of age, prescription, etc.

6. *Formal equivalents and juridical fiction*

Formal equivalents, also called remissions or references, are a basic resource for legislative technique. To avoid superfluous repetition, *for juridical purposes* the law makes one factual presupposition equivalent in law to a different one. Equivalents are found in the *CIC* with expressions like *censeatur tamquam*, *aequiparantur* and *habeatur pro*. They essentially consist of a cross-reference from a norm to other norms that regulate factual patterns which are equivalent to those contemplated by the first norm.

A special type of formal equivalent is *juridical fiction*, which is due more to historical use and the language sometimes used than to its nature.

Juridical fiction originated in Roman law from the requirements of juridical traffic. In contrast to early quiritarian law, which was considered intangible, a procedure was used which *feigned* that a fact different from the one covered by law was the same, thus making them equivalent for juridical purposes. After the medieval acceptance of Roman law, following Roman technique, canonists and legists for centuries defined fiction as "legis adversus veritatem, in re possibile ac ex iusta causa dispositio" (Alciato). Although many canonists still define it this way, in modern times many others no longer admit that configuration (Reiding, Demelius, Ihering, Stammler, Esser, Legaz, etc.), or they call it a latent remission or latent equivalent (Larenz). Also from the point of view of canon law, the traditional definition has been subjected to revision (Llano Cifuentes).

Actually, the technique of juridical fiction does not feign anything, nor does it contain any untruths. It is a legislative device by which, as in any equivalence, the juridical effects of one fact are given to another. With Llano we can say that *fictio juris* is a tool of juridical technique by which, formally making two actually different presuppositions of fact to be equivalent, equivalent juridical treatment is achieved when the juridical effects that a different juridical norm gives one presupposition are given to a different presupposition.

7. *Formalism and publicity*

Formalism and publicity are two means used by the technique of law to protect security in the juridical order. Theoretically, because the juridical order i s a social system among persons, everything that works in the world of law should be external, meaning, it should be manifested externally. What is merely internal, not manifest, cannot be grasped by others and therefore cannot be the object of social relationships. Hence the importance of the sign in law as a necessary medium so that through it, what cannot be exteriorized by itself can be made manifest and be the object of social relationships and regulation. In this sense, the *form* or external figure by which something is known and can be grasped by others constitutes a primordial factor in law.

The forms are quite varied. An act of will may become manifest through words, silence, behavior or omission; it can be made manifest in writing or orally, using various means of expression, etc.

All forms or signs are not equally capable of expressing the content or intention of the things of which they are manifestations. This fact is an element of insecurity that may lead to different and erroneous interpretations of the act or behavior. Thus arises the need to impose certain forms and formulas that in each case can best express the content, and the forms that are considered insufficient are discarded. Sometimes the forms and formulas are imposed by everyday usage; other times they are imposed by legislation. Selection of a single form may be based on prescription and be obligatory, but it does not exclude the juridical effects of other manifestations allowed (form *ad liceitatem*). Or it may also be held to be the only valid form when it is deemed that order and justice so demand (form *ad validitatem*).

Security is not, however, the only principle that justifies formalism in law. There is another basic factor to which we have alluded. Social relationships, facts and acts must be manifest. Furthermore, the only way people can communicate with one another is to capture the sign and the manifestation—in other words, the exterior figure that reveals another's intentions, thoughts and will. (This is so true that even in our relation with God, God's existence is grasped through his works, his will through signs and his deep truth through Revelation. Christ gives signals, which are the miracles, and manifests himself through his works. All this, evidently, is when God wishes to make contact with man in the *human mode*.) Thus law is dominated by the principle of form. Without manifestation there is no existence in the world of law. Furthermore, if this is correctly understood, we must speak of a certain predominance of form, in the sense that an act or behavior exists and is valid insofar as it is comprehensible by its sign or manifestation. Thus it is that any form and sign admitted is theoretically valid; that is, it results in an effect. In other words, any manifestation that is recognized produces at least an assumption of content. We say

"at least" because sometimes security and justice require that a sign be absolutely valid.

If we look closely at reality we can see that principle of form is not specific to law, although its characteristics may be special. All of social life is colored by this principle. The importance of social forms is hidden from no one, even when they are disguised with a lack of form, which is nothing more than a different kind of formalization, many times louder and more formal than the forms an attempt is being made to eliminate. In another order of things, it is evident that personal faith is essentially "without form"; but when personal faith becomes manifest in or passes to a community, immediately a certain formalization appears: the formulas of the faith. In the Church, for example, the formulas—the Creed, conciliar canons, Magisterium, etc.—are not only words to facilitate expressing the faith in assemblies of worship, they are the *very expression of the content of the Church's faith*. And thus the truth contained in a formula is dogma. Of course, a formula has no absolute value, and it has none in law, except in the cases indicated and for the requirements of a just social order. Form in law appears as a sign or manifestation; thus it has an inherent reference to content. A sign is worth as much as the worth of what is expressed by the sign. That is why the predominance of form normally means nothing more than an assumption of content. Hence, for example, the relevance of simulation, error, etc., in juridical acts.

The principle of form touches the entire juridical order, including acts of authority. Acts of authority are expressed in forms and formulas; they are valid insofar as they are formalized and formulated, and they are interpreted in accordance with their forms. In perhaps no other field can this principle offer greater guarantees in defense of individual rights. In canon law this principle is well accepted with regard to the activity of the courts. Not so in legislative or administrative activities, with the consequent effect of insecurity in interpretation and the risk of arbitrariness in administrative bodies.

If formalism properly understood is a resource that favors the security of juridical traffic and to that degrees serves as a tool in defense of individual rights, when it is used to excess it results in a denaturing of the resource. Law then falls into a rigidity that suffocates the vital impulse of social reality. Excessive formalism is a sign of primitive or decadent law.

With regard to the principle of publicity, suffice it to say that all we have said about formalism is applicable here. In its specific aspects, publicity also obeys a basic reason and the principle of security in its deepest connotations.

Insofar as it must be external, every juridical act in some sense has a note of publicity. But when we speak of the principle of publicity in law, we refer in particular to certain means by which an act or a relationship or a juridical situation may be learned about by all interested parties. The

means of publicizing are varied, from the intervention of public functionaries to the insertion of an announcement in the different communication media. Publicity or publication, depending on the case, can be a requirement *ad liceitatem*, or even *ad validitatem*. This principle is also especially applicable to norms, administrative acts and judicial decisions.

8. *Juridical language*

In every science, language has a vital *raison d'être*. It is the vehicle for communicating and transmitting knowledge obtained. Its exact meaning is guaranteed to be understood insofar as possible, given the inherent limitations of language.

That is why juridical science uses its own language with a lexicon that in each case expresses—or should express—the concept, the judgment or the juridical consequences *precisely*, *clearly* and *simply*. Through the lexicon, normative imperatives are transmitted, judicial decisions are expressed or the content of juridical relationships is revealed.

Each concept requires a term to express it, and since juridical science creates its own typical concepts, it needs its own typical notional lexicon. Only such a lexicon can express juridical concepts without uncertainty or confusion.

It is not reasonable to expect laws or judicial decisions to use common language, clear and simple though it may be, and to avoid technical terms—making it into a language accessible to everyone. If this were the case, juridical language would lose precision and would be unable to express its content, or it would be necessary for laws to use long circumlocutions that would seriously harm their effectiveness. As Ihering said, a single technical expression saves a hundred words, and, we may add, it saves a hundred lawsuits.

In addition, a law is no place for fine discourses on the social importance of institutions nor for great exhortations. The purpose of a law is to organize social life effectively. For other purposes there are radio messages, encyclicals, pastoral letters or conciliar documents. A law is not an avant-garde ecclesiological essay.

However, the appropriate bodies do need the proper advisory services, and the faithful in general do need to know the law through publicizing efforts, when necessary.

Similarly, when we hear that laws should be drawn up in Biblical language, there is no other solution than to carry out a delicate didactical task and explain what law is. The same is true in the face of the opinion that laws should use a language reflecting certain subtle shades of the Christian attitude at the present time. Then the response must be that legislating or working in juridical science is not drawing up a will or a document to cause a good impression on any profane person that might read it; laws and science exist and are expressed in writing to resolve practical problems. Leg-

islation or juridical science should reflect not language, but content: a just order suited to divine law, respectful, defender and guarantor of individual dignity and liberty, and an ecclesial system *in libertate filiorum Dei.*

The juridical lexicon is a tool of juridical technique. For that reason especially, it should be extremely *precise*. The purpose of law is to establish a stable order that can ensure all interests and needs for the common good, and it must effectively grasp social realities and contain them in systematic structures, while avoiding uncertainty and vagueness.

The use of common language, which is constantly subject to change and elastic meanings, would mean the immediate decay of law and its ordering force. Hence metaphors, symbols and *sui generis* expressions must be carefully avoided in juridical language, even though it does not always seem feasible; and it is not feasible precisely in cases where reality has not been captured in properly conceived terms or concepts.

The language used should also be *clear*; that is, it must be possible to capture the meaning, even if that is not always easy. Obscurity brings to social life nothing but a plurality of interpretations, synonymous with the ineffectiveness of laws. And in science, obscurity prevents the communication of results and sterilizes the task that has been accomplished.

Finally, the language must be *simple*, without unnecessary complications. Pomposity and complexity have no place in law, which is eminently functional, nor in science, which seeks the truth. Anything other than the sobriety proper to science or its technical tools is empty verbosity. As the American jurist Llewellyn says, the beauty of juridical language is a functional and efficient beauty.

9. *Basic principles for interpreting the law*

The most important nucleus of the juridical method is doubtless the set of rules and criteria for interpreting the law. Norms, juridical actions and administrative acts, to be applied, need to be interpreted. The juridical method, and the rules and technical resources for ordering social life, are made up of the criteria that serve to interpret the law. From a scientific point of view, this is the most interesting part of the method, because of its basic nature, for without interpretation there is no scientific knowledge, no systematic construction, no application to reality.

Not only the laws need to be interpreted; also custom, juridical actions and administrative acts and the whole juridical structure (rights, duties, etc.) need to be interpreted, and the rules for interpreting are peculiar to each case. That is why it is preferable to limit ourselves now to stating the basic principles of juridical interpretation and leave the presentation of the specific rules for the appropriate moment.

What does interpret mean? Interpretation of the law is commonly defined by canonists as a statement of the genuine meaning. The same can be said of interpreting custom, administrative acts or juridical actions.

Theoretically, this is a perfectly valid definition, provided that interpretation is understood in its genuine form. Interpreting is, above all, an intellectual operation of understanding. It consists in grasping the *normative content* of law, the order that it is trying to implement, whether this is explicit in the law or not.

a) The first basic principle of interpretation is the connection between the juridical structure and social reality. Law is not a set of logical conclusions obtained by syllogisms from a priori principles. It is a system of and for social reality. It is a product of juridical prudence and as such must be constantly referred to in the situations of fact that it is trying to regulate. Juridical structure exists *as a function* of social reality. Its *raison d'être* is based on these two co-ordinates: a social reality that must be regulated, and the requirements of order and justice which the law and in general, juridical structure, claim to serve. If there is no social reality, there is no law properly speaking. It is either a historic relic or a pure intellectual game. What else could a law be that in the present time claimed, for example, to regulate fiefdoms? And if there are no order and justice requirements, regulation escapes the nature and function of law.

Although social reality presents a whole range of possibilities for being organized into something upon which legislative options are based, it has a fundamental nucleus of inherent order. It has a nucleus of normativity, because all of reality naturally has a sense and direction. The normative content of all juridical structures should be understood as a function of and in relation to social reality and its fundamental nucleus of normativity; it should be a function of the necessities and demands of order and justice. In this way it is not correct to interpret law only through its statements without taking into account social reality at the same time.

b) Directly tied to the first general principle is the second principle, the historicity of law. The essential and inherently practical dimension (an effective and living order) of law implies that juridical structures should be interpreted in accordance with their moment in history, and we are not speaking now of adaptation. Interpretation of the law generally has an undercurrent of ideas that influence it, often decisively. A given law, for example, may be understood—interpreted—with different shades of meaning depending upon the mentality with which it is viewed. Social reality, immersed in history, acquires new shades of meaning with the passing of time. The law should always be interpreted in relation to its historical dimension, meaning current times.

c) Finally, a basic and very fundamental criterion is the *meaning* or *purpose of law*. A given juridical structure, a norm, a right, a duty, etc. is not fully expressed in the immediate purpose that appears in its statement. These elements are only aspects, factors or parts of a broader and more complete order of things that should be reflected in their interpretation. Each of a parish priest's or bishop's functions, for example, is not fully understood unless seen in its proper pastoral function; each marriage right is

a function of the purposes of marriage; ecclesiastical property has specific objectives, etc. Thus, all norms or elements of a juridical structure have a *meaning* that is fuller than when taken alone. This *meaning* is a factor of the first order for interpreting them, for understanding their nature, delimiting their scope and strength, and understanding their purpose.

In conclusion, the law must be interpreted realistically, with a sense of the moment in time and using teleological criteria.

III. CANON LAW IN HISTORY (FROM ITS ORIGINS TO THE FIRST CODIFICATION)

A. *The law of the Church in the Roman Empire*

1. *General introduction. The law of the Church in the dynamics of history*[4]

The fundamental principles on which the Church's constitution is based, the purposes pursued by the Church's activities and the criteria upon which relations among the faithful should be based were established

4. For this chapter, see, among others, F. CALASSO, *Medio Evo del diritto* (Milan 1954); G. CHITTOLINI-G. MICCOLI (dir.), *Storia d'Italia. La Chiesa e il potere politico dal Medioevo all'età contemporanea*, (Turin 1986); P. ERDÖ, *Introductio in historiam scientiae canonicae*, cit.; H.E. FEINE, *Kirchliche Rechtsgeschichte, Die Katholische Kirche*, (Cologne 1964); A. FLICHE-V. MARTIN (et al.), *Histoire de l'Église depuis les origines jusqu' au nos jours*, 21 vols. (Paris 1941–1952); G. FORCHIELLI-A.M. STICKLER (dir.), *Studia Gratiana*, I–XXIV (Rome 1953–1989); P. FOURNIER-G. LE BRAS, *Histoire des collections canoniques en Occident depuis les Fausses Décrétales jusqu'au Décret de Gratien*, I–II (Paris 1931–1932); A. GARCÍA Y GARCÍA, *Historia del Derecho Canónico*, I: *El primer milenio* (Salamanca 1967); idem (dir.), *Synodicon Hispanum*, I–IV (Madrid 1981–1987); A. GIACOBBI, "Il Diritto nella storia della Chiesa. Sintesi di Storia delle fonti e delle istituzioni," in *Il Diritto nel mistero della Chiesa*, I (Rome 1979), pp. 117–236; A. DE LA HERA, *Introducción a la ciencia del Derecho Canónico* (Madrid 1967); idem, "Posibilidades actuales de la teoría de la potestad indirecta," in *Iglesia y Derecho* (Salamanca 1965), pp. 245ff; A. VAN HOVE, *Prolegomena*, 2nd ed. (Mechlin-Rome 1945); S. KUTTNER, "El Código de Derecho Canónico en la Historia," in *Revista Española de Derecho Canónico* 24 (1968), pp. 301ff; idem (dir.), *Proceedings of the International Congress of Medieval Canon Law*, I–IX (Vatican City 1959–1972); G. LE BRAS (et al.), *Histoire du Droit et des Institutions de l'Église en Occident* (Paris 1955ff); L. DE LUCA, art. "Fonti del diritto (diritto canonico)," in *Enciclopedia del diritto*, vol. 17 (Milan 1968), pp. 966ff; J. MALDONADO Y FERNÁNDEZ DEL TORCO, *Curso de Derecho Canónico para juristas civiles. Parte general* (Madrid 1967); idem, "La significación histórica del Derecho Canónico," in *Ius Canonicum* 9 (1969), pp. 5ff; L. MUSSELLI, *Storia del diritto canonico* (Turin 1992); K. PENNINGTON, *Popes, Canonists and Texts, 1150–1550*, Variorum Reprint (Hampshire 1993); W. M. PLÖCHL, *Geschichte des Kirchenrechts*, 5 vols. (Wien 1952ff); V. DE REINA, "Los términos de la polémica sacerdocio-reino," in *Ius Canonicum* 6 (1966), pp. 153ff; A. STICKLER, *Historia iuris canonici Latini*, I: *Historia fontium* (Torino 1950); E. TEJERO, "Formación histórica del Derecho canónico," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), pp. 51–111; C. VAN DE WIEL, *History of Canon Law* (Louvain 1991).

by Christ himself, founder of the Church. All of that forms the *divine constitution* of the Church and by its very nature is immutable.

However, the Church lives and grows throughout human history and participates in the same dynamism; furthermore, the Church is an element that drives historical dynamism. Church history and secular history influence one another; their influence causes a continual evolution of the constitution and organization of the Church and of the criteria upon which the juridical activities that take place in the ecclesial community are based. In spite of the permanence of certain immutable principles, canon law changes over the centuries.

The factors that determine the evolution of canon law are numerous and varied. Among them it is essential to remember the following:

a) The divine constitution of the Church was established by Christ and is one of the aspects of the revelation made by God to mankind. This message is known through the *sources of Revelation*; that is, *Holy Scripture* and *Ecclesiastical Tradition*. The Hierarchy of the Church is the custodian and authentic interpreter of the *revealed deposit*; that is, of the content of Revelation. In addition, those who work in the ecclesiastical sciences try, in their studies, to delve deeper into the sources of Revelation. They continually point out new aspects of the inexhaustible content of the revealed deposit. Their scientific work forms the technical base used by the Church's hierarchical Magisterium which is continually enriched by a *homogeneous evolution* of the doctrine proposed with the assistance of the Holy Spirit. Furthermore, revealed doctrine is not merely abstract and theoretical; it must manifest itself in the spiritual experiences of those who give their assent to it and make an effort to live in conformity with its requirements. The Holy Spirit also operates upon the souls of each and every member of the faithful. Thus divine Revelation is manifested in the faith of the people of God. It is the Church's hierarchy who judge the manifestations, approving those that are genuine and rejecting those that are erroneous.

All of which tells us that although the divine constitution of the Church is immutable, since it was definitively established by Christ, the ecclesial community grows richer in an uninterrupted evolution of becoming aware of and learning about new aspects of the principles that are found therein.

Acts of the Church's Magisterium that express the content of and interpret divine Revelation have been numerous and varied in nature. Their diversity lies in their level and solemnity (from which are derived differences in degree of the obligation of the faithful to give their assent to them) and scope (some include very specific aspects of the content of Revelation and others, rarer throughout history, give an overall vision of the vast amount of materials related to Revelation). Taken all together they are the principal source into which the Church's knowledge of the di-

vine design for it is condensed. No act cancels out the previous ones, for the ecclesiastical Magisterium becomes enriched, but does not change in substance. However, each new act by the Magisterium not only adds *new data*, but also brings in criteria that illuminate all of divine Revelation.

Because of their rich doctrine and their authority, the texts of Vatican Council II are the most important source for the *present stage* in the continual evolution of the Church's becoming aware of its own mystery. The texts that reflect the Magisterium's activities throughout history are scattered in many documents.

b) Until the Church arrives at its eschatological goal, which it will only reach in its ultraterrestrial stage, it is immersed in human history. "Destined to extend to all regions of the earth," says Vatican Council II, "it enters into human history, though it transcends at once all times and all racial boundaries. Advancing through trials and tribulations, the Church is strengthened by God's grace, promised to her by the Lord so that she may not waver from perfect fidelity, but remain the worthy bride of the Lord, ceaselessly renewing herself through the action of the Holy Spirit until, through the cross, she may attain to that light which knows no setting." (*LG* 9)

The effort made by the Church to renew itself by taking into account the changing circumstances of society and the different stages in the development of human cultures is also seen in the field of law. It is an aspect of the Church's effort to which the exigencies of the object of our discipline require that we give preferential attention. Paul IV reminded us that "canonical legislation is not static and immobile; but without changing its essential function, from time to time at certain moments in history it renews its technical declarations and formulations". He added that from that point of view all the texts that reflect the development of canon law "represent and give witness solely to the constant effort by the Church to adapt its legislation to the various moments and contexts in history, always serving the progress of the Church of God" (*Discourse*, May 25, 1968).

c) Throughout history the Church has indeed been shaping its constitution, organization and activity, judging the circumstances of each moment in time (the signs of the times) in the light of the principles of the evangelical message. This is shown in all facets of ecclesial life and also—this is the aspect of most interest to us here—in the field of law. At each moment in time canon law is a concretion and development of the principles of its divine constitution in a number of elements of human origin. The criteria upon which the concretion and development are based are as many again as the Church's *historical options* that decide the content and technical profile of its own law and its relationship with other juridical systems. The options, with room for correctness and incorrectness (the fallibility of canonical power), are based on a judgment of the Church's needs and on the use of the resources of the juridical technique of the time to attend to the needs of each epoch.

Obviously, technical resources have depended upon the juridical culture of the time; for that reason secular law has always —and it could hardly be otherwise—made a contribution to the Church's organization. The Church has used and imitated many of the secular law's juridical constructs and solutions. In addition, in resolving its own problems in the juridical context of each moment in time, the Church has made contributions that are full of originality, that have been integrated into the juridical culture of all men and developed a life of their own outside the ecclesiastical environment. Thus, due to doctrinal criteria that bring their own message for men to live in peace with one another and to the technical-juridical solutions tried out by its own organization, the Church has been one of the moving forces of the juridical culture of humanity and one of the protagonists in the history of law.

This makes the history of canon law a branch of the history of law. Its purpose is to study the law of the Church as it has evolved throughout the centuries.

As long as it never loses sight of its integration into all historical-juridical studies, the history of canon law may be cultivated and expounded with full autonomy. It has indeed had a brilliant past and is called upon to continue to have a brilliant future, independent from the science of canon law in the strict sense, which is devoted to studying the law in force in the Church at the present time. From that point of view, a complete and rigorous study of the history of canon law has no place here. The purpose of the following pages is simply to show some aspects that offer a view of the dynamism of the juridical phenomenon in the Church so as to facilitate comprehension of present-day canonical problems.

2. *Early Christian communities*

Christianity came out of the area of Palestine where Christ had taught, as a result of the diffusion of his teachings through the ministry of the Apostles and their first collaborators and immediately afterwards by Christians. The early Christians included those in the nascent ecclesiastical hierarchy and the simple faithful. The Apostles and those who received the doctrine from them propagated it, choosing the great cities of the Roman Empire as the most favorable environment for their preaching. They began in the cities of the East and afterwards—although in some cases such as Rome, still in apostolic times—turned to the cities of the West. Thus early Christianity is typically an urban phenomenon. Its paths of diffusion were land or sea routes that linked the great populations of the Mediterranean world. Rural areas were Christianized much later. In the first to the fourth centuries of our era, many nuclei of Christian adepts were founded, scattered in various cities. Even though we have no data to calculate the number even approximately, at the beginning of the fourth century those cities formed a considerable part of the Empire's population.

In the fourth century the approximate geography of Christianity covered Palestine, Asia Minor, Greece, Macedonia and Egypt in the Eastern part of the Empire, and Italy, Gaul, Hispania and Africa (today's Tunisia and Algerian territories) in the Western part. This division between East and West has great importance in understanding the origins of canon law. It left an imprint that lives on in the history of the Church. There was political differentiation (the Eastern Empire versus the Western Empire), and cultural, psychological and linguistic differentiation (Greek was the most usual language in the East and Latin in the West).

During the early centuries, the communities in each city organized themselves for worship and, in general, for other manifestations of ecclesiastical life. In each community there were ministers for worship (as a group they were to be called clergy), presided over by a bishop, who was assisted in his functions by priest, deacons and other lesser ministers. The members of the community as a whole were generically called Christians, with a distinction being made between the faithful, who had already been baptized, and the catechumens, who were in preparation for baptism.

Some members of the faithful stood out in the community because they were endowed by God with special charisms. Among the most frequent in the early Church were the gift of prophecy and the gift of tongues. Other charisms included the witnessing of a particularly appreciated virtue (virgins), the combination of a virtuous life with devotion to helping ministers or attending to needy members of the faithful (widows) or, starting in the third century, withdrawing to isolated places to live a life dedicated to prayer and penitence (anchorites, of whom there were many in the Egyptian deserts).

Life in a Christian community was centered around the celebration of the Eucharist or the Lord's Supper. Only the faithful participated and it was the expression and source of their unity.

Doctrinal activity (forming the faithful in the mysteries of faith) generally developed as a prologue or introduction to the Eucharist. The books of the Holy Scripture served as a basis. They are made up of the *Jewish Bible* and the *Christian Bible*. The Jewish Bible is the Old Testament, used by Christians from the beginning as a source of prayers, teachings on the history of salvation, and proof of Christ's divinity, since it was in Him that the predictions of the prophets were fulfilled. The Christian Bible is the New Testament, made up of the four *Gospels* (St. Matthew, St. Mark, St. Luke and St. John), which are the written versions of the Apostles' preaching on the life and teachings of Our Lord; the *Acts of the Apostles*, a narration written by St. Luke about the first steps the Church took in Palestine and the missionary travels of some of the Apostles, especially St. Paul; the *Epistles* or letters of the Apostles, which contain teachings on Christian doctrine and exhortations to the faithful (written by St. Paul, St. Peter, St. John, St. James and St. Jude); and Revelation, the book in which St. John allegorically explains some of his visions and religious experiences. All

these books were used in the liturgy, for which they provided texts for prayers and especially, readings directed towards the instruction of the faithful and the catechumens (who were admitted into the didactic part of the liturgical assemblies), and the readings were explicated with homilies.

The Church teaches that the books of the Holy Scriptures are inspired writings; that is, their principal author is God, under whose influence men wrote them. This fact gives Biblical writings such authority that the early Church was basically occupied in clearly distinguishing the inspired books from the rest of Jewish and Christian literature, especially from the Christian texts of the early centuries that presented themselves as written by the apostles or were erroneously considered by certain sectors of the Church as inspired (apocryphal). That is why fixing the *canon* is so important in the history of the ecclesiastical Magisterium; the canon is the official list of books considered by the Church to be inspired. The uninterrupted tradition of the canon was set as a fundamental principle of faith by the Council of Trent. It considered the *protocanonical* books of the Hebrew Bible (the Old Testament) as inspired, as well as the *deuterocanonical* books, originally written in Greek and not included in the Jewish canon, but followed by many reformed Christian Churches. The deuterocanonical books of the Old Testament are Tobit, Judith, Maccabees I and II, the Wisdom of Solomon, Ecclesiasticus, Baruch with the letter from Jeremiah, and some fragments of Esther and Daniel.

For the New Testament (obviously not included in the Jewish canon), the list of books admitted by Catholics and Reformed Christians is completely identical. However, some New Testament books that have presented special critical problems are also called deuterocanonical (for example, the Epistle to the Hebrews and Revelation).

Christian communities were structured hierarchically to spread the doctrine (evangelization) and celebrate the mysteries (liturgy). They had an organization that carried out charitable activities (assistance to the poor), cared for the buildings used for worship (from the third century), and organized the burial of the faithful. It also administered the goods that were entrusted to it to tend to the community's needs and required the faithful to respect the truths of the faith, which had to be confessed even at the risk of one's life, and finally, it required behaving in accordance with the evangelical message. The faithful who did not fulfill their duty to confess the faith, distorted doctrine (*heretics*) or committed grave infractions of the norms of behavior proper to Christian life were prevented from *communion* (mainly, participation in the celebration of the Eucharist). Communion, as we have previously indicated, is the expression of the cohesion of the community. To be readmitted into full participation in the community's activities, sinners had to observe a more or less lengthy period of penance. Neither penance nor readmission to communion was a purely private act; each had a community dimension, since it expressed

not just the internal transformation of the sinner but his reconciliation with the community.

Especially in the large cities, as a consequence of the increase in the number of the faithful, the various churches or local communities were gradually obliged to celebrate several Eucharistic assemblies. Thus, together with the meetings for worship presided over by the bishop, other meetings came to be presided over by *presbyters* in the name of the bishop. They were priests subordinated to the bishop, who always kept the condition of head of the local church for the purpose of an effective relationship of preeminence. As head of the local church, the bishop governed with the assistance of the *presbiterium*, consisting of the presbyters. This dispersion of worship was also accompanied by a certain decentralizing process of other ecclesiastical functions: attending the poor, administering goods, instructing the faithful and the catechumens, etc. Thus at that time some local churches were being organized by districts, with the natural diversity of one from another with respect to organization and the functions that were being decentralized.

From the beginning there was among the various local churches a bond of unity which expressed itself in the celebration of the Eucharist. That is why it was said that the churches or communities were in communion with one another because they celebrated the same Eucharist. Members of the faithful who moved from one city to another were issued a document by their community of origin stating that they were *in communion*; when it was presented to the new community, the member was assured admission to liturgical ceremonies and to all of community life. The bond of communion, established between the various churches by reciprocal recognition, was soon considered to be established in relation to the bishop of Rome. Because of his primacy, he became the guarantee of the Church's unity. Communion of a church with the Church of Rome also meant communion with other individual churches that were in communion with the Church of Rome; that meant communion with all the churches on Earth that had not broken the bond of fraternity because of heresy or disobedience.

In this way from its earliest times the organization of the Church was the *real* continuation of the work of the Lord. Unity was based on the celebration of the Eucharist, in which the body and blood of Christ are effectively offered and received. Local churches were governed by bishops, naturally presiding over Eucharistic assemblies because they were the successors of the Apostles, who celebrated the Eucharist for the first time with the Lord. The primacy of all churches belonged to the bishop of Rome, the direct successor to the Apostle Peter, to whom the Lord attributed preeminence over the other Apostles. His primacy was made concrete by his fixing the content of the faith and having the final word in disciplinary controversies.

What was the role of law in the early Church, the principal characteristics of which we have now outlined?

3. *The law of the Church*

The Church carries within it the seed of a distinction between political and religious power. Therefore, independently from the historical circumstances of the early centuries of Christianity, the incipient ecclesiastical organization had a structure, institutions and activities, with a clear awareness of its autonomy and a decided tendency to grow. The basic lines of the organization of Christian communities have already been described. We can now turn to the texts that contained the norms applicable to ecclesiastical life.

During the early centuries of the Church the basic norms that governed the activities of Christian communities were taken from the books of the New Testament. In them are found not only the truths that the faithful had to believe, but also the principles upon which Christian worship is based and the foundation of the power of ecclesiastical dignitaries. The unity of basic texts greatly justifies the most characteristic quality of the early Church's juridical institutions: the close connection with the other aspects of Christian life that are not specifically juridical. Although a thorough analysis performed using our frame of mind of the Church's organization and activities in the early centuries shows us that a law did exist, it is obvious that the law was interwoven with the other facets of ecclesiastical life with no pretensions to formal autonomy.

There is, of course, nothing in that period to reveal the presence of a scientific juridical attitude towards ecclesiastical activities—a conscious reflection on strictly and exclusively juridical subjects. That appeared much later and was not fully developed until the 12th century. Nor were there any exclusively or preferentially juridical practical functions in community life, although certain acts by ecclesiastical governors could fall into that category. As for the texts, the distinction appeared in a gradual process of diversification.

Together with the texts of Holy Scripture, it was ecclesiastical Tradition that revealed the Lord's design for the Church and the criteria of the Apostles with their special charisms when they spread their message in his name and founded the first communities. In other words, it was the oral transmission of Christian preaching from generation to generation. The Tradition completed and became a part of the New Testament writings, and it can truly be said that they are a written form of the oral preaching.

The Holy Scriptures and Tradition are, thus, the basis of the criteria for community life. Communities were directed by their own pastors in conformity with those criteria. Thus the Holy Scriptures and Tradition are the pastors' titles to power and guides to behavior and turn into commu-

nity customs, one of the most important sources of the Church's nascent law.

We know about life in early Christian communities, insofar as is possible, through epigraphic or documentary evidence that provides us with information on the liturgy, on discipline and the various facets of community activities. In addition to inscriptions, texts of secular literature, the apocryphal New Testament books, etc., there are some interesting anonymous texts of venerable antiquity; for example, *Teaching of the Twelve Apostles* or *Didache*, composed in Syria, probably during the first century; *Didascalia Apostolorum*, written in the third century in Palestine or Syria; *Apostolic Constitutions*, also from Syria or Palestine and written around the year 380, to which are attached 85 *Apostolic Canons*, 50 of which were later collected by Dionysius Exiguus in his canonical collection and later appeared in other collections; the *Apostolic Tradition of St. Hippolytus*, probably written by the antipope St. Hippolytus around the year 218.

The usual way of transmitting and explaining Christian doctrine and behavioral norms was through the preaching of bishops. The form was generally oral, although often recorded in writing, and sometimes set down in letters (as the Apostles had done) addressed to the faithful in general or to specific communities. Sometimes the task of presenting doctrine was carried out by members of the faithful who were not part of the hierarchy but noted for their learning. Together with some polemical writings (*apologies*) against those who gave distorted versions of Christianity, the presentations of doctrine by the bishops and others form the fundamental nucleus of early Christian literature. Among these writings the following are noteworthy for their antiquity: the writings of the Apostolic Fathers, who are the authors who received the doctrine directly from the Apostles: St. Ignatius of Antioch, St. Clement of Rome and St. Polycarp of Smyrna, whose works make up a very old exegesis of the Scriptures and an authorized testimony to Tradition.

This literature was continued in the *patristic* writings of a great number of authors whose chronological time frame is usually set from the second and third centuries to the eighth century. The Church Fathers explained Scripture, gave testimony to tradition, refuted heresies, encouraged Christian behavior in the faithful and explained the truths of the faith according to the philosophy of their times. Thus they inaugurated the history of theological thinking.

Among patristic writings in the East the following are noteworthy: Origen, St. Basil, St. Gregory of Nyssa, St. Gregory of Nazianzus, St. John Chrysostom and St. John Damascene. In the West there were Tertullian, St. Cyprian, St. Jerome, St. Ambrose of Milan and especially St. Augustine, whose writings, along with those of St. Thomas Aquinas (13th century), mark one of the fundamental milestones in the history of Christian thought.

The first Christian texts with a legislative style—meaning brief, imperative formulas—are the *canons* issued by councils in series that varied in length. But we are still not looking at texts of an exclusively juridical character since councils often addressed questions of dogma. However, the canons from the frequent councils of this period in which measures were adopted that affected the organization and discipline of the Church are the oldest canonical legislative texts.

Councils were assemblies of bishops, who met to deliberate on matters pertaining to doctrine and ecclesiastical discipline. Councils usually gathered together the bishops of a certain geographical area. They were presided over by a prelate who, because his see was older or he enjoyed personal prestige, was given precedence over the others. The geographical areas were homogenized by the influence of episcopal sees of venerable age (apostolic sees), for political reasons (imperial circumscription), communications, or similarity of circumstances of ecclesiastical life. They gradually became *ecclesiastical demarcations* (Patriarchates, ecclesiastical Provinces, etc.). At their head was the bishop of a certain see, who was called the *patriarch* or *metropolitan*. The Eastern patriarchs enjoyed very broad autonomy, although they had to be united under the Patriarch of the West (the Roman Pontiff) by the bond of communion and were subject to him in matters of the orthodoxy of the faith and final judgments—a last court of appeal—in disciplinary questions.

From the second century onwards in the East and from the third century in the West there are records of conciliar activity, which was especially strong starting in the fourth century. In the Western areas, Africa, Hispania and Gaul were particularly active centers for conciliar meetings. Some Eastern councils, which are particularly important because of the matters they treated and because of the number of bishops who took part in them, were recognized by the Church as *ecumenical*. That means they expressed the criterion of the episcopate of the entire Church and so their norms were given universal effect. The oldest of the ecumenical councils is the Council of Nicaea in the year 325.

As conciliar activities developed, each of the Churches found a greater number of norms applicable to their community life. As a functional necessity, the custom of reducing the norms to a *corpus* developed; they were gathered into a collection so they could be consulted and applied. The canonical collections were at first made up exclusively of conciliar canons; then the collections of the different local churches were enlarged through various means. It is interesting to stop a moment and look at them to understand the diffusion and acceptance of the norms of ancient canon law.

First there are the canons from the councils in which the bishop of the see had participated. He personally brought those texts with him upon his return from the meeting of the council. As the ecclesiastical provinces were gradually linked together, the bishops of those provinces included

canons from other provincial councils in their own collection, if they were considered obligatory for the entire province.

In addition, acceptance of a council as ecumenical implied the idea of universal obligation. The bishops would try to obtain a copy of the canonical texts and add it to the collection used in their church.

However, we cannot think that the force of the ancient norms was ensured exclusively by the criterion of hierarchical submission, meaning, by the fact that a certain group of persons was subject to the *potestas* of those who dictated the norms. Legal texts were subject to all the problems common to textual transmission in ancient times, such as written transmission with few copies and the inevitable copyists' errors, difficulties of communication, etc. Therefore, the fact that a canon was issued by a provincial council did not necessarily ensure that it would become known and be applied in the entire province, for the provinces were often greatly spread out, considering the capacity for communication at that time. This difficulty was much greater for Ecumenical Councils. Their texts, to be effectively universal, had to be taken great distances and overcome the linguistic diversity of the period. Also, to include texts in their own *corpus canonum*, the churches were governed not only by the criterion of *potestas*, but also and to a great degree by *auctoritas*. We must realize that the Western Churches tried to learn about and apply the canons of the councils in the East, which were drawn up by bishops whose sees were frequently founded by an Apostle. The Western Churches wanted the canons regardless of whether the meeting was ecumenical or not, although Ecumenical Councils were especially venerated and respected. Even within the West itself, there can be no doubt that the great prestige enjoyed by prelates such as St. Cyprian or St. Augustine attracted an interest in the Councils of Africa that brought their canons into collections to be used in the outermost parts of Hispania, Italy or Gaul, regardless of any criterion of provincial demarcation. There is also no doubt that insofar as the texts were available, the councils considered the canons of the oldest episcopal meetings to be precedents. Thus conciliar activity was being formed and completed with little regard for provincial demarcations.

Thus was a continuous transmission of texts originated, and the very varied Western canonical collections of the time were formed. They often showed great similarities, as well as innumerable variants.

The fundamental cause of similarities in the collections of this period is the homogeneity of the elements forming them. In the West, they were usually: *a)* a translation into Latin of the Eastern canons, among which the most important are the canons from Ecumenical Councils; *b)* the canons of the Western councils, especially the councils in Africa, Hispania and Gaul. Sometimes *decretal epistles* from the Roman Pontiffs were also added; they were documents in which the bishop of Rome, by virtue of his primacy, resolved questions that had been raised or in which on his own initiative he established disciplinary or doctrinal criteria.

The causes of the variants are essentially the following: *a)* the translation of the Eastern canons into Latin was not made by a single author, and the texts were propagated all over the West. In fact, various translations were in circulation, some in certain collections, others in different collections. In this translating activity, *Dionysius Exiguus* was particularly renowned; he was a Scythian monk who lived in the fifth and sixth centuries; *b)* there were variants in the transmission of the texts; *c)* there was a diversity of texts included in the various collections; *d)* the various *recensions* of the texts inevitably contained variations in the order of the canons, contractions or paraphrases, etc.

This panorama explains the variety of the early canonical collections. Some were implemented because they were more successful and others fell into disuse, since later in their history transmission was not of texts or groups of texts, but of complete collections. This phenomenon, however, exceeds the chronological limits of this period; we shall look at it further on.

Summarizing, we can say that the sources of early canon law can be grouped as follows: a) *Sources from divine law.* The fundamental text is the Holy Scriptures; but the Patristics are witness to Tradition (source of the Revelation) and explain the content of the Scriptures with regard to doctrine and to orienting the behavior of the faithful. b) *Sources from human law.* The fundamental texts are the canonical collections. They include the legislative activity of the Popes (decretal epistles) and of the councils (canons). However, in addition to written texts, customs in the various communities also played an important role.

The present work is principally devoted to the canon law of the West and no further references will be made to the Eastern Church except those necessary as a consequence of the natural connections between the two sectors of the Church. Thus the canonical collections of the East will be almost totally excluded here. Suffice it to say that the Christian East experienced an analogous phenomenon. However, note that the close relationship in the East between political power and the Church, to which we shall refer below, is reflected in the structure of the canonical collections. An example of that is the *nomocanons,* which are collections that include conciliar texts beside imperial laws. Of particular importance were the *Nomocanon in 50 Titles*, from the end of the sixth century and the *Nomocanon in 14 Titles*, which was most likely composed about the year 629.

4. *The Church and Roman law*

Until the beginning of the fourth century the Church was not recognized by Roman law. Being a Christian was even considered unlawful and the faithful could be persecuted and condemned to death for not accepting the official religion of the Empire. Persecution legislation underwent

various modifications and grew stricter, but it was applied intermittently over time and to different degrees in different places as a consequence of the lack of unity of criteria by the Emperors and the imperial functionaries in charge of the territories. The periods when this legislation was strictly applied throughout the Empire or in specific geographical areas were called *persecutions*.

Because the sources provide only partial information, historians have not been unanimous in their conclusions in attempting to fix the periods of persecution and the number of martyrs. In fact, as a consequence of the cruelty of some episodes and the sincerity of the witness to their faith demonstrated by martyrs, the persecutions have left their imprint on the history of the Church. In addition, in this dramatic circumstance, the Church had to confront a grave penitential problem: whether to sanction the faithful (*lapsi*) who made sacrifices to the Roman gods under threat of persecution or to sanction those who did not effectively make a sacrifice and obtained certification that they had, in order to avoid the weight of the law (*libellatici*). It was also during this period that the liturgy initiated the worship of saints in the Church to honor the memory of martyrs.

As a community, the Church lived outside of Roman law during this period. However, part of the Church's organization followed the criteria of the law in force for the purpose of legalizing some of their meetings or resolving problems concerning the ownership of goods attached to achieving ecclesiastical purposes. Generally speaking, however, with respect to the basic principles of living together, the great Christian revolution was carried out with no support from Roman law. For example, the idea of discarding the goods of this world, the sense of human equality or the Christian idea of marriage began to shape the life of the faithful but inspired no changes whatsoever in Roman law. The faithful simply kept the spirit of Christianity in mind while acting within the law. However, since Christian principles were often in conflict with the pagan environment in which Christians were peacefully co-existing, in the early centuries a certain climate of political abstentionism arose. This fact is compatible with the observance of strict civic duty. Marginalization with respect to Roman law was accentuated when it is considered that Roman law was preferentially jurisprudential; but the Christians, moved to follow the advice of St. Paul (1 Cor 6:1-6), avoided bringing their causes before pagan magistrates and frequently submitted them to the arbitration of the bishop or prudent members of the faithful.

At the beginning of the second decade of the fourth century, when the Church had already made great progress, the situation changed substantially as a result of a number of edicts by Galerius, Constantine and Licinius. The Edict of Milan (June 13, 313) established the principle that Christians and other citizens could follow the religion of their choice. In an evolution that was interrupted only by a few parentheses (Julian the Apostate and a few others), the Emperors gradually leaned toward favoring

Christianity. In 380, Theodosius I, with Gratian and Valentinian II declared Christianity to be the religion of the Empire. That was the beginning of a policy that put the pagan religions and the sects of Christianity that arose from the development of heresies into a position of legal inferiority.

With the fall of the Western Roman Empire (476) the question of the relationship between Empire and Christianity remained fundamentally limited to the East, where there was to be continual interference between the temporal government and the ecclesiastical organization. What has been called Christian Roman law—an expression that requires explanation—was to find its most complete and permanent expression in the Justinian Code (*Corpus Iuris Civilis*).

To understand the situation of Christianity in the Roman Empire, the reciprocal tension between two principles must be kept in mind.

First, the imperial system was firmly based on the idea of public and official religious worship. In the polytheistic religious traditions of ancient Rome, family worship had already acquired a public dimension. When the Empire was broadened to include territories and peoples with different religious traditions, it was not difficult to integrate them if the new religions were also polytheistic. The gods of the conquered peoples could be incorporated into the body of divinities to which the official religion paid tribute. Thus the traditional religion of each people could be reconciled with the official religion. When the Emperor was introduced to worship, since he was also considered to be a divinity, the same worship was imposed upon all the subject peoples. This took place without too much violence when it was inserted very formally into religious usage accustomed to a plurality of divinities. Without renouncing their own religious cults, some of which went back to the legendary times of the founding of the Urbs, the Romans were able to integrate into a single religious order peoples with such diverse traditions and beliefs as those who followed the Oriental mystery religions. And at certain times those religions were adopted even in patrician families of the imperial capital.

Conflict did arise, however, with monotheistic religions that admitted no syncretism, especially Judaism and Christianity. Such religions were considered subversive to religious order in the Empire, especially to the worship of the Emperor. That tension goes a long way towards explaining the persecutions.

When the Emperors converted to Christianity and the Catholic faith became the Empire's official religion, the Empire had barely become consolidated in the West, since these events occurred shortly before the fall of the Western Empire. In contrast, Christianity was official throughout the lengthy history of the Eastern Empire. Even when the emperors recognized they could not preserve consideration of themselves as divinities, they could not entirely escape the weight of a tradition that attributed to them the function of ensuring the religious unity of the Empire. They were

now trying to consolidate it on the basis of Catholic dogma. That is the source of the tendency to consider ecclesiastical organization as a political question in which the emperors should take an active role. It was also the source of their preoccupation with dogma, which led them to intervene in the problem of the heresies. This gave rise to the curious environment of the court in Byzantium, which was frequently involved in complex theological disputes.

In addition, Christianity had within it a seed that radically clashed with the Empire's religious system. Christianity distinguished between political power and religious power and was thus led to create its own organization, independent of the imperial system. We have previously described the fundamental lines of early Christian organization; it developed totally independent of political power during the first three centuries of the Christian era, in spite of the onslaught of persecution. Ecclesiastical dignitaries gradually obtained a relevant social position as the demographic density of the faithful grew and the freedom granted by the edicts of the beginning of the fourth century enabled them to fulfill their functions with greater publicity. The freedom of the Church first and its status as the official religion next, together with the fact that the emperors, starting with Constantine, were Christians, inaugurated a dialog between the nascent ecclesiastical hierarchy and the political organization. We have seen the effect on this encounter on the emperors' traditional religious policy during pagan times. Now we shall look at the question from the Church's point of view.

The Christian communities had lived about two hundred fifty years under the threat of persecution. Even more importantly, they had lived in an official climate that favored idolatry and maintained social institutions that in many aspects were opposed to Christian principles. Because of the pressure in the Church to inspire social institutions with evangelical doctrine when political authorities showed interest in the new faith, religious policy had to be reconsidered. Contact between religious and political authorities was short-lived in the West because the Empire fell within a short time. The change, to which we shall allude later, occurred outside the political framework that is of interest now. But the encounter of the two powers at this crucial time in history yielded a stable situation for the religious policy of the Byzantine Empire. The Emperor continually intervened in the life of the Church, including problems related to disputes over dogma and the convocation of councils (cesaropapism). The bishops received recognition for judicial functions concerning wholly temporal matters through the *episcopalis audientia*. Thus a point of confusion was reached between politics and religion, which among other factors, contributed to making relationships very difficult between the Latin language church with its Western mentality, and the Greek language church with its Eastern spirit. These relations suffered a grave crisis in the ninth century and were permanently broken off in 1054, causing the Great Schism. After

the Schism, relations between the separated Eastern Church and the Empire lasted until the final fall of the Empire in the 15th century.

During that period, Roman law underwent a notable change. It was so extreme that Biondo Biondi has called this law that reflects the Justinian compilation, Christian Roman law. Although Christian doctrine influenced changes in Roman law from the 4th century onward, especially in the compilation made by Justinian's jurists (in particular the humanization of certain institutions), we must remember that this influence did not modify juridical institutions to the point where we can say that they effectively reflect the spirit of Christianity. Furthermore, it is logical that it should have happened thus, for Roman law was a juridical system of extraordinary technical perfection that could have been changed only by an influence that was supported by the technique of law. Obviously, nascent canon law, still in its embryonic stage, was in no condition to fulfill that function.

On the other hand, the influence of Roman law on the nascent law of the Church was much stronger. Church law has been considered to be canon law *coloris romani*. Many institutions of the early ecclesiastical organization bear the imprint of Roman law.

B. *The Law of the Church during the Formation of Medieval Europe (5th to 11th centuries)*

1. *Ecclesiastical institutions*

When the leader Odoacer stripped Romulus Augustulus of his title "Emperor of the West" in 476, imperial authority had practically disappeared. The history of Europe was about to be dominated by new peoples who centuries ago had begun to appear within the frontiers of the old Roman Empire, first with titles supported by imperial power, but with more and more independence. Under these peoples, generically but not always correctly called Germanic, the historical events to which we shall refer in this paragraph were about to take place. If, within the limits we have imposed here, we omit the history of the law of the Eastern Church and keep in mind that at the end of the 7th and beginning of the 8th centuries Islam was to cause Christianity in the north of Africa to disappear and place the Christians in a large part of the Iberian Peninsula in a precarious position, then the geographical limits we have to deal with are western and central Europe.

During this period conditions surrounding the life of the Church were to suffer a profound transformation. The following factors must be remembered:

a) In addition to the great advance in numbers that the Church appears to have made in the final century of the history of the Western Empire, it also grew through the incorporation of new peoples. Sometimes the conversion of monarchs included the conversion of most of their barons and a goodly part of the common people. Such was the case of the Franks under Clovis, who came to the Church from paganism, or of the Visigoths under Reccared, who had professed the Christian heresy of Arianism. But to understand the demographic advance of the Church at this time, the decay of the cities of the Empire must be kept in mind. It was in the cities that during the previous period Christian communities had principally developed, and their decay was balanced by the rise in rural life that characterized this period. Catholic missionaries penetrated central Europe, carried out evangelizing activities in the Nordic countries and carried the faith as far as the British isles. During this period Christianity went from urban communities, which were growing in the midst of the pagan environment of the Mediterranean world, to a Church of Europe, whose population was to become almost totally Catholic. The Church in Europe was enclosed by two frontiers: Islam and the Christian Byzantine Empire. Byzantine relations with Rome were never to be easy and the final separation took place in 1054 (the Eastern or Great Schism). Obviously, this Church of the masses, within whose social life manifestations of faith took place, was not always an example of Christian virtues. Religious life was frequently mixed with remainders of pagan superstitions and customs that were inconsistent with the evangelical message, that the Church had to make an effort to rectify.

b) All of the above had a strong influence on ecclesiastical organization. Alongside the clergy of episcopal cities there arose rural churches; some were founded ecclesiastically when bishops sent priests to country villages; others were founded for lords, as in the case of the proper churches in Spain. In both types of Church ecclesiastical questions were strongly influenced by temporal social organization. Parishes find their origin in that period in history.

c) The decentralization of episcopal government was accompanied by another event of great importance for the Church at this time—the development of monasticism. Communities of monks, when they were established in isolated places, made their monasteries into more centers for spreading the Catholic faith. At the same time they were centers of colonization for uncultivated lands and for preserving and spreading religious and profane knowledge. The monastic movement from the start had its own dynamic, which frequently placed the monasteries in a situation of gradual autonomy with respect to bishops. However, the episcopates of the cities and the monasteries enjoyed close relations and it was frequent that outstanding persons from the monasteries were called upon to occupy episcopal sees.

d) Those two factors and the fact that ecclesiastical activity encouraged cultural and charitable manifestations of every type and the most varied entities of social life included worship in their corporate life all demonstrate how rich and varied the ecclesiastical organization was becoming. There were institutions of all types and no clear distinction between those that were strictly ecclesiastical and those that corresponded more or less to what, in present day terms, we might consider to be a part of secular social life. They were all permeated with religious-type manifestations. There are many examples of this movement towards complexity and variety in ecclesiastical organization. One particularly characteristic example is the patrimonial organization. From the unique patrimony of each episcopal see, administered under the control of the bishop, the use of which was governed by norms dictated in the fifth century by Popes Simplicius and Gelasius, there developed a proliferation of patrimonies for churches, monasteries, benefices, brotherhoods, etc., typical of the Middle Ages. Classic canon law would attempt to describe their juridical regimen, and their characteristic dispersion is still a living and current question for historians.

e) Conciliar activity continued. However, during this period, because of the political circumstances to which we shall refer later, councils were frequently mixed assemblies of bishops and secular dignitaries who jointly dealt with political and religious problems.

f) The bishop of Rome exercised his primacy over the entire Church until the Schism of 1054, even while the Eastern patriarchs were enjoying their traditional autonomy. With regard to the West, political circumstances often interfered with the exercise of papal power over the various individual Churches. Among these circumstances the most important are the insertion of many ecclesiastical dignitaries and many sectors of the official organization of the Church into the feudal system. We shall see the resulting tension reflected in the history of the canonical collections of the period. In the 11th century Pope Gregory VII succeeded in carrying out a centralizing policy that facilitated the unification of canon law that was to begin in the 12th century and which intensified the intervention of the Roman Pontiffs in the affairs of the different individual Churches. As a consequence of increasing intervention by the Popes in the ecclesiastical affairs of all Christianity there grew up around the Popes a set of dignitaries and officials to help him in the tasks of governing. Pontifical legates were sent out and charged with fulfilling missions in various territories. Documents were drawn up that collected formulas and norms of behavior for the Roman Chancellery, such as the *Liber diurnus Romanorum Pontificum*, which reflects the style of these activities from the 8th to 11th centuries.

2. *The canonical collections*

The necessarily partial and synthetic view of ecclesiastical life in this period that we have just presented clearly shows us a group of activities and questions that required an organization, governing functions and norms to regulate them. Thus we must now ask about the sources of law on ecclesiastical questions during this period. Two aspects need to be distinguished.

The most important is the lasting influence of Roman law on the Church's organization. It continued during the period prior to receiving the Justinian compilation, along with a Germanic element in the form of Vulgar Roman law. An example can be seen in the polemics between Germanism and Romanism where the sources of law in the Visigothic period posed problems for historians of Spanish law. It was through the sources of secular law that frequently dealt with ecclesiastical problems (the capitulars of the Carolingian period were particularly important) and customary law that Germanic law influenced Church organization and introduced criteria that cropped up in the councils of the time. But the Church spirit also influenced secular institutions through solutions that took the hard edge off the spirit of the times: the Peace of God and the Truce of God, etc. According to a correct classification of these periods, kept in Spain by Maldonado, while in the preceding period we spoke of canon law *coloris romani*, now we have canon law *coloris germanici*.

Nevertheless, the fundamental materials that became a part of the most important of the numerous canonical collections of the time were mostly from an earlier period, at least up until the time of Charlemagne. For that reason in the preceding period we limited ourselves to referring to the formation of collections and explaining their characteristics (see *supra*, III, A, 3). Now we shall briefly show a change that began with the transition between the periods culminated in the period we are now studying. Its most characteristic phases are the following:

a) In the West the fundamental movement to compile the canons and decretals of antiquity took place between the pontificates of Pope Gelasius (492–496) and Pope Hormisdas (525); this was after the fall of the Western Roman Empire in 476. The compilation movement, which had earlier precedents, was called the *Gelasian Renaissance* by historians. During that time canonical collections were made in Africa, the Iberian Peninsula, Gaul and Italy. Because it was later influential, we include here the work in Rome of Dionysius Exiguus at the end of the fifth and beginning of the sixth centuries. The famous Scythian monk compiled a series of collections of canons from Eastern (translated into Latin) and African councils, and decretals of the Popes. Both elements together are called the *Corpus canonum*, *Codex canonum* or simply the *Dionysian Collection*. The Dionysian Collection stands out from its contemporaries because of the excellence of the translations, the rigor of chronological

order, the indices, the summaries or headings inserted between canons and fragments of decretals, etc. Most of all, in comparison with the particularistic criteria of other collections, it is historically important because it is typical of the spirit of the Gelasian Renaissance. Three qualities summarize it: *universality,* since the texts included are not exclusively of local origin, but also from the East and Africa; *authenticity,* since it attempted to reject false texts and custom took second place; *Romanity,* since the decretals of the Popes are recognized as primordial and it is easy to see their importance in this period, for nearly one hundred decretals have come down to us from Pope Gelasius alone (De Luca).

b) According to the data that appear most certain, the *Hispana Canonical Collection* was the code of the Visigothic Church, and the entire disciplinary life of the Spanish Church was to revolve around it until the 11th century. The collection was formed of canonical material that had been previously used in Spain and that came from various sources: Eastern, African, Gallican and Hispanic councils, and a large number of papal decretals. Its first recension was compiled between 633 and 636, and modern research confirms its attribution to St. Isidore of Seville. Later recensions, especially the Toledan series, added to it councils that were held in later years. As with all the collections of that period, this one was at first chronological. However, starting with the end of the seventh century it was rearranged to facilitate consultation. The fruit of those reworkings was the *Excerpta,* which consist of summaries of the canons from the Hispana, systematically arranged. Later the corresponding canonical texts were added to the summaries, and thus arose the *Systematic Hispana* (eighth century). This collection had great influence beyond Spain and is one of the most important examples of this type of canonical collection that appeared during the period, especially in Ireland and Wales.

c) The variety of the canonical collections of this period is not exclusively due to the differences in the Latin versions used for the Eastern canons, to the variants in textual transmission, to the degree of richness of the materials available to the compiler or to the criteria used for arranging the texts in the case of the systematic collections. In all the canonical collections of this period, historical criticism has detected *tendencies* that reflect certain attitudes in the conception of ecclesiastical life.

Among those tendencies are particularism and universalism. Particularlism, or the tendency to localism, is characteristic, for example, of the French collections before the Carolingian period. A typical example of universalism, which continued the characteristic breadth of the Gelasian Renaissance, is the Hispana Collection. The gradual triumph of universalism was to culminate in a single canon law for the entire Latin Church. This achievement was finally accomplished only in the 12th century with classic canon law. The Popes favored disciplinary universalism; the procedure for obtaining it was not normally by publishing newly minted pontifical decretals, inspired by a universalistic criterion, but was based on the

only material accepted by everyone, to wit, the ancient universalistic collections, specifically the Dionysian and the Hispana.

d) To resolve the particularist crisis that was seen in French conciliar activity, in the year 774 Pope Adrian I sent a collection to Charlemagne so that the Frankish Church could be governed by the same norms as the Roman Church. That collection was basically made up of the Dionysian Collection, to which we have referred above. In the form in which it was sent to Charlemagne, the *Dionysio-Hadriana* shows some variants in comparison with the early Dionysian text. However, they agree in essence, and through the later recension, the universalist spirit upon which the Dionysian work was based exercised a clear influence on the Carolingian Church. In the ninth century the *Dionysio-Hadriana* was combined with the *Hispana*, the various recensions of which had been disseminated throughout France, giving rise to the *Dacheriana* collection, which was a systematic collection.

e) While the canonical collections were becoming universalistic, most strongly during the Gregorian Reform, the particularistic tendency appeared in another type of canonical source, commonly used throughout this period. The particularist tendency appeared in the most diverse places of Christianity, although its chief center of diffusion was the British Isles. We are referring to the *Penitentials*, guides for the practice of penitence, which soon ceased to be a public manifestation as had been typical in the early Church to become an essentially private rite in which the faithful asked priests to pardon their sins, and then a penance was imposed that was proportionate to the gravity of the sin committed. Penitentials were thus catalogs of sins with an indication of the penitence suitable to each one. The oldest examples go back to the second half of the sixth century. The universalist spirit of the Carolingian reform is also shown in the attempt, not always crowned with success, to substitute the old penitentials by the criteria reflected in the Hispana, Adriana and Dacheriana collections.

f) At a time when the Popes still did not have enough prestige and strength to impose a new kind of law, the attempts to be universalist were achieved through the diffusion of the ancient canons, which enjoyed undisputed authority. As we have said, the answer to this problem was the important role played by the Hispana, Adriana and Dacheriana collections during the Carolingian period. Those collections, however, because they were composed of ancient texts, could not resolve new problems that arose in the Church, especially those derived from the interposition of ecclesiastical dignitaries into feudal structures, with the consequent questions of the connection between exercising spiritual and temporal power and the criteria that should be used to name bishops, who were frequently also feudal lords. To ensure the Church's independence, avoid military obligations of the Prelates, etc., in France in the mid-ninth century spurious collections appeared. They were collections of texts that took advantage

of the prestige of the ancient canons, taken from genuine collections of the time, but presented with altered texts or even written *ex novo* by the compilers. The criteria used in making the false documents responded precisely to the new problems that were wanting to be resolved.

Scholars have still not succeeded in determining who the authors of the false documents were; they were probably not individual compilers, but teams undertaking a group project. These collections were held as genuine in their time and were very influential. The most important one is known to scholars by the name of *Decretales Pseudoisidorianae*, a group of false decretals together with the texts of the Hispana. When historical criticism, still in its infancy in the 16th century, discovered the falsification, the collections acquired new life as an argument in discussions on pontifical authority during the crisis of the Reformation.

The attitude adopted by the falsifiers of the pseudo-Isidorian decretals and in some later collections, such as the *False Capitularies* of Benedict Levita, are clear evidence of the fundamental problem of the canon law of the period. There was no ecclesiastical legislative power to unify and update the ancient ecclesiastical discipline, help to spread the necessary reforms, free the Church from secular intromission and keep the sense of unity under Rome alive. At the beginning of the 11th century this spirit was encouraged by the monks of Cluny and found support in Emperor Henry II, who here also continued the tradition of Charlemagne. Two great canonical collections are significant in this period: the *Decretum* of Burchard of Worms (Germany) and the *Collection of the Five Books* (Italy).

g) The Church reform undertaken in the 11th century by Pope Gregory VII is decisively important in this process. It meant restoration of the supreme authority of the Pope, aspiration for a universal law, elimination of spurious texts and recourse to civil law, not to bring about civil ecclesiastical legislation but to support the position of the Church in civil law in relation, and in contrast, to civil powers (De Luca). Among the canonical collections that reflect the consequences of the Gregorian reform and foreshadow the work to be accomplished by Gratian in the next period, the following should be noted: the *Gregorian Edition* of the Decretum of Burchard; the *Dictatus Papae* of Gregory VII; the *Collection of 74 Titles*, which, like the Dionysiana, may be considered an official collection of the Holy See; the *Collection* of Anselm of Lucca; and the *Collection* of Cardinal Deusdedit.

h) At this time, as Calasso has pointed out, the three bases are being formed upon which the edifice of classic canon law will be built: *a)* the influence of Roman law, a typical example of which, from as early as the ninth century, is the so-called *Lex romana cononice compta*, a collection of Roman laws adapted to ecclesiastical problems; *b)* the beginnings of papal legislative power, in which the figure of Gregory VII is significant; c) the appearance of an incipient canonical technique, not limited to the

compilation of texts, but using the texts as a foundation for future elaboration. From the falsifiers of the *Pseudoisidorianae* to the compilers who tried to introduce the spirit of the Gregorian reform into their collections, all were working purposefully on the texts and reflecting on the subject matter. When we see the great effort by Ivo of Chartres, perhaps the greatest canonist of the 11th century (author of the *Decretum*, the *Panormia* and the *Tripartita*), to "reconcile the rigoristic excesses of the Gregorian reform with local needs, in search of the true *bonum commune*,"[5] we are witnessing the first steps of the great canonistics to appear in the following century.

3. *The Church and the Formation of the Medieval Political System*

For anyone interested in interpreting the deepest meaning of the medieval system and the relationship between religious beliefs and political attitudes in the formation of Western civilization in general, the topic of the Church's place in relation to social institutions and temporal powers during the 5th–11th centuries is one of the most difficult and interesting historical problems. Because of the natural limits of this introduction, we shall adhere to a very basic outline, in which we shall try to summarize the conclusions of research. We shall, however, omit details and problems of textual exegesis. As far as possible, we shall distinguish the various aspects of the question.

a) *Historical background*

In the East the Church enjoyed the official protection of a powerful and cohesive political organization (the Byzantine Empire). In return, the imperial powers demanded that the Church be subject to a system of strong control (caesaropapism). In contrast, in the Western sector of the Empire the situation was quite different. It is true that the Edict *Cunctos populos*, issued by Theodosius I in 380, in which Christianity was declared the official religion of the Empire, also applied in the West. But during the short century between the famous Edict and the final Fall of the Empire (476), imperial power had already been so weakened that it could shape no religious policy that resulted in stable institutions. We must not forget that from the end of the fourth century some of the barbarian peoples were already settled within the borders of the Empire. Throughout the fifth century, territories as crucial to the ancient Empire as Italy and Gaul were the scene of continual raids by hosts under different leaders. They occupied cities and conducted campaigns with varying outcomes. Sometimes they received titles that formally integrated them into the imperial army; at other times they were truly invaders. As for the Iberian peninsula,

5. Cf. L. DE LUCA, *Fonti del diritto (diritto canonico)*, cit., pp. 966ff.

not only did it suffer the same fate, but it also served as the base for launching an invasion of the Empire's African provinces by the Vandals.

Under those circumstances, with the remains of the imperial government overwhelmed, without any new government to take its place, a power vacuum was produced and the ecclesiastical hierarchy began to fill that void and take on an important political role. When all power appeared to tumble and the cities of the Empire were frequently threatened by the risk of destruction or being sacked, the bishop appeared with the only undisputed authority and frequently assumed the title of *defensor civitatis*. This was simply an event of *auctoritas*, derived from the prestige of the religious role and very frequently from an undisputed superiority in education. The effect was greatest in Rome, the old imperial capital that had already been displaced by other cities (Milan, Ravenna) in political matters. Henceforth it greatest claim to fame would be its status as the seat of the successors to the Apostle Peter.

Starting from that point, invested with great moral authority and serving as the depository of religious and profane education and culture, the hierarchy did not lose its role as the highest authority during the entire Middle Ages. The Germanic monarchies were formed, but the bishops always held an important position among the high officials of the new political organization. Similarly, when the Holy Roman Empire was consolidated, more than half the prince electors were prelates.

All of the above, at the same time that it involved the ecclesiastical hierarchy in responsibilities proper to feudal lords, placed it in a good position to exercise its spiritual influence in a social context quite different from ours. It was practically impossible to influence social behavior without occupying a preeminent position. Furthermore, since everyone was Christian, the function of the ecclesiastical hierarchy was considered to be a key task and therefore the members of the hierarchy enjoyed privileges that are typical of a stratified society.

The monasteries played a similar role that was especially important in education and culture and that frequently led to the abbots' acting like feudal lords.

As for the Popes, long before Pepin the Short (eighth century), as lord of the Merovingian kingdom, granted them certain Italian territories, they were the only real lords of Rome. Thus they acquired a political power that continued in the Papal States and endured until 1870, and symbolically from 1929 in the present State of the Vatican City.

Those facts explain the great question that was debated throughout the Middle Ages. The Pope and the ecclesiastical Hierarchy claimed they were free to exercise their spiritual powers fully and without interference. This was a purely ecclesiastical power, but it has evident temporal consequences, since any blemish of infidelity to the Christian spirit in fact divides the prestige necessary for temporal governments to exercise their

power in the *respublica christiana*. In addition, ecclesiastical dignitaries, who were often feudal lords at the same time, were of necessity in their temporal functions bound to the Emperor and kings by an oath of fidelity.

Thus we have the basis for the famous Investiture Controversy, which made for extraordinarily difficult relations between the Germanic Holy Roman Emperor (supreme temporal head of Christianity) and the Pope (supreme spiritual head of the Church). The temporal princes claimed to have the same rights over the ecclesiastical lords as over the temporal lords. The Pope, in turn, considered the investiture of ring and staff—symbols of spiritual power but with temporal consequences—an ecclesiastical matter that could not by interfered with by temporal powers. This subtle question involved theological, political and juridical problems of extraordinary difficulty; it was one of the key points in the public law of medieval Christianity. The Concordat of Worms (1122), agreed upon by Pope Callistus II and Emperor Henry V, ended the Investiture Controversy and established a basis for the two powers to live together peacefully. The Concordat consists of two documents (privileges), one signed by the Emperor and the other by the Pope. The Emperor recognized the Church's authority to make any investiture with ring and staff and guaranteed the canonical election and free consecration of prelates in all churches in the Empire. The Pope conceded that the elections of bishops and abbots in Germany would take place in the presence of the Emperor, without simony or violence. In case of disagreement, the Emperor, with the advice or opinion of the Metropolitan and other bishops in the province, should recognize whoever was right and lend him assistance. The Emperor conceded the associated prerogatives and the person invested was obligated to fulfill the duties which he had under law to the Emperor. In the remaining territories of the Empire, elections would not be made in the presence of the Emperor; the Emperor would concede prerogatives to the consecrated person within six months.

b) *Doctrinal criteria*

For the Church, this whole question could not be merely political. As in all difficulties the Church has had to face during its earthly peregrination, it has been obliged to aspire simultaneously to two goals: proclaiming fundamental and permanent evangelical doctrine, as a necessary consequence of the *Lex incarnationis*, by interpreting the specific circumstances of the times. Even those responsible for formulating Church doctrine were not given to completely ignoring the conditions of the time. In relation to this problem, the Church was now experiencing a most difficult phase that required evaluating facts, using political and juridical solutions, judging the opinion of theological thinkers and, in the end, formulating its doctrine in magisterial texts. Throughout these vicissitudes the human and divine element in the Church are interwoven and the history of its right and wrong choices is interlaced with the task of

proclaiming evangelical doctrine, with the assistance of the Holy Spirit. As schematically as possible, let us look at the history of how Catholic doctrine was formulated during this period.

Once again we encounter that key moment in the history of the Church, the pontificate of Pope Gelasius. Writing to Emperor Anastasius I in 494, the Pope set forth a specific formula for the principle that was already present in the texts of the New Testament and that has frequently been called the Christian Revolution of Sovereignty. This was the division of the government of all people between two distinct powers, with the consequent distinction between religious and political questions. "There are two, Emperor Augustus, who principally rule the world here: the holy authority of the Popes and royal power; both are principal, both supreme and each in its mission not subject to the other." This is a crystal-clear statement that implies a bold reaction to the caesaropapist mentality of the imperial court at Byzantium. It will be the basic doctrine that serves as the starting point for the developments that concern us here. Gelasian dualism will gradually be substituted by a greater and greater absorption of temporal power by spiritual power, which will reach its most extreme forms in the 14th century.

Referring to the text of Pope Gelasius, V. Reina wrote,[6] "The idea could not be expressed in more radical and theological terms. It was the idea that there is a single movement toward a single end that later will be interpreted in different ways but still tending toward unity. The interesting thing now is that although God is one and created all things, the single system has two regulators, similar to the way the terrestrial universe has two heavenly bodies, the sun and the moon."

"Naturally", the author continues, "although the Gelasian formula is irreproachable and was doctrine until the 11th century (J. Rivière), there can be no doubt that it presupposes a conception, an ideology so rigorous and simple that there we find the foundation of the unified ideal power that inspires a good part of medieval doctrine. That explains why later Popes, those who, strictly speaking, broke with Gelasian dualism, never *thought they were operating outside what they considered* to be ecclesiastical tradition."

What are the doctrinal elements and the historical events that explain this development?

Above all, there was an ideological background that was the basis of thinking on the matter until the triumph of Scholasticism, and that was political Augustinianism. It is irrelevant to refer here to Saint Augustine's actual thinking; his sensitivity to temporal autonomy and religious freedom made his writings surprisingly timely today. What matters for our purposes is how his thinking was interpreted in the Middle Ages. The question

6. "Los términos de la polémica sacerdocio-reino," in *Ius Canonicum* 6 (1966), pp. 153ff.

may be put thus: The tendency to absorb the natural order into the supernatural order, when transferred to political systems, yields the absorption of natural law into supernatural justice, the law of the State into the law of the Church. To avoid that risk it was vital to distinguish reason clearly from *faith* and then to establish their correct relationship. But Christian thinking would not finally achieve that conquest until the 13th century with the genius of Thomas Aquinas.

Under the ideological influence of political Augustinianism, events facilitated developments. One important idea was the formation of the idea of Christianity. In reality, the *world* spoken of by Pope Gelasius became the *respublica christiana.* As Congar has brilliantly explained, in a sacred context in all manifestations of life, it makes no sense to establish a theory of relations between the Church and State as can be conceived in modern times. What happens is, rather, that within the Catholic catechesis, the theology of the function of a Christian king is formulated. In a word, in the set of tasks that various persons and institutions must accomplish in the service of Christian ideals, the doctrine of the ministry of kings is included; it is in some manner conceived of as "a ministry of the Church."

Arquilière has summarized the phases of this process in three names: Gregory the Great, Isidore of Seville and Charlemagne.

In studying the texts from the pontificate of Gregory the Great (604), we can see the difference between the texts addressed to the emperors of the East (Gelasian in content and very respectful in tone) and the writings addressed to the Merovingian princes, which are much more imperative, full of warnings and suggestions. In these texts the Pope urges the kings to work for evangelization and ecclesiastical discipline. Thus the idea of the ecclesiastical ministry of a Christian king begins to take shape in those texts. In addition, for St. Gregory, God willed that there be a coercive power to keep people good and force bad people to be good. Kings are God's representatives on earth; he gives them power and takes it away at his pleasure and is always the sovereign judge.

The position of St. Isidore of Seville appears first in the Fourth Council of Toledo (633), which later had great influence as the basis of political Augustinianism: "una fides, unum regnum." This linked the ideas of St. Augustine on justice and peace to the new historical context. The men of the Middle Ages, insofar as they could not conceive of justice or peace outside the Church, placed themselves on an intellectual plane that could lead to the greatest hierocratic exaggerations. "If only a *just* king is a legitimate king", wrote V. Reina, explaining the positions of the time, "if only a just king has the right to command, then the Church, the only guarantor of true peace, could, through the Sovereign Pontiff, exclude an *unjust* king from his throne and declare him unqualified to rule, deposing him. The State's natural law, the basis of the sovereignty of pagan or Christian emperors, is thus absorbed into supernatural justice and the ecclesiastical law that applies it."

When Charlemagne was crowned Emperor by the Pope on Christmas night of the year 800, the third link in the chain was closed which, according to Arquilière, leads from St. Augustine to political Augustinianism. The position of the new Emperor of the West is reflected in these words: "For each, according to his rank and dignity, to apply himself to the holy service of God." Specifically, the emperor's role in the matter was conceived to be naming bishops, founding abbeys, convoking synods, regulating ecclesiastical discipline, showing interest in dogma, promoting the instruction of the clergy, using clergy for the general administration of the realm—in sum, a great deal of participation in ecclesiastical life. However, as more serious historical research has revealed, the religious policy of Charlemagne differed a great deal from the caesaropapism of the East. In general, the new imperial conception of Western Europe was not a mere restoration of the Empires of Constantine or Justinian, but very original. Apart from the controversial question of how much influence derived from the Germanic element, the conviction that power is a ministry in the service of Christian ideas gives us a basis for understanding the great paradox of the political and religious consequences in the Carolingian empire. The Emperor, anointed by the Pope, would accumulate immense ecclesiastical power, but nevertheless would lay the foundation that would eventually lead to the supremacy of the Papacy over the Empire.

The Investiture Controversy between Gregory VII and the German Emperor Henry IV brought about new doctrinal formulas. Among the antecedents usually cited are certain expressions used by St. Peter Damian and Leo IX. Among the texts of the famous Pope Hildebrand (Gregory VII) we have the excommunication of Henry IV (1076), in which he freed the Christian subjects of the Emperor from any oath that bound them to his authority and prohibited them "from serving him as a king". This awareness of what was considered proper to his apostolic authority also clearly appears in a document from 1080. "To these texts", and here we are also following the excellent summary of V. Reina, "we must add the 27 decrees of the celebrated *Dictatus Papae* and the numerous letters in which the Pope claims feudal rights from various kingdoms for the Holy See... although these texts should be interpreted in relation to the Gregorian reform and its causes, which were not, naturally, to dominate the Christian West politically, but rather to ensure the independence and freedom of the Church, using reasons that could best be understood by the different Christian princes."

As a consequence of this conflict, the authority of Gregory VII, and thus papal authority, became highly favored. This was to have important consequences for both the internal order of the Church (the birth of classic canon law) and for the conception of relations between the two powers from the 12th century onwards. We shall be concerned with both these questions in the next section.

C. *Classic Canon Law (12th–15th Centuries)*

1. *Prerequisites*

In the preceding period, canonical collections already reflected a gradual retrogression of particularism and an affirmation of universalism. But this was achieved in collections made up of texts whose authority depended upon their venerable antiquity. However, there was no law adapted to the needs of the time, proposed by an authority that was accepted by all. The consolidation of the Popes' power with the Gregorian reform and the Concordat of Worms, and the consolidation of papal prestige, resolved the problem. Thereafter, and with greater and greater frequency, Roman Pontiffs issued norms that were considered by all to be the law of the Church. Although papal decretals had existed from the earliest times and were included in the old collections, they were, however, only occasional acts. But during the classic era of canon law, the Pope was a legislator who regularly discharged his mission and produced norms that were respected by all. Ecclesiologically, this was merely a consequence of the primacy of the bishop of Rome, and by virtue of that primacy, his legislative function was accepted. But in a time when prestige was so important and universally recognized, we must emphasize the close relationship between prestige and the pre-eminent role acquired by the Roman Pontiffs in the medieval order of things. Thus it is not strange that some authors set the beginning of this new stage in the history of canon law in 1122, which is the date of the Concordat of Worms and marks a solution to the Investiture Controversy between the Pontificate and the Empire.

A truly coherent and consistent system of law does not arise exclusively from the exercise of power; a technique and juridical culture are also needed. Thus another of the great prerequisites for classic canon law is the birth of the university as an institution for creating and spreading education and culture; there the study of law occupied a principal position. The law studied was the Roman law contained in the Justinian compilation, and canon law, that was just being forged at the time. Universities gave canon law the technique of Roman jurisconsult insofar as it had been preserved in the *libri legales* (especially the *Instituta* and the Digest) and analyzed by the first glossators. Universities also provided a climate, an atmosphere, suitable for creating canon law proper and for forming the men who were to formulate it and apply it. Several of the great legislating Popes had been outstanding professors or students at the university of Bologna. There and in other European cities where juridical studies were being established, men were formed who applied classic canon law with the unity of criteria they had been given in their common background as university students. The best vehicle for spreading the new canon law was, therefore, the universities. There the few who would be applying the law were educated. Thus it is no surprise that the great canonical collections of this period were promulgated by being sent to the universities by

the Popes. This ensured that they would be taught by masters and learned by students who would spread them throughout Europe.

Juridical culture also needs to be delimited, to have its purpose specified. With a vacillation and difficulty that we shall explain when dealing with the history of canonical science, canon law began to be distinguished from *ius civile*—the profane law of the Justinian compilation—and from the rest of ecclesiastical knowledge, especially from theology. Nascent universities also developed theological knowledge using a new method, which is a key to medieval culture. Meanwhile, in Bologna, Irnerius was the moving force behind the study of *ius civile*, and Gratian was initiating canonical Science; in Paris, Peter Lombard was creating the definitive systematization of the principal science of his time, scholastic theology.

2. *The Decretum of Gratian, a synthesis of the canonical tradition*

The science of civil law was born with the *glossators*, masters who studied and interpreted the *libri legales* in accordance with the dialectical resources of their time. These books were the codices of the Justinian compilation and they were accepted in the climate of the nascent medieval universities with such respect that no one doubted that this was juridical knowledge. Irnerius and his disciples created the gloss, but the text they studied came to them as a given. The undertaking of their canonist colleagues was much more arduous and therefore of greater merit, as Calasso has pointed out, since they not only made the gloss, but also chose the text to be glossed. As we have seen in the preceding period, in the 12th century there were various canonical collections, but none of them was of sufficient importance to overshadow the others. As for the subject matter compiled therein, it was the result of the sedimentation of texts from diverse sources at different times that logically lacked unity and were frequently self-contradictory.

A body of canonical doctrine was therefore not possible based on the system of glossing texts so long as there was no collection available that enjoyed a prestige such as did the *libri legales*, upon which they could center all their efforts. And now we have something that was impossible to accomplish definitively throughout the entire movement of universalistic collections, something that was accomplished by the work of a single man. For the magnitude of his undertaking and the long-lasting success it enjoyed, he deserves to be considered the greatest figure in the entire history of canon law.

We know very little about his person. He was called Gratian and was born at the end of the 11th century in an Italian village (Carraria) near Orvieto, belonged to the Camaldulensian Order and died in 1158. In the climate of renewed studies in 12th-century Bologna he appears in the Convent of Saints Felix and Nabor teaching "practical theology", the term for the less speculative aspect of sacred knowledge that was more directed to ordering behavior (in present-day terms, it was a kind of mixture

of certain aspects of moral and pastoral theology, canon law and liturgy). A contemporary of Irnerius, he performed his teaching while occupied with glossing the *ius civile*. The "canons", the dispositions of the Church, which he knew through the more widely known collections from the preceding period, were of interest to him. He conceived the grandiose project of *reconciling the discordant canons*, that is, creating a corpus of doctrine in which the entire system of Church law was unified. He would co-ordinate criteria and hone down contradictions. Gratian's work is an enigma for historical criticism to determine how it left his hands and how much it was touched up by his followers, but he concluded it about 1140 and it soon spread throughout Europe. It became the only canonical collection, for its prestige relegated all previous collections to oblivion. With the title that he very probably never used, it became famous as the *Decretum of Master Gratian*.

As it has come down to us, it is an extraordinarily large book with a complex organization that need not be described here. It is made up of a multitude of fragments that can be classified into two groups. One is the *dicta* of the Master; they are Gratian's comments, which, taken together, constitute a scientific work, a corpus of doctrine. The other is the *auctoritates*, the texts that Gratian cited in support of his comments and which are something like citations of laws and jurisprudence from contemporary books; but Gratian did not merely refer to them, he reproduced verbatim the fragments that interested him. The *dicta* were the first complete treatise on canon law in history. The *auctoritates* were the most complete canonical collection compiled up to that time. It is a systematic collection, since the *auctoritates* are organized according to the thread of the argument presented in the *dicta*. But in addition to systematically organizing the texts, he evaluated them as he unified their doctrine and resolved contradictions.

The *auctoritates* are of many types; there are canons from councils, fragments of pontifical decretals, texts taken from the Holy Scriptures or the writings of the Fathers of the Church, even fragments from the Justinian compilation and various sources of medieval law. Some of them carry the indication "palea"; historical critics theorize that those texts were not included in the first edition of the *Decretum*, but were added later by Paucapalea, a pupil of Gratian.

It is easy to see how this work circulated with men who traveled throughout Europe to and from the studious environment of learned Bologna, while continuing to be a private work. It rapidly became the book that held canon law and was therefore studied and explicated in the universities, referenced before tribunals and consulted to resolve problems arising from the practice of ecclesiastical bodies.

It had the further advantage of including twelve centuries of history in a single book that was up-to-date in its time, for in it the most venerable canonical texts were preserved (with the natural defects, anachronisms

and errors of attribution typical of a period before the rise of historical criticism). It obviated the need for any of the preceding collections, which, as we have said, fell into disuse. The ancient texts were also adapted to the needs of the time, since Gratian interpreted them according to his lights without thinking of reproducing the criteria and needs of the past. For that reason we can say that with Gratian's *Decretum*, the history of canon law begins anew; from that time onward it will consist of the *Decretum*—a synthesis of traditions—and the texts produced thereafter. The expression *extravagantes* was coined, meaning texts not included in the *Decretum*, some examples of which are the almost contemporaneous papal decretals that escaped the frenzied compiling of the Master and texts produced by the legislating Pontiffs who conducted their activities in the years immediately following.

It has also been said that Gratian's *Decretum* signified the definitive severance of canon law from other ecclesiastical texts with non-juridical content. Clearly, if we wish to give this statement a modern meaning and connect it with present preoccupation over the formal autonomy of juridical science, it is an exaggeration and an anachronism. Still, it is evident that, in writing a book showing the technical influence of Roman law, a book that was glossed in the universities just like the "other law", parallel with Roman law, and studied by men who considered themselves to be canonists, experts in the law of the Church, the great Bolognese master took a decisive step in consolidating the autonomy and specific personality of canon law.

3. *The legislating Pontiffs*

The second half of the 12^{th} century and the first third of the 13^{th} century are very important for canon law since to the synthesis of traditional law that Gratian had organized, a new canon law with the following characteristics was added:

a) It is the fruit of legislative activity by the Popes, who, aware of their power, frequently exercised it. The usual method of so doing was *by decretal epistles*, in which the Roman Pontiff resolved a specific case that had been presented to him. Although the response was directly addressed to the person who consulted him (generally a bishop or other ecclesiastical dignitary), because of the Pope's procedure the criterion to which it responded is understood to be applicable to other cases with the same presuppositions. Hence the interest in compiling the decretals and studying them in the universities as texts containing canon law.

During this period from 1140 to 1234, which is of interest here and also generally during the three and a half centuries of gestation of the *Corpus Iuris Canonici*, several councils were held that are listed in manuals as ecumenical councils. Their canons are also included in collections of decretals. However, up until the conciliarist crisis (15^{th} century), these as-

semblies were attended by many bishops of the West and in only a few cases, to encourage hopes for union, was there any Eastern participation. Also, the councils were in effect directed by the Pope, whose authority was unquestioned. The resulting texts were not properly speaking conciliar acts, but papal texts in a *general* council, a term that reflects the sources of the time, which practically never speak of an *ecumenical* council. The situation was to change after the crisis of pontifical authority caused by the Great Schism, when the Church had to resolve the conflict between the Pope's authority and the authority of the councils. The Council of Constance signifies the climax of this tension.

b) The law of this period reflected the juridical technique taught at the nascent universities, especially in Bologna. Its bases are essentially twofold: canonical tradition, reflected in the *Decretum* of Gratian, and the Roman law concept of reception. There is a close connection between the universities and the legislative activity of the Popes. The universities studied and spread pontifical law. The Popes, or at least, their collaborators in legislative tasks, were formed as jurists in the universities. Some masters from Bologna reached the pontifical throne; Alexander III and Innocent IV are particularly famous as jurists.

c) During this period the Church laid out a complete system of law. Canonical marriage, the system of benefices, the theory of the normative sources of canon law, the Roman canonical process, etc. are the fruits of juridical technique at this time and left a permanent mark on the history of Western law. Later we shall deal with the relationship between the two types of law—Roman and canonical.

4. *The collections of Decretals*

The growing legislative activity of the Roman Pontiffs in the form of decretals made it necessary to combine these *extravagantes* texts into a *corpus*, a collection. The *extravagantes* are texts not included in Gratian's *Decretum*. The compilation of texts was necessary for the forum (for the tribunals to apply them) and for schools. They were explained and analyzed in the nascent universities, which could not ignore canon law, as it was then appearing to be more modern and important. It responded to the needs of the time and reflected the juridical technique that the universities themselves were developing.

Awareness of need drove intense compilation activity. At first the result was a number of small collections that enjoyed only ephemeral success, but in 1234 the most important official canonical collection in history was produced.

The collections or compilations of decretals were rather numerous, but five of them, which were especially popular, are known as the *Quinque compilationes* (*Five Old Compilations*). In some cases they were the result of private work by the jurists of the period; such is the

case with the first one, entitled *Breviarium extravagantium,* the work of Bernard of Pavia. In other cases, the work of compilation was commissioned by the Popes, who sent them to Bologna with a bull of promulgation in which it was ordered that the collection, thus made official, be applied by the tribunals and studied in the universities. Innocent III in 1210 and Honorius III in 1226 promulgated collections of this type.

The importance of these collections resides in the fact they were growing closer and closer to the present code model. They organized the fragments of decretals—canons or chapters—into books, in turn divided into titles. In that way the organization of the collection tried to show in an orderly fashion all canonical matter presented as a unified and complete system. This view of compilation is the fruit of the efforts of university jurists who presented the material they were studying in the form of *Summae,* or brief and systematic books.

The organization employed in all decretal collections of the classic period was conceived by Bernard of Pavia, who applied it to his collection (*Breviarium extravagantium* or *First Old Compilation)* and to his *Summae* (of the Decretals). In this doctrinal work, which has exactly the same organization as his collection of decretals, he explains the criteria used to arrange the material. He groups all of canon law into five books. The first includes the norms referring to the forms of producing the law (formal sources) and to the offices of the official organization of the Church, with matters relating to powers, responsibilities and jurisdiction. In the second there are matters pertaining to the procedure to follow in judicial activities (procedural law). The third book groups all matters referring to behavior and means of living of the clergy, the organization of monasteries, ecclesiastical goods, etc. In the fourth, marriage is regulated and in the fifth, offenses and penalties (canonical penal law) are found. Following a widespread custom in the schools of the time, the contents of the books on which this system is based are summarized in five words: *iudex, iudicium, clerus, connubia, crimen.*

Although because of their systematic design these collections were the seed of the great medieval codes, they enjoyed ephemeral success. Each one contained a relatively small amount of material and the continuing legislative activity of the Popes caused them to be outdated as soon as uncollected texts appeared. Each of the new collections did not include all current texts that had been compiled in previous compilations, making the work of jurists and the application of law difficult due to the number of collections.

In 1234 in the bull *Rex pacificus,* Pope Gregory IX promulgated a code of vast proportions entitled *Decretalium D. Gregorii Papae IX compilatio.* This code used the system conceived by Bernard of Pavia and included all of canon law not included in Gratian's *Decretum.* Thus it is called *Liber Extra,* a collection of everything not included in Gratian. From 1234 onward canon law is contained in two great collections: the

Decretum of Gratian, a private but very authorized synthesis of canonical tradition from the first centuries as understood and interpreted by the men of the Middle Ages, and the *Decretals of Gregory IX*, a code that contained the new law that had been produced throughout a whole century by Popes following the Romanistic technique then in vogue. The creation of the Gregorian code was not merely a grouping of the materials contained in collections of the end of the 12th century and the first third of the 13th century. With those compilations as the basis, superseded texts were eliminated, texts that needed reforming were rewritten and, to fill in the gaps in a system that was trying to be complete yet was constructed of fragments of texts produced in isolation, decretals were written specifically to be included in the collection. To conceive and achieve this magnum opus, Gregory IX had the technical help of an exceptional jurist, the Catalan Dominican St. Raymond of Pennaforte, who was one of the best canonists of his time.

This great collection was in effect in the Church until 1918. Although it was supplemented with later compilations, to which we shall refer, for seven centuries it was the center of the juridical life of the Church. It was the text to which the best canonists in history devoted their exegeses and commentaries.

The publication of the *Decretals of Gregory IX* did not close the cycle of production of medieval canon law. New pontifical decretals, and canons from the *general Councils* later held, increased the amount of legislative material and led to the need for new compilations. From 1234 to 1500 four collections of different scope and value were produced. They did not change the *Decretals of Gregory IX* but complemented them. In 1298 in the bull *Sacrosanctae romanae Ecclesiae*, Pope Boniface VIII sent a new collection to the universities of Bologna and Salamanca. Although it was divided into five books according to the system in use, to which we have referred, it was called *Liber Sextus*, probably to emphasize its character as a complement or continuation of the five books of the collection of Gregory IX.

One of the Popes who had his seat in Avignon, John XXII, in the bull *Quoniam nulla* in 1317, promulgated a new collection that was a revision and correction of the one presented at a consistory but never finally promulgated by his predecessor Clement V. It is for that reason called *Decretales Clementinae*, although in order to indicate the continuity of the collections, some called it *Liber Septimus*.

5. *"The Corpus Iuris Canonici"*

The idea of a unified canonical collection began to be reflected in the use of the term *Corpus Iuris Canonici* to designate all the collections. It was first recorded at the beginning of the 15th century in imitation of the Justinian compilation, usually known as the *Corpus Iuris Civilis*. When

the term *Corpus Iuris Canonici* began to be used, the corpus was composed of four collections: the *Decretum* of Gratian, the *Decretals of Gregory IX*, the *Liber Sextus* and the *Clementinae.*

In the Renaissance period, historical styles even reached the point of establishing a book-by-book parallel between the two *corpora.* Gratian's *Decretum* was compared with the Digest, the *Decretals of Gregory IX* with the Justinian Code, and the remaining collections of decretals with the *Novellae.* These complementary collections of decretals were the object of various attempts at continuation, some crowned with success, others not. In fact, two more collections of decretals were definitively incorporated into the *Corpus.* They were the *Extravagantes communes* and the *Extravagantes* of John XXII, both sent to be printed in 1500 by the Paris professor Jean Chappuis, although the first collection had been finished long before, in 1325.

After the invention of the printing press, the *Corpus Iuris Canonici,* which included all of medieval canon law, was printed in multiple editions. One of them was official in nature and was the object of a project to fix the texts according to the criteria of early historical criticism. This was called the edition of the *correctores romani* in reference to the scholars who worked at reconstructing the original version of the texts and was published by Gregory XIII in 1582.

However, the *Corpus Iuris Canonici,* as an imitation of the Justinian compilation, lacked one element to make the parallelism with the *Corpus Iuris Civilis* complete; it was a *Corpus* without *Instituta.* In the 16^{th} century a jurist from Perugia named Paul Lancelotti edited some *Institutiones Iuris Canonici,* a didactic work of scant merit, conceived, like Justinian's *Instituta,* in accordance with the tripartite work of the post-Classic jurist Gaius: "All of the law we use refers to *persons, things* or *acts.*" Lancelotti was not successful in having his canonical *Instituta* included in the official editions of the *Corpus,* but it was introduced into many private editions and was imitated by many later canonists, authors of elementary and doctrinally poor works. His greatest historical success was that the system he proposed decisively influenced the system used in *CIC*/1917.

6. *"Ius canonicum—Ius civile"*

Classic canon law was one of the fundamental elements of the law of the Middle Ages. From the point of view of juridical teaching, medieval Europe knew two types of law: civil, as contained in the Justinian compilation, and canonical, as written in the *Corpus Iuris Canonici.* Both were studied in the universities and influenced the juridical practice of Europe to the degree that they contributed to forming the criteria used when applying the law. On this level of juridical culture, however, we must remember that the two kinds of law continually and reciprocally influence one

another. Civil law contributes to expressing technical solutions for the Church's law; canon law takes a position on questions that are not exclusively ecclesiastical and in this way rectifies the juridical solutions of Roman law that are not considered to conform to ecclesiastical criteria. If we compare, for example, the *Decretals of Gregory IX* with *CIC*/1917 we find that, apart from the logical differences due to changes in juridical technique, there is a different view of the material since medieval canon law concerned not only questions relating to ecclesiastical organization, but also subjects as typically temporal as contracts, estate law, and even matters that today we would consider to be political law, such as succession to the throne. In reality, when the Popes legislated in the Middle Ages they were not only trying to resolve matters subject to their ecclesiastical power, but also to bring Christian solutions to the law of the time. Thus they were filling a role somewhat analogous to the role of the Pontiffs at the end of the 19th and in the 20th centuries when stating general criteria of a doctrinal nature in modern Encyclicals.

Does this mean that the Church was invading the jurisdiction of temporal power? For the Middle Ages the question should not even be phrased in those terms. When classic canon law arose, the State had not yet appeared as a form of political organization as it did after the Renaissance. Medieval secular law was above all a juridical culture; it was a "common" Roman and canon law, which was what was taught in the universities and what all educated jurists learned in the Hispanic kingdoms, in France, the British Isles or the territories of the German Empire. This "common" law was influential not because a king, the Emperor or the Pope imposed it, but because it was the juridical knowledge of educated men. The kings or the Emperor still did not even claim that their will was all of law. They issued specific edicts, tried to influence the rules that regulated the life of independent entities, granted privileges or rights to city burghers, tried to consolidate or cut back certain powers held by the nobility, etc. But in the medieval system there was no conflict between canon law and secular law in the way there came to be after the consolidation of the State. In reality, there was one "common" law (Roman and canonical), typically in the universities. But there was also royal law, municipal law, the law of specific ecclesiastical or secular groups or classes, etc.

The great success of the Popes lay in the fact that they put their power at risk in order to be obeyed in ecclesiastical questions or by having certain questions or persons fall under the jurisdiction of ecclesiastical tribunals. But more importantly, they also succeeded in creating a learned law, known in the universities, something that no Emperor or king of the Middle Ages even tried to achieve. For the medieval universities the last temporal prince to create a system of law that was more or less complete was Justinian. He and the authors of the norms included in the *Corpus Iuris Canonici* started to put together a system of texts with their principal strength in *auctoritas*. Their specific scope was definitively fixed by

jurists, the *magistri in utroque iure*, whose opinion acquired binding force insofar as they contributed to forming the criteria for tribunals of justice. Although the medieval Popes wrote decretals on typically temporal questions, none would have dared attempt to be an authentic and exclusive interpreter of the law in way the Pontifical Commission does in interpreting the *CIC* since the pontificate of Benedict XV. Doctrine played a key role that perhaps it has never since been able to recover.

7. *The Pontificate and secular power*

As we have said, the important influence the Church had on the formation of "common" law (the combination of Roman and canon law) is explained to a large degree by the predominant role the Roman Pontiffs played in the political life of Europe. The Popes issued decretals that formed a complete and harmonious law applied by ecclesiastical tribunals and that also reinforced the position of Roman law in Europe. According to the gloss of the Decretals, Roman law was to be applied in ecclesiastical matters as a supplement, unless corrected by canonical provisions. This state of affairs cannot be understood without taking into account the predominant role acquired by the papacy in the medieval period as a consequence of the influence of political Augustinianism and the consequent conception of temporal power as a kind of "ecclesiastical ministry" in the service of Christian ideals. Such a conception was reinforced in this period by juridical technique, for now the pontifical decretals were establishing criteria to resolve possible conflicts, determine the jurisdiction of the ecclesiastical forum and establish fundamental criteria for matters that today we would not hesitate to call temporal.

We have studied the fundamental lines and the principal milestones in the evolution of canon law doctrine from the 5^{th}–11^{th} centuries. It culminated with the importance attributed to the role of the pontificate in the texts of Gregory VII (see above, III, B, 3). Now we can briefly look at the new doctrinal attitudes of the 12^{th}–14^{th} centuries, which is the period of the definitive formation of scholastic theology and classic canon law.

In the years when Gratian conceived his work and it was being spread throughout Europe there appeared two opinions from theologians of great renown; their points of view contributed to strengthening the position of the papacy. Speaking of the unity of the Church, meaning Christianity, Hugh of St. Victor (†1141) referred to the Church's two powers, which he considered to be distinct and parallel. But he emphasized that because spiritual power was more worthy, it should "instituere" (form, orient) temporal power and pass judgment upon it if it did not operate correctly. Finally, he concluded that temporal power, which receives the blessing of spiritual power, is logically considered to be inferior. Writing in 1152, St. Bernard of Clairvaux attributed to the Church the two swords that have so often been alluded to in medieval literature on the subject.

The passage is difficult to interpret where he says that the spiritual sword must be "wielded by the Church", but the temporal sword must be in hands of soldiers, although handled with the criteria of priests and the orders of the Emperor.

Papal texts from this period of maximum medieval pontifical splendor form such a mass of material and are so difficult to interpret that there has been much research thereon; but the results do not always agree and it is not possible to include them all here in detail. Following the weighty synthesis of V. Reina, we shall limit ourselves to referring to the statements of the three key pontificates on the problem: Innocent III, Innocent IV and Boniface VIII.

Among the many texts from Innocent III, the decretal *Novit* is particularly important. It was addressed to the French episcopate when the peace sworn by Philip Augustus and John Lackland (1204) was broken. In the decretal he established the principle of not claiming to judge the feud, but to find the sin, a question that is with no doubt whatsoever the Pope's to decide. The formula was commented by Sinibaldo Fieschi, who later became Pope with the name of Innocent IV. Sinibaldo clarified that the incompetence of Innocent III in a question of feuds should be understood to mean that the affair did not *directly*, but did *indirectly* fall under the Pope's jurisdiction.

After he became Pope, Innocent IV stated that the Roman Pontiff, as the Vicar of Christ, is "naturaliter et potentialiter" king, although he does not exercise temporal power. In addition, at the Council of Lyons (1245), he deposed Frederick II, whom he considered deprived of all honor and dignity by the Lord because of his sins, while he considered the Emperor's subjects freed from any oath of fealty.

As for Boniface VIII, his doctrine is organized in the celebrated and controversial Bull *Unam Sanctam*. The fundamental theses, according to Rivière's exegesis, are the following:

a) To the Church, as the universal and necessary body for salvation, belong the two swords; the difference lies in how they are used.

b) Civil power is distinct from ecclesiastical power, but totally subordinate to it; therefore distinction and subordination are advocated.

c) Subordination is specified as follows: *a)* Secular authority originates in the Church. *b)* Secular authority should act "ad nutum et patientiam sacerdotis". *c)* Spiritual power has jurisdiction to pass judgment on temporal acts if they are not good.

It is easy to see the extraordinary difficulty of the texts. It is not easy to determine if by "Church" is meant what today we would call the "People of God", the community of the faithful united by exclusively spiritual bonds, or when it indicates "Christianity", meaning Christian medieval society as a whole. This problem is obviously very important for us when studying the history of the ecclesiastical Magisterium. It cannot be

phrased in those terms by our contemporaries, given the cultural and political environment; it would simply be unrealistic. There is also the problem of the Pope judging rulers who, as members of the faithful and with regard to evaluating their conduct and pardoning their sins, were evidently subject to the ministry of priests. Another question is the political consequences of judgment. Finally, at the bottom of the problem there is always a doubt about whether acts by the Popes have any value when they perform a function of pastoral government and when they are simply fulfilling a mission proper to the role assigned them by the law of the peoples of the period. That point of view is often put to us by qualified students of the problem.

In summarizing the terms of the question, V. Reina has written the following: "Aside from the interpretations which today have become historically outdated and which attempted to see in any of the earlier texts an insatiable appetite for power on the part of the papacy in the Middle Ages, we think we can say that the most reasonable scientific interpretations oscillate between the following two positions: 1) those who see in the earlier texts a dissociation from the Gelasian tradition and especially, the growing formation of the theory of *potestas directa*; 2) those who interpret the same passages in the context of *potestas indirecta*."

This is not the time to attempt to elucidate the question. Regardless of progress made in research, there will probably always be ample field for discussion. In fact, theologians of the period discussed these problems, and less radical attitudes—among which the precise thinking of Thomas Aquinas on the theme of nature and grace stands out—facilitated abandonment of the more extremist conception of *potestas directa*. Such a move was impelled by the new direction historical events took shortly afterwards.

This matter was not exclusively argued using theological reasoning. With their specific solutions, jurists made an important contribution. Stickler said that we are still far from having a complete view of medieval thinking on this matter and the jurists are the least studied source. "Keep in mind", added Reina, "that medieval canonistics is not only one of the sources of our knowledge of the problem, like theology, economics, politics, etc. But in the Middle Ages canon law with civil law was the basis of thinking and life. In the Middle Ages a unified social consciousness was dominant; it was converted and decanted at its peak into juridical science, which found in law its maximal instrument of theoretical expression."

8. *The crisis of the bases of classic canon law*

The formulations of Boniface VIII mark the high point in the expression of maximalist doctrine on the Church's temporal power, at least in official texts. Historical events of all kinds caused a series of changes that pointed the direction towards what is usually called the Modern Age.

First, the papacy's prestige suffered a heavy blow as a consequence of the adverse fate of Boniface VIII in his conflicts with Philip the Fair of France, which led to the Babylonian captivity in Avignon (1305–1377). That in turn brought about the calamitous Schism of the West, which was resolved at the Council of Constance with the election of Martin V (1417–1431). The constitutional problem was remedied but the prestige of the pontificate had been so gravely damaged by those deplorable events that it never regained its prior status.

In addition, the great scholastic theology that was the key to medieval culture entered the 14th and 15th centuries in a state of genuine decadence. It was substituted by the nominalist method, which subtracted vigor and consistency from the doctrinal edifice, being based on a bold synthesis of classical and Arab philosophy and Catholic theology constructed by Thomas Aquinas. There were also new currents, more attentive to scientific knowledge than to questions of Aristotelian metaphysics, that prepared the way for the intellectual adventure of modern philosophy.

Finally, in political thinking, hopes were growing for a cleaner separation between political and religious problems. From various intellectual perspectives, men of the stature of Dante or Marsilius of Padua were helping to revise medieval Christianity's view of the world. When Machiavelli introduced the principle of the separation of politics and ethics, the bases for modern States was being laid.

Meanwhile, the *Corpus Iuris Canonici* continued to be expanded. Some of its collections belong to the time of the Avignon exile; the last two date from 1500. In the 14th and 15th centuries masterly works were being written by the commentators of the Decretals. And so the cycle of medieval canon law did not close; rather a most interesting historical event awaited it: the application of a juridical system born in the spirit of medieval Christianity to a new world. We shall concern ourselves with this problem in the next section.

D. *The Law of the Church and the Modern State (16th–18th centuries)*

1. *Medieval law for a modern world*

As we have just explained, the *Corpus Iuris Canonici* reflects the spirit of "Western Christianity". The ancient texts collected in the *Decretum* had been "concorded" by Gratian according to his thinking, to resolve the Church's problems in the time when he lived. As for the papal decretals and canons from councils that were included in the other collections of the *Corpus*, typically they are medieval material based on a Romanist technique as Roman law was understood in the universities of the time.

However, the *Corpus* lived on as canon law in effect until 1917 in a world that had drastically changed. Thus the *fundamental problem* of this period in the history of canon law, which we are now going to review, can be summarized as follows: *the adaptation of a medieval canon law that remained in effect to the particular circumstances of a modern world.*

In spite of the risk of oversimplifying very complex problems, we must allude to the basic factors that changed the environment in which canon law developed.

The geography of Christianity changed radically. The Eastern Roman Empire that had preserved a Christianity separate from Rome was absorbed by the Ottoman Empire (the Turks occupied Constantinople in 1454). During the Middle Ages, in spite of the Schism, the Eastern Empire had maintained relations with the West. Some contacts were political, especially apropos of the Crusades, for in attempting to occupy the Holy Places of Palestine, Western Christians were almost obliged to find their route through the Eastern Empire. Other contacts were religious, such as the proposed union between the two sections of the Church that was most hopefully proposed at the Council of Florence (1439–1441). In the 15th century the Eastern Empire ceased to exist as a Christian political entity, although that did not mean the end of the faith for its Christian inhabitants or the disappearance of its ecclesiastical hierarchy.

Also from the 15th century onward Portuguese and Castilian navigators were exploring the world, the Portuguese along the coasts of Africa and Asia and the Castilians over large parts of the Americas. The missionary activities that accompanied these expeditions and conquests greatly expanded the geography of Catholicism.

Papal power weakened and many developments made the idea of the Pope as head of Christianity now seem purely theoretical. There were the polemics between the Guelphs and the Ghibellines, the prestige of the theories of Marsilius of Padua and the rise of the modern State (a juridical form that resulted from the expansion of royal power, encouraged by the theoretical writings of the Renaissance, especially Machiavelli and Bodin), all sowing the seed of the idea of a lay State that would come to fruition centuries later. In the strictly ecclesiastical sphere, the Western Schism and the polemics around the pre-eminence of Councils over the Pope greatly weakened the prestige of the papacy. Although the Church never incorporated the conciliarist thesis into its official doctrine, the ideology helped make the Council of Constance possible (1414–1417), and therefore helped restore unity to the papacy and bring an end to the Western Schism.

The formation of the modern State as a political unit at the end of the 15th and beginning of the 16th centuries placed new sources of power in the hands of kings: armies, the administration of justice and increased possibilities for establishing a system of juridical norms (the early seed of

the idea of a state juridical system). However, the State did not obtain a monopoly over law, since jurists continued to be formed in the universities, where until the 18th century they were basically taught the Roman-canon law. As royal powers increased, the Church also began to lose its independence. Because its organization was a part of the old order, the Church was weakened as soon as there was a crisis in the system. With the weakening of feudal power, a good many of the specific formulas that had helped safeguard the autonomy of most bishops were also lost. The tendency towards a single system of justice, administered in the name of the king, created a tension with ecclesiastical tribunals—a tension which served to rectify certain ecclesiastical interventions in purely temporal matters, but which endangered the very idea of independent tribunals for spiritual matters. Administrative and tax-collecting services for the king were carried out by a bureaucracy that tended to handle all questions affecting the collective life, and obviously tended to be interested in questions pertaining to worship, which was a large part of the State's problems. Finally, from the point of view of producing laws, the gradual development of royal law tended to substitute it for municipal law, feudal law or the law of free corporations. It was in this way that royal law began to flow together with norms governing ecclesiastical activities. Royal law was trying to prevail over *ius commune* and thus over the *Corpus Iuris Canonici*.

All these paths of political and juridical intervention by monarchs in the Church's affairs were characteristic of the Christian States of the time. They were eventually forged into a system with many characteristics in common, and a diversity of methods and names in the different countries: Gallicanism in France, regalism in Spain, jurisdictionalism in Italy, etc.

This practice required doctrinal support, which it basically obtained from two sources: the doctrine of palace canonists who had royal power deriving from divine law and the historical-juridical debate over rights acquired by kings from privileges granted by the Church, such as polemics over patronage rights, a royal permit for papal documents so they would apply in the kingdom, veto rights or exclusive rights in pontifical elections.

Learning began to free itself from Theology. The fundamental phases of the process were Cartesian philosophy, rationalism, idealism, etc., and the whole process of the development of modern philosophy caused a divorce between the sacred and secular sciences. The result was that modern culture and science developed in an environment of independence and even hostility with regard to revealed truth. The Age of Enlightenment in the 18th century nourished the spread of an irreligious attitude that until then in Christian countries had been growing among intellectual minorities and had been frequently encouraged by sincere Catholics.

Then in the 16th century a religious movement called the Reformation was unchained. In it there was a mixture of errors of dogma and a desire to purify ecclesiastical structures. The controversial figure of Martin

Luther played a historic role of the first order, leading the way for the great "reformers" Calvin, Zwingli, Melanchthon and others.

Because the papacy was not sensitive enough to purify its ecclesiastical structures as well as fulfilling its duty to condemn the heresies historically known as the Protestant Reformation, Christianity became divided. A number of Christian confessions were torn away from the Church, favored by a variety of factors such as the political climate in the German Empire and trivial bedchamber episodes in the British court. The consequence of all this was that the religious unity of Christianity was destroyed.

The circumstances we have just described are the historical framework in which canon law evolved after the 15th century. We shall deal with this evolution next.

2. *A modern bureaucracy in the service of the Church*

In carrying out missions, the Roman Pontiffs of the 16th century had to face problems of their time in which we can distinguish two aspects. First, as sovereigns of the Papal States, Popes participated as temporal princes of the time in political problems and the game of alliances. Second, as the spiritual head of the Church, they had to be the leaders of spiritual life. From this point of view, which is the one that is of interest here, their activity in governing the Church takes on a new shade of meaning. All too often the image of the Renaissance Popes reflected the ideal of other Italian princes of the period rather than the ideal of the bishop of Rome, head of the community of believers. That image and the deep impression caused by the tragic consequences for the Church of the Protestant crisis caused a spiritual reaction that led to reform in the Church.

The reforming and vitalizing spirit was most genuinely expressed at the ecumenical Council of Trent (1545–1563). The conciliarist spirit of the time of the Council of Constance was put behind it, for it was called by the Pope and presided over by his legates. In the bull *Benedictus Deus* of 26 January 1564, Pius IV finally ratified its decisions. The texts that issued from the Council of Trent were of fundamental significance for dogma; they ratified and developed truths of the faith, especially in points that had been argued by reformed thinkers. But the Council was also concerned with questions of ecclesiastical discipline. In that sense it was very important in the history of canon law, for it dealt with the Pope's and bishops' authority, sacramental discipline and other points of doctrine upon which the foundation of the juridical system of the Church is based. The Council also introduced specific juridical-canonical reforms, especially pertaining to the duties of bishops and the clergy, the form of canonical marriage, etc. For all those reasons and although they are not properly speaking a canonical collection, the decrees of the Council of Trent entered into and in part reformed the law of the Church contained in the *Corpus*. But in ad-

dition to the decrees from Trent, no new collection appeared to be added to, or substituted for, the collections born during the preceding period. Faced with that fact, a jurist cannot help but ask how the Church was able to keep its basic legislative corpus for such a long period of time, in spite of how much circumstances changed.

To understand how it was possible, we must reflect on the influence of the way of thinking about the exercise of power on ecclesiology during this time. The theologians of the Counter-Reformation, especially the Jesuit Robert Bellarmine, reaffirmed the Pope's authority as head of the Church. They insisted on the visible and social nature of the community of the faithful. According to Bellarmine, the faithful were to be considered a society as visible and palpable "as the Kingdom of France or the Republic of Venice". Evidently this ecclesiology does not prevent the bonds that bind the faithful from being eminently spiritual. Bellarmine himself defined the Church as "a group of men united by professing the same Christian faith and participating in the same sacraments". However, it was especially emphasized that the faithful are united "under the regimen of lawful pastors and especially of the Roman Pontiff, the sole vicar of Christ on Earth". Although the belief that the community of faith and worship is fundamental to the Church was not lost from view, the link between the Eucharist, government and unity became secondary. Because of the anarchical attitude of the Protestants, emphasis was placed especially on the idea of the power of the system, which resided in all pastors, but very particularly in the Pope. This image of the Church—hierarchical ecclesiology, according to an expression lately popular among theologians—pushes into second place the idea of a community that includes all the faithful; it makes the distinction between hierarchy and simple faithful stand out over their common condition as Christians, which both enjoy.

On this ecclesiological basis and in order to combat the claims of princes to govern in ecclesiastical questions and attempts to break down ecclesiastical obedience, emphasis was placed on the idea that the Pope is the head of the Church, the sovereign in spiritual questions. Analogies were drawn with the public law of the time; thus the Church was called a monarchical society and the Pope was its sovereign ruler.

Such a view logically leads to endowing the Roman Pontificate with a modern-style bureaucracy as the instrument for its task to govern the universal Church, similar to what was happening in the monarchies of the time. The bureaucratic complex was called the Roman Curia and was structured in 1588 by Pope Sixtus V in the Const. *Immensa aeterni.*

In such a context, the fundamental source of canon law is not a new code in the manner of the *Decretals* of Gregory IX, which were taught in the universities and caused a vast juridical doctrine to be written about them. All of that lived on and, as we have seen, late in the 16th century (in 1582) Gregory XIII worked on publishing an official edition of the *Corpus.* But now when the Popes technically conceived the development of their

spiritual mission, the type of ruler they were imitating was not a Justinian legislator, but the monarchs who headed the bureaucracies of modern States.

Clearly the two types of bureaucracy, that of the Church and those of the States, were destined to conflict with one another. In the first place, the Popes created organizations to watch over the purity of the faith, direct the activities of bishops, motivate missions, organize the Church's property, see that the decrees from the Council of Trent were applied, etc. They also restructured the tribunals so that suits could be settled by the judicial power of the Pontificate, etc.; these became the dicasteries of the Roman Curia. Secondly, under their policy of intervening in ecclesiastical questions, the State bureaucracy of Catholic monarchs tried to have bishops named that were to their liking, tried to avoid the flight of ecclesiastical funds to Rome from their States, took a dim view of deciding the ecclesiastical suits of its subjects outside its boundaries, motivated and organized the evangelization of entire continents, and so on. The tension between the two sides—the jurisdiction of the organizations of the Curia versus the palace officials of the monarchs—gave rise to a continuing debate in which canonists in the Roman Curia and in palaces put forth all types of arguments.

During this period in the Church's history, Rome was intransigent on questions that affected ecclesiological fundamentals (the nature of the right of States to intervene). Even though it ceded power regarding particular issues rather easily, it was agreed that the monarch's rights to intervene were privileges granted by the Holy See. The conflicts of ecclesiastical jurisdiction were complicated by questions of international politics as a consequence of the Pope's status as a temporal sovereign that involved him in the game of conflicts and alliances. Diplomacy played an important role in all these tensions; monarchs accredited ambassadors to the Holy See and the Pope sent nuncios to various nations.

3. *Sources*

The historical circumstances we have just described place the sources of knowledge of canon law for this period in their true perspective. Here it is not possible to give a detailed analysis of the sources, but simply a note on the nature of the different types of collections.

a) The *Corpus Iuris Canonici* continued to be used. It was the basis of university teaching of canon law and was consulted in practice as legislation in effect, even when in fact its application was strongly affected by competition from other sources belonging to this period.

b) The decrees of the Council of Trent were the basis of a movement to restore dogma and discipline called the *Counter-Reformation* or *Catholic Reformation*. The Roman Curia tried to encourage application of the decrees, but their influence was less than what at first sight might be sup-

posed, for two reasons. One was that they were little used in the universities. In fact, Pope Pius IV prohibited writing commentaries on the Tridentine decrees, no doubt to avoid having too flexible an interpretation (in accordance with the moralist methods of the time) weaken their provisions. That, however, was the reason that the Tridentine law was little esteemed by the great canonists of the period, who continued to consider the *Decretals* of Gregory IX as their working base. The second reason for the lack of influence was political. In a number of countries the influence of the Tridentine legislation was very slight because some monarchs were opposed to applying the Council of Trent in the territories of their States.

c) During this period the Roman Pontiffs issued many documents of various sorts: bulls, briefs, etc. These documents were classified more for reasons of form than because of their content (the names "bulls" and "briefs" are due to the form of the documents, which depended on the bureaucratic customs of the pontifical court). Sometimes they were actual laws that reformed aspects of ecclesiastical discipline. Other times they contained grants of privileges to princes, authorizations for religious institutes, and acts of a similar nature to which it was desired to give especial solemnity; frequently they were protocols or grants of honor and distinction. In truth, during this period there was no legislative activity that was clearly differentiated as such; there was nothing like the decretals of the classic period, although many pontifical acts had marked legislative importance. There was an attempt at pontifical legislation known as the Decretals of Clement VIII (16^{th} century), which was intended to be a new collection of the *Corpus*, but it was never promulgated. However, there are many collections of pontifical acts of this period, chronologically arranged and totally lacking in any substantial rationale for organizing them. The most important of these are the series of *Bullaries* (of L. Cherubini, A.M. Cherubini, Mainardo, Cocquelines, Benedict XIV, etc.).

d) The activity of the Roman Curia's dicasteries resulted in an enormous mass of documents that were also placed in collections, with the acts of some of the dicasteries arranged chronologically. Some were published by the dicastery which issued the documents; others were the work of private compilers. Important examples are the *Thesaurus* of decisions of the Congregation of the Council, the *Collectanea* of the Congregation of the Propaganda, the collection of decrees from the Congregation of Rites, etc. There are also various collections of decisions made by the Tribunal of the Roman Rota; some of them contain the Tribunal's decisions in various periods (*Antiquiores*, *Antiquae*, *Novae*, *Novissimae*, *Recentiores*, *Nuperrimae*). The most recent are due to the well-known canonist Farinacius; others were published by different auditors, including the decisions handed down by the author of each collection.

e) After the Council of Trent, diocesan synods also developed markedly, although never as much as provided in the conciliar dispositions on the matter. The constitutions of the synods were frequently printed.

Although in the last decades great progress has been made in learning about them, we still have no catalog of this type of sources, which by their nature are widely dispersed. It is essential to consult them to learn about the specific pastoral circumstances in which canon law was applied in various places.

f) For a period such as now concerns us, in which the Catholic States were so actively involved in ecclesiastical affairs, it would be useless to try to learn about the life of the Church using exclusively ecclesiastical sources. Regardless of any doctrinal evaluation, this fact must be kept very much in mind by historians in relation to all aspects of the life of the Church. To cite a particularly significant example, even though the Sacred Congregation of the Propaganda was the moving force behind a worthy missionary labor, its scope was very narrow in comparison with the Christianization of a good part of the Americas, which was organized on the basis of patronage by the monarchs of Spain under the effective control of the Council of the Indies. The same can be said of the Christianization of the Portuguese Empire and, to a lesser degree, because it was a smaller undertaking, of the Christianizing work carried out by the French in Canada. In addition to documents (especially the concordats) that reveal the diplomatic relations between the Holy See and the various States, sources that show the ecclesiastical policy of temporal powers must also be taken into account.

To be useful and manageable, this summary description of the basic types of sources of knowledge for the canon law of the 16^{th}–18^{th} centuries must be supplemented by a detailed knowledge of each of the specific collections, and that is a task that far exceeds the possibilities of this introduction.[7]

4. *State ecclesiastical law*

The confluence of circumstances that we have just described is at the origin of what is now usually called ecclesiastical law, although in Spain Maldonado proposed that it more correctly be called the State ecclesiastical law. What is meant is a set of State laws to regulate ecclesiastical matters.

The fact that sources of law deriving from secular legislators deal with ecclesiastical matters is not a new phenomenon. Examples are the *Corpus Iuris Civilis* or the capitularies of the Carolingian period. But they were different from the law that now concerns us. They reflect his-

7. Among works in Spanish, this information can be found, for example, in J. MALDONADO Y FERNÁNDEZ DEL TORCO, *Curso de Derecho Canónico*...cit., pp. 409–420; A. DE LA HERA, *Introducción a la Ciencia del Derecho Canónico*, cit., pp. 266–291; cf. also L. DE LUCA, *Fonti del diritto (diritto canonico)*, cit., pp. 966ff; P. ERDÖ, *Introductio in historiam scientiae canonicae*, cit.

torical periods when the idea of power was not so closely related to the production of laws and in those periods the Church, within its historic context, wanted certain questions that affected it to be regulated by secular law. The Church even contributed to forming secular law through the political function of ecclesiastics and the "ministerial" conception of secular rulers in the service of Christianity. In addition, within the concept of *utrumque ius-ius commune*, Popes were the legislators of a large part of what constituted the law of Christian Europe.

The rise of the modern State changed the terms of the question. The growth of European nations and the consolidation of absolute monarchies slowly gave rise to a system of juridical norms proper to each State and supported by royal power. In Catholic countries this law was seen when the majestic rights of the monarchs were exercised (regalism, Gallicanism, jurisdictionalism, etc.) and it developed even more in countries that accepted the Reformation. When Luther adopted a hostile attitude toward canon law, the regulation of all ecclesiastical activities was left in the hands of the German princes. In England, a schism made the king head of the Church in that country.

When the unity of medieval Christianity was shattered, it was necessary to find a basis for international co-existence, common to both Catholics and Protestants. Based on the Thomistic distinction between grace and nature and the idea of natural law that rational nature shares—according to the ideas of Saint Thomas—Francisco de Vitoria tried to establish a basis for the law of nations in natural law criteria not linked to the Pope's authority or to the tradition of medieval theology. That line was followed by the so-called Spanish School. Grotius and Pufendorf, who promoted the Rationalist School of natural law, aspired to establish a law based exclusively on reason, conceived, as expressed by Grotius, "as if God did not exist". Neither of the two views, frequently mixed in with the idea of the *raison d'État*, succeeded in avoiding the wars of religion that devastated Europe throughout most of the 16th and 17th centuries. In the aftermath, at the Peace of Westphalia (1648), the Protestant winners established the principle "*cuius regio, eius religio*," which authorized the princes to impose their own religion on their subjects. Here was the culmination of the excesses of what has come to be called the "confessionality" of the State, which was all-absorbing in Protestant States and strong in Catholic States, although in the latter, respect for the spiritual power of the Pope left the doctrinal bases standing along with a good many manifestations of the Gelasian dualistic tradition.

During this period, especially in Protestant countries, secularized manifestations of the ancient institutions of classic canon law arose. Perhaps the most important of these was civil marriage.

E. *Canon Law of the 19th–20th Centuries*

1. *A canon law for the 19th and 20th centuries*

At the end of the 18th century, after 1789, the date of the French Revolution, the modern State that we saw being formed in the preceding period may once again serve as our first point of reference, even though any attempt to delimit periods in history is mere convention. There were radical transformations, driven by a series of ideological movements, among which the following need to be pointed out because of their effect on the political form of the State:

a) Liberal individualism, which emphasized the individual citizen versus royal power. It caused a crisis in the foundations of absolute monarchy. In the search for theoretical political equality, which in fact made the middle class more powerful, the cycle of class society was closed.

b) The spirit of democracy, which was basically reflected in encouraging everyone to participate in the responsibilities of government.

c) Various socialist movements, which in some cases totally opposed democratic political institutions and through the dictatorship of the proletariat tried a new kind of democracy which was supposed to be achievable in the dialectic of class struggle. In other cases, when socialists became a part of what we have called the democratic spirit, they provided it with specific content and well-defined goals in an effort to have the State promote the weaker social classes; they succeeded in giving realistic bases to political equality and achieving effective participation.

It is plain to see that the necessarily elementary quality of this summary makes it merely conventional. However, it perhaps in some way explains the genesis of the bases of present-day democratic States, at least in the West. Those bases can be briefly described as follows:

a) The principle of the lawful State, based on the government's being subject to juridical norms and on the distinction of functions in the exercise of power.

b) The declaration, promotion and safeguarding of fundamental human rights, with limitations on political power established by constitutions and supported by international documents.

c) A decisive advance in socialization as a basis for the effective equality of all persons. Social unity and political participation are thus made possible. From this point of view, it is not necessary to emphasize the importance of promoting cultural and technical education.

This entire historical process affected the Church's position in the world after the French Revolution. Here are some of the effects: the openly irreligious attitude of many of the ideological movements caused as these transformations began; the separation of sacred and secular sci-

ences, which in many European countries caused Theology to be disconnected from the universities, and involved an agnostic or even atheistic attitude in modern science; the disappearance of the supports for a class society upon which the independence of some of the ecclesiastical structures depended; the seizure of nearly all ecclesiastical property; anti-Catholic discrimination, which in some countries (France is a typical example) in the eagerness to reduce the influence of religious orders and congregations, led to contradictory solutions in the right of association; the occupation of the Papal States by the armies of the Kingdom of Italy; and above all, the de-Christianization of great masses of people, who could not escape the influence of an irreligious education or propaganda. The social strata were especially sensitive to propaganda, which presented the Church as defender of a declining order and as an enemy of political and social progress, and they were even denied the "new education".

We shall not stop to describe and assess all these facts except when strictly required by problems of canon law. Through a laborious and complex process, they lead to a situation that we can describe in the following terms:

a) The ecclesiastical Hierarchy abandoned the positions that had in fact given it strong influence in temporal matters. It became almost exclusively concerned with a strictly spiritual task, governing the faithful in matters pertaining to the internal order of the Church.

b) After the idea became popular that the State is the source of law, from the binding power of which is derived the effectiveness of each juridical system, in a well-known phrase by Radbruch canon law ceased to be a juridical system for the world and became limited to regulating the internal order of the Church. Especially in the first stages of the transformation, the Church was placed in a most difficult situation. When the delicate Gelasian balance was upset in favor of the State, the guardianship of the Church's freedom to carry out its own spiritual task fell to the mercy of the will of State legislators. The natural inconsistencies of any working process occasionally caused ideologies as irreconcilable as liberalism and regalism to coexist.

Through an accumulation of circumstances that can merely be pointed out here, another great question that arose in this period was the relationship between secular juridical systems and the canonical system. Various technical solutions were tried, as ideologies were developed and historical events took place.

c) While the Church, practically speaking, abandoned all positions in which its hierarchy could be influential in shaping secular law or political or social institutions, it could not, however, ignore its duty to assess all facets of human life in the light of the evangelical message. This task was carried out by creating an awareness in the conscience of the faithful through the activity of the Magisterium. Two ecumenical councils

(Vatican I and Vatican II) and many documents from the Roman Pontiffs were the fundamental sources of the Magisterium.

2. *The Church's Magisterium*

The Church's official Magisterium had to face all these problems in a number of documents that are varied in nature and subject matter. We shall briefly and selectively indicate the most interesting subjects:

a) Naturally, the Church's situation in a world that culturally and politically showed clear tendencies to hostility led the Church to reflect upon its own unity in dogma and discipline. In this regard, Vatican Council I was particularly important. It was called by Pius IX and began its work in 1869, interrupting it in 1870 due to war. Although the sudden interruption of the Council's tasks prevented completion of much of the planned work, there are two items in the Council's activities that are important for our subject. First, the conciliar Const. *Pastor Aeternus* defined the infallibility of the Roman Pontiff as doctrine of faith when he pronounces doctrine pertaining to dogma or to the Church's moral teaching "*ex cathedra*," as he most solemnly exercises his pastoral power. The council's definition was reached after difficult theological studies and in the light of the perplexity of a world dominated by agnosticism and a liberal spirit. It cost the Church a small split (the sect of old Catholics), but gave Popes the necessary authority and prestige to direct the progress of the Church in one of the most difficult moments of its earthly journey. Second, although from the point of view of conciliar work there was no specific result, at Vatican Council I many bishops demonstrated a desire to have canon law codified and the intricate forest of texts and collections that had accumulated since the time of Gratian condensed into a manageable body of law. The vast number of texts was so difficult to use that effective knowledge of the law was only possible for a small circle of specialists. The result was damaging to the clarity of the norms for ecclesiastical discipline when they were applied to specific pastoral circumstances. From the time of Vatican Council I, a movement was begun to systematize certain aspects of canon law into special laws and it culminated with the great undertaking of writing the *Codex Iuris Canonici*.

b) Although the Popes that followed Vatican I were sparing in definitions of dogma, to which the Const. *Pastor Aeternus* was strictly applicable, they did, on the other hand, frequently perform acts of their regular Magisterium functions or acts of a disciplinary nature. Conscious of their responsibility and of the assistance of the Holy Spirit, they faced problems of capital importance for the life of the Church. One of the most important of these was the great doctrinal battle generically known as the *modernist crisis*. This was an extraordinarily complex problem that we shall try to phrase in the simplest terms possible. The separation of the sacred and secular sciences caused a most brilliant development of the positive

method in all branches of knowledge during a period of little intellectual inspiration in the sacred sciences. Except for some central European university departments of theology, the sacred sciences had taken refuge in centers devoted exclusively to forming the clergy and in a few merely mediocre ecclesiastical departments totally disconnected from the cultural centers and currents where the new university style based on scientific research was being forged by modern science. The doctrine of Thomas Aquinas, who is justly considered by the official Magisterium as a Doctor of the Church, with very few exceptions found no followers with sufficient creative genius to develop his teachings in a dialog with those who questioned it in modern times; instead, it was transmitted in summaries and in stereotyped and dead commentaries. In addition, progress in philology caused the text of the Bible to be revised, and brought about the so-called "rationalist criticism" of the Holy Scriptures, which seemed to undermine the very foundations of Christian Revelation. In those dramatic circumstances, a question was raised about the compatibility between Science and Faith. Some Catholics tried to get around it with their new ideas and condescending airs toward dogmatic formulas, which meant stripping them of their real content. Other researchers began to feel stimulated to apply new scientific methods to develop the sacred sciences, especially in the study of the Holy Scriptures. The Popes had to face this problem with the responsibility conferred upon them by their role as guarantors of the unity of the faith and the special charisms of their ministry, assisted by the modest intellectual baggage of the technicians in the Roman Curia. In the Enc. *Pascendi* and the Decr. *Lamentabili*, Pius X roundly condemned modernism, reaffirmed the fundamental bases of the faith and denounced the principal errors of irenic theology. The struggles on occasion took dramatic turns and caused great intellectual anguish in certain minds. At the same time, inspired by the Popes, especially Pius XI and Pius XII, a more scientific spirit began to be developed in the Roman view of the sacred sciences, which facilitated gradual agreement with orthodox innovators. From the firmness of the Popes in defending the faith and the intellectual boldness of the renovators of the sacred sciences sprang the fruits of the modern pastoral, ecclesiological and Biblical Theology of the first half of the twentieth century. In the Enc. *Ecclesiam suam* Paul VI dedicated warm praise to the new spirit, which came to be intellectually indispensable for the Church's official Magisterium in Vatican II.

c) Another of the great questions that the pontifical Magisterium had to cope with was assessment of the new political and social ideas in the light of the evangelical message. The nucleus of liberal thinking was incompatible with Church doctrine, and the first confrontations with ecclesiastical institutions and the conflict between the policy proposed for Italian unity versus the Papal States reflected a dialectic attitude that inevitably made the question virulent in its early stages. The *Syllabus* of liberal errors condemned by Pius IX is radically opposed to the liberal spirit.

Some of its statements can scarcely be understood today if it is taken literally and the historical context to which it was a reaction is ignored.

With respect to the forms of government, the pontifical Magisterium declared that this question did not affect the doctrine of the Church.

As for the conflict between capital and labor, while the Church rejected the materialism that was the basis of many socialist beliefs and the violence of the class struggle, it shaped a social doctrine that defended the rights of workers against the abuses of capitalism. Popes Leo XIII and Pius XI marked the two fundamental milestones in the formation of the Church's social doctrine with their Encyclicals *Rerum novarum* and *Quadragesimo anno.* The doctrine was completed in the Enc. *Mater et magistra* by John XXIII and was universalized in *Populorum progressio* of Paul VI, who presented the problem of social justice in relation to the development of nations. The voices of these Pontiffs sensitized many of the faithful in the political battle for social justice and refuted the idea that the Church supported the abuses of capitalism.

Another very different question is to what point did these teachings at certain moments make an impression on the conscience of the faithful in privileged social positions. In addition, the dialectical materialism behind Marxist movements has been repeatedly condemned by the Popes as incompatible with Christian doctrine. During the pontificates of Pius XI and Pius XII, the Popes had to deal with totalitarian regimes. In spite of the initial relations between Pius XI and the Fascist regime that let to the solution of the famous *Roman question*, the Church never ceased energetically condemning the excesses of National Socialism and certain restrictions on civil liberties imposed by Fascism. In this last case, the Popes particularly denounced the difficulties placed by the Italian regime in the way of developing secular apostolic movements, which were encouraged by Pius XI under the name of Catholic Action. His successor, Pius XII, developed these positions and drew up a number of documents on a vision of human dignity and the need to safeguard fundamental rights in the constitutions of States and in internationally acceptable documents. His successor John XXIII systematized and enriched this doctrine in his important Enc. *Pacem in terris.* Also worth special mention are, finally, the Encyclicals of Paul VI *Populorum progressio* and *Octogesima adveniens*, and from John Paul II *Laborem exercens*, *Centessimus annus* and *Sollicitudo rei socialis.*

d) In this brief summary of the pontifical Magisterium we must refer to the subject of the relations between Church and State, which have been the subject of many documents that still have not been thoroughly and objectively analyzed. Any reader who quickly read through the Magisterial documents from Gregory XVI to Vatican II without further reflection or information on the subject and without looking at the historical context would hardly be able to escape the impression that there had been a real change of opinion on the subject. A scholar as worthy as Professor

d'Avack, comparing certain nineteenth-century texts with texts from Vatican II, clearly suggests such a conclusion. We cannot claim to resolve here a question that is still open to research and in which not even from a theological point of view can the modification of certain criteria be excluded a priori. Nevertheless we shall try to indicate the fundamental aspects of the doctrinal evolution.

When Gregory XVI and Pius IX condemned liberalism and "the pernicious liberties of conscience, of the press, etc.", what they were basically judging was the liberal spirit that considered humans to be politically and socially free of moral duties before God and the idea that the convictions of a Catholic should have no influence on his public life. They also condemned certain political solutions of the time that were then irreligious indeed; but considered literally they could be taken as a condemnation of what today we would not hesitate to call democratic liberties, inherent in the Christian idea of human dignity. When Leo XIII developed his doctrine of two independent and sovereign societies, each with its own system, and in case of conflict on the priority of the spiritual purpose of the Church, he was still working under the dualistic doctrine of the Gelasian tradition as understood in Catholic countries by those who cultivated the so-called "Ecclesiastical Public Law." In Leonine thinking, in the vigorous reaction of St. Pius X to the anti-ecclesiastical excesses of the French policy of separation of Church and State, and, in certain texts of Pius XI where the underlying idea is the duties of the State toward religion and a repudiation of the confusion between true rights and error, etc., what was in reality happening was a reaction to religious indifference as a political program and to de-Christianization as a panacea for all civic goods. However, at the same time, through the distinction between thesis and hypothesis and the continuing support of the theological doctrine of the freedom of the act of faith, all statements about the ideal of the Catholic State find their point of balance in the concepts of tolerance for worship, freedom of conscience, etc.

The center of gravity of the whole question moved from the theme of State religion to the idea of personal religious freedom after the following occurred: the anti-ecclesiastical tone and de-Christianizing proposals of most of the influential groups of European liberalism were put behind; concordat juridical formulas were found in order to ensure freedom of the Church without the need for formal affirmation of a State religion; the pluralistic experience of religious policy in the United States of America and the doctrine of theologians who studied the problem in contexts very different from that of Europe were analyzed; and the modern State came to be seen as a juridical person that cannot have opinions about worship or questions of dogma. When Pius XII developed a vigorous Magisterium on liberty and fundamental human rights, he referred to the lawful laity of the State. In the climate of the *Pacem in terris*, John XXIII prepared the foundations for the doctrine of Vatican II on religious freedom.

3. *The first Code of Canon Law*

While these questions of doctrine were being debated, the matters of the internal revitalization of the Church and the normative clarification of ecclesiastical discipline ran into great difficulty because of the confused state of the sources of canon law. We have already referred to the hopes expressed during Vatican I for a simplification of the normative system following the form of a legal corpus like the one achieved by the codifying movement in secular law. The undertaking was finally set in motion by St. Pius X in 1904 in the mp *Arduum sane munus*, which established a commission charged with carrying out the work and declared that the work should begin. In spite of skepticism expressed by a certain outstanding canonist of the time (Francesco Ruffini), the undertaking was moved forward by a team of technicians who had almost all been formed in the Curia and had a curial mentality. Among those outstanding for their scientific qualities were the illustrious master at the Gregorian University F.X. Wernz, and the Italian canonist Pietro Gasparri, an indefatigable mover and ultimately Cardinal President, who previously had been a professor of canon law at the Catholic Institute of Paris.[8]

The purpose of the codifiers was less to reform canon law completely than it was to codify the current norms into a manageable legal corpus. Although the Code introduced some legislative modifications, generally the commission was faithful to the original purpose and carried out the enormous but humble task with exemplary diligence. Pius X died without seeing the work completed, but Benedict XV, after sending the project to consultation by the universal episcopate, promulgated it in the bull *Providentissima Mater* of June 27, 1917 and it became effective on May 19, 1918.

The Code included practically the entire law in effect in the Latin Church in 2,414 canons (in the manner of articles in civil codes), distributed in five books, basically following the organization conceived by P. Lancelotti in the 16th century for his *Institutiones Iuris Canonici*. It was a system that for four centuries had been imitated many times by authors of elementary books on canon law. The headings of the books are *Normae generales, De Personis, De Rebus, De Processibus* and *De Delictis et Poenis*.

4. *Application of the 1917 "Codex"*

In making a judgment upon the function that *CIC*/1917 fulfilled in the juridical system of the Church for the nearly seventy years it was in effect, we must point out that it succeeded in accomplishing the fundamental ob-

8. Concerning the origins and early history of the dogmatic-juridical school, cf. ibid., pp. 208ff.

jective its editors proposed. By determining the attributions and responsibilities of the offices in the ecclesiastical organization as precisely as possible they wanted to provide the official structure of the Church with clear norms for their acts. In this sense, *CIC*/1917 for years was an excellent disciplinary instrument for the clergy, a clear guide for the activities of the ecclesiastical organization and a solid basis for channeling the instruments of the Church's pastoral activities.

On the other hand, *CIC*/1917 did not fully succeed in being effective in establishing a juridical order applied to all Christians. Christian individuals were hardly affected by its canons except for marriage law, certain norms on associations of the faithful, the specification of some religious and worship duties and in procedural norms for marital lawsuits.

From a technical point of view, *CIC*/1917 suffered a curious fate that could hardly fail to surprise a secular jurist. If questions about the *Codex* were raised in the 1960's in ecclesiastical circles, the response was often that it was a very old legal corpus... for it dated from 1917. Obviously, any Spanish jurist, accustomed when focusing on more current problems to coordinating recent laws quite normally with a Civil Code promulgated in the 19th century, would not be expected to understand why a Code that was barely half a century old should be looked upon as so old. However, perhaps the diagnosis cannot be considered incorrect. Apart from the fact that a good part of the discipline contained in it was actually much older that the date it was promulgated (we must not forget that the *Codex* was limited mostly to compiling previous discipline), the basic problem with *CIC*/1917 was not so much its age but its conservatism. In spite of the legislator's clear intention expressed in c. 6, in most cases the *Codex* was applied disconnected from its historical tradition by a doctrine that rarely dared to interpret it progressively. It was imprisoned by a system of authentic interpretation that in fact made the criteria of the central bodies of ecclesiastical administration binding. If we except the subject of marriage, the *Codex* was totally lacking any modernizing influence from jurisprudence. *CIC*/1917 was like a kind of immense administrative regulation—it was applied without contentious administrative control. This bureaucratic manner of application was its ruin. While the official structures it provided for channeling the Church's pastoral activity needed to be updated due to changed circumstances, they remained fossilized. In the meantime there arose a set of parallel structures that were little regulated; through them pastoral activity developed outside any juridical system. All of this gave rise to the curious pastoral/law dualism sometimes heard about and which strictly speaking scarcely makes sense. Nor is it understandable what function the law can fulfill in the Church if it is not serving pastoral action, nor much less, why an effective pastoral should be synonymous with a lack of jurisdictional definitions, an absence of guarantees of freedom and initiative for the faithful when confronted with possible absorbing attitudes of official structures, etc.

We can understand the situation in which *CIC*/1917 was being applied if we take into account two more very characteristic qualities of canon law during the years the *Codex* was in effect. Although the best contemporary doctrine persists in describing canon law as a flexible system, in part justified by the plurality of sources of production of the law and by the so-called *ius singulare*, the lack of jurisprudential application weakened the role of custom, the play of traditional *aequitas canonica*, the application of *dissimulatio* and tolerance—in a word, the most effective flexibilizing elements of classic canon law. On the other hand, for specific cases that were difficult to reduce to legal formats, attempts were made to resolve them with privileges and dispensations granted by the ecclesiastical authority in a scantily regulated administrative activity. Who had the authority to grant "graces" was determined by excessively centralizing criteria that very often placed the solution in cases far removed from the specific question at hand. The loss of the traditional canonical flexibility was not compensated by incorporating the advantages of formalism to the degree that it can help establish guarantees by clarifying the hierarchy of sources of production of the law and by subjecting administrative activity to the law.

The norms that accompanied the promulgation of *CIC*/1917 conceived the utopian project that for years the *Codex* would be kept as the only source of law for the Church and would be applicable in the entire Latin Church. They went so far as to establish an ingenious system for inserting texts into the *Codex* without modifying the numbering of the 2,414 canons. The legislative power to make the opportune textual modifications was reserved to the Roman Pontiff, who would act on his own initiative or upon proposals from the dicasteries of the Roman Curia. Therefore, no provision was made for any type of body with the vicarious ordinary power of the Pope or at least of a consultative nature to aid the Pontiff in exercising this legislative function. The inevitable consequence was that reform initiatives and preparatory technical work for later legislative acts were de facto in the charge of the dicasteries of the Curia; and they were the same administrative organs supposed to be governed by the law. A commission of cardinals was given the mission of making authentic interpretations of the *Codex*, of issuing responses to questions put to it by the ecclesiastical organization. The commission of cardinals issued many responses, which, according to the provisions of the *Codex*, could be merely declarative or also constitutive, meaning they could possibly broaden or restrict the presumed facts covered by the Code. Obviously, in that case, given the clearly innovative nature of the responses, to be effective they had to be promulgated and could not be applied retroactively.

There were not many modifications made to the text of *CIC*/1917. There was, on the other hand, during the years the *Codex* was in effect a moderate production of special laws promulgated by acts of the Roman Pontiffs in the form of Apostolic Constitutions or *Motu proprio*. The

canon law system has fortunately been free of this kind of "motorized legislation" from which many secular systems have suffered. The special laws were generally inspired by the criteria of the dicasteries of the Roman *Curia with jurisdiction* over the respective matters.

At the time of the promulgation of *CIC*/1917, it was also provided that the dicasteries of the Curia could develop regulating activities in the form of instructions or general decrees to determine and develop the legal provisions, but they would be limited in validity by the same criteria as the *Codex* and other legal norms. The limitation was not, however, very effective, since the instructions and decrees of the Roman Congregations frequently modified the meaning of the laws by claiming that they had the approval of the supreme legislator. Even when his approval was not evident, since the law was mostly applied through the channels of an administration without judicial control and with no impugnment of regulatory activity for violating the law, the Congregations of the Roman Curia did in fact play the starring role in postcodical legislative activity. There was one possible exception—instructions on procedural matters, with one particularly famous case in the *Provida Mater* on the procedure that diocesan tribunals should follow in marriage suits (1936). Jurisprudence of the tribunals and certain sectors of doctrine offered a weak resistance to the discrepancies of criteria with *Liber* IV of the *Codex*, but the "legislative" criteria of the Congregation for Sacraments finally prevailed.

On the other hand *CIC*/1917 and the supplementary legislation were successful in preserving the hierarchy of sources, with regard to the relationship between universal laws and laws proceeding from lesser legislators. The validity of norms issued by the bishops has always been conditioned upon not contradicting the norms issued by the Holy See, unless explicitly authorized by Rome. Before taking effect, norms issued by provincial councils, plenary councils, etc. required the approval of the Curial dicastery with jurisdiction. The bishops' powers to make exemption from the laws issued by the Holy See were broader than a literal interpretation of the Code suggested and they were carefully limited by the canons, by special powers conferred by the dicasteries of the Curia, controls by papal nuncios, etc.

In addition to difficulties in the matter of the hierarchy of sources, the system of *CIC*/1917 suffered from a lack of the guarantees customary in modern juridical systems: legal and procedural guarantees for penal matters, a clear definition of the jurisdictions of juridical and administrative bodies, etc. Because of this type of problem, generally speaking, doctrine was too conformist. Aside from the logical position of canonists in the Curia, scholars with a juridical-dogmatic orientation emphasized the theme of the peculiar characteristics of the Church's system based on a consideration of the primacy of the *salus animarum* principle, with quite

conventional ecclesiological bases; they thus contributed to an indirect apology for the system, which did not facilitate constructive criticism.[9]

All these circumstances explain one the most striking paradoxes that arose in the climate of Vatican Council II. The spirit of canon law as reflected in *CIC*/1917 and its application according to the guidelines issued by the Roman Curia were called "juridism"; then there appeared the disconcerting spectacle of a council meeting that showed disinterest in the law, but set forth important criteria for building a just order of the people of God, and without a doubt designed the foundations of a vast renovation of the law of the Church that probably has no precedents since the time of classic canon law.

To date the most important fruits of the new law are the 1983 *CIC* (for the history of how it was written, see *infra*, Prologue II) and the 1990 *CCEO*.

5. *The function of modern Concordats*

Since medieval times there have been frequent agreements between ecclesiastical and civil authorities that regulated matters relating to the relations between the two powers. When stipulated between the Holy See and State bodies competent to reach international compromises, these agreements are called *concordats* if the agreement is sufficiently broad and basic to suggest that it will be the basis of relations between the Church and State with a certain degree of permanency. If this type of agreement is limited to a specific matter or provisionally resolves a conflict, it is called a *convention* or *modus vivendi*.

Ignoring for the present the technical problem of the juridical nature of concordats and their relationship to the theory of norms, we must remember that concordatory activity has in fact developed according to the style and juridical formulas of international negotiations. It has followed the usual practices of diplomatic relations in each historical period. Because the Papal States existed until 1870, the comparison is even more logical.

When the Papal States disappeared in 1870, the Holy See was left in a peculiar situation. First, the Pontiffs did not recognize the *fait accompli* that their territories had been occupied and they considered themselves violently and unjustly divested. Second, an effective independence was preserved both for the person of the Pope and for the dependencies of the Holy See, guaranteed by norms unilaterally issued by the Kingdom of Italy (*law of Guarantees*). This situation was no obstacle to continuing concor-

9. For a more detailed discussion of the canonists who worked to codify canon law, cf. J. HERVADA-P. LOMBARDÍA, *El Derecho del Pueblo de Dios*, I, *Introducción*, cit., pp. 206ff.

dat activity based on a personality in international law recognized by many States, no longer of the Papal States but now of the Holy See.

In spite of the difficulties of this juridical figure and the evident technical objections that can be made to a comparison of Concordats and international Treaties (Bernárdez), this empirical view has fulfilled a most interesting mission lately, especially in the 20th century. At a time when it was very difficult to come to a theoretical agreement on the subject of relations between Church and State, still, by a concordat specific formulas were established to regulate questions between the two powers and guarantee the juridical statute of the Church's freedom in relation to the domestic law of the different countries.

CIC/1917 greatly facilitated concordat relations through the guarantees of clarity offered to the States by a set of norms that reflected the fundamental organization of the other party to the contract. It was shortly after promulgation of the *CIC* and on the occasion of the end of World War I that Benedict XV in a consistorial address (1921) outlined the basis of modern concordat activity, which was very much in evidence between 1922 and 1940. Although concordat activity did not disappear afterwards, it took on the interesting characteristics that it has today.

Prologue II
Genesis and Development of the New Code of Canon Law

Julián Herranz

SUMMARY

I. THE NEED FOR LEGISLATIVE REFORM

A. *Formation and Nature of the Pontifical Commission*

On January 25, 1959, the Feast of St. Paul's Conversion, before the College of Cardinals assembled in the Basilica of Saint Paul Outside the Walls, Pope John XXIII, "somewhat awed, but also humbly resolved," revealed his decision to convoke an Ecumenical Council and a Roman Synod, which were to lead to "the long-awaited update of the Code of Canon Law."[1] Twenty-four years later on January 25, 1983, in the Hall of the Consistory in the Papal Palace, before Prelates of the Roman Curia, members of the Code Commission and other experts, Pope John Paul II signed the Ap. Const. *Sacrae disciplinae leges*, whereby the new body of legislation for the Latin Church was promulgated.[2]

These two important historical events then led to the revision of the common law of the Eastern Catholic Churches[3] and to the legislative reform of the Church's central government.[4] We may wonder why so much time elapsed between the announcement of the anticipated reform of *CIC*/1917 and the promulgation of the new Code of Canon Law. What were the guidelines and the methodology used for this long legislative reform?

The answer to these questions is the history of the new codification. It requires three types of data in all. Some are strictly juridical (such as the facts that led to the *CIC*/1917 crisis). Others are juridical-ecclesiological (postulates and principles that guided the drafting of the new body of legislation in accordance with the spirit of Vatican Council II and the documents that issued therefrom). Finally, there is the data that belong to the *process* of the work (focus, sources, relations with consultative bodies, and so forth) that was entrusted by the legislator to the special Pontifical Commission for technical assistance. The three different types of data —strictly speaking, juridical, juridical-ecclesiological and methodological—are, however, so closely interwoven and have had such a clear mutual influence that it would perhaps not be correct to describe them in total separation from each other. It would be better to look at them all together, although at certain points important aspects of each will be emphasized.

1. Cf. *Primus Oecumenici Concilii Nuntius*, January 25, 1959, in *AAS* 51 (1959), pp. 65–69.
2. Cf. *AAS* 75 (1983), pt. II, pp. VII–XIV.
3. The relevant Pontifical Commission was created by Paul VI on June 16, 1972; the *Codex Canonum Ecclesiarum Orientalium* was promulgated by JOHN PAUL II on October 18, 1990: cf. Ap. Const. *Sacri canones*, in *AAS* 82 (1990), pp. 1033–1044.
4. Cf. *PB*, which reformed the Roman Curia in 1988.

On Saturday March 30, 1963, *L'Osservatore Romano* announced on the first page that John XXIII had formed the Code Commission, made up of 30 Cardinals,[5] with Card. Pietro Ciriaci named as President[6] and Msgr. Giacomo Violardo as Secretary.[7] The Pope's decision to create the Code Commission while the work of Vatican Council II was still in progress was in response to the explicit proposal of the Commission for Coordinating Conciliary Work, presided by Card. Amleto G. Cicognani, Secretary of State. The proposal had been discussed on March 26 by the Coordinating Commission in relation to the implementation of certain decisions that had already been made by the Council.[8] Scarcely two days after, the Pope accepted the proposal and created the new body, thereby initiating the third point of the program that he had announced in the Basilica of Saint Paul.

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5. There is no evidence in published documents or in the archives of the Code Commission that the creation of this commission was brought about through an especially solemn exercise of pontifical authority (*Motu proprio*, etc.). The only relevant document in the archive is a letter from the Secretary of State, Card. Amleto Giovanni Cicognani, to Card. Pietro Ciriaci (Prot. N. 101241, March 28, 1963), which reads as follows: "LA SANTITÀ DI NOSTRO SIGNORE Si è benignamente degnata di costituire una Commissione per la revisione del Codice di Diritto Canonico. Tale Commissione è cosí composta: Presidente: Sua Eminenza Reverendissima il Signor Cardinale Pietro Ciriaci, Prefetto della Sacra Congregazione del Concilio; Membri: le Loro Eminenze Reverendissime i Signori Cardinali: Eugenio Tisserant, Prefetto della Sacra Congregazione Cerimoniale; Giuseppe Pizzardo, Prefetto della Sacra Congregazione dei Seminari e delle Università degli Studi; Benedetto Aloisi Masella, Prefetto della Sacra Congregazione della Disciplina dei Sacramenti; Amleto Giovanni Cicognani, Segretario di Stato di Sua Santità; Achille Liénart, Vescovo di Lilla; Giacomo Luigi Copello, Cancelliere di Santa Romana Chiesa; Gregorio Pietro Agagianian, Prefetto della Sacra Congregazione *de Propaganda Fide*; Francesco Spellman, Arcivescovo di New York; Ernesto Ruffini, Arcivescovo di Palermo; Valerio Valeri, Prefetto della Sacra Congregazione dei Religiosi; Fernando Quiroga y Palacios, Arcivescovo di Santiago di Compostella; Paolo Emilio Léger, Arcivescovo di Montréal; Giovanni Battista Montini, Arcivescovo di Milano; Giovanni Urbani, Patriarca di Venezia; Paolo Giobbe, Datario di Sua Santità; Fernando Cento, Penitenziere Maggiore; Carlo Confalonieri, Segretario della Sacra Congregazione Concistoriale; Giulio Döpfner, Arcivescovo di Monaco e Frisinga; Paolo Marella, Prefetto della Sacra Congregazione della Reverenda Fabbrica di San Pietro; Gustavo Testa, Segretario della Sacra Congregazione per la Chiesa Orientale; Ildebrando Antoniutti; Leone Giuseppe Suenens, Arcivescovo di Malines-Bruxelles; Alfredo Ottaviani, Segretario della Suprema Sacra Congregazione del Sant'Uffizio; Francesco Roberti, Prefetto del Supremo Tribunale della Segnatura Apostolica; Andrea Jullien; Arcadio Larraona, Prefetto della Sacra Congregazione dei Riti; Guglielmo Teodoro Heard; Agostino Bea, Presidente del Segretariato *ad Unitatem Christianorum fovendam*; Michele Browne. Tanto si partecipa all'Eminentissimo Signor Cardinale Ciriaci, per Sua opportuna conoscenza e norma."

6. Card. Pietro Ciriaci, Prefect of the S. Congr. of the Council and President of the Conciliar Commission *De Disciplina cleri et Populi christiani*, was also President of the CPI. Regarding Card. Ciriaci, the person, cf. P. PALAZZINI, *Fulgida Porpora. Il Cardinale Pietro Ciriaci*, Rome 1968.

7. Msgr. Violardo, Professor at the Pontifical Lateran University, was Secretary of the CPI *CIC*/1917.

8. Cf. *Acta Synodalia Sacrosancti Concilii Oecumenici Vaticani II*, V. *Processus verbalis*, Pars I (Typis polyglottis Vaticanis 1989), pp. 479–480.

The Commission was no improvisation; rather, the Code Commission was the fruit of mature reflection, as suggested by the fact that among the members were men of the highest caliber, who demonstrated diverse tendencies in the Council (Cardinals Lienart, Ottaviani, Döpfner, Montini, Suenens, Agagianian, Bea, for example), in addition to the most illustrious jurists from the College of Cardinals: Jullien, Roberti, Larraona and Heard. A few days later, in an unsigned article *L'Osservatore Romano* commented, "A simple look at the composition of the Commission shows what the Pontiff had in mind. The Commission is to translate the principles, the new guidelines and the purposes determined by the Ecumenical Council into law. That is why the Holy Father wanted to include a conspicuous number of Fathers from the Council's guiding bodies, all members of the Coordinating Commission, and Archbishops representing the entire globe."[9]

From the beginning John XXIII conceived the *aggiornamento* of *CIC*/1917 not as an act of purely academic speculation, but as the disciplinary "crown" to Vatican Council II,[10] to be carried out with the continuous collaboration of the Episcopate. The composition of the Code Commission also shows the importance John XXIII wanted to give to the presence, among members and consultors, of experts in canon law and pastors of souls directly involved in the responsibilities of governing the universal Church and individual churches. Of the 30 Cardinals who composed the Code Commission at its inception, ten were diocesan bishops. Of the first 70 consultors, 25 were bishops. By the wishes of Paul VI and John Paul II, the same rationale was generally kept in the later phases of drafting, consultation and redrafting the *Schemata*. Furthermore, in the closing phase of reviewing the draft of the entire new Code, John Paul II wished to see even greater participation. Of the 75 members called to the fifth and last Plenary Assembly of the Code Commission in October of 1981, 58 were Archbishops or diocesan bishops.[11] In total, as indicated in the *Praefatio* to the *CIC*, "throughout the entire task there were 105 Cardinal Fathers, 77 archbishops and bishops, 73 secular presbyters, 47 religious presbyters, 3 religious and 12 lay persons from the five continents and from 31 nations who collaborated in the Code Commission as members, consultors or other collaborators."

B. *The Methodological Dilemma*

During the weeks immediately following the creation of the Code Commission, several informal meetings were held in the home of the Cardinal President. Some of us who worked at the Secretariat and other

9. *L'Osservatore Romano*, April 6, 1963, p. 1.
10. Cf. *Primus Oecumenici Concilii Nuntius*, op. cit., p. 68.
11. For a complete listing of the prelates involved, cf. *Comm.* 14 (1982), pp. 117–119.

canonists and conciliar experts also participated.[12] The main subject of the discussions was how to proceed to accomplish the broad mandate received from the legislator. Since we were starting from the basis that the codified system should be retained, what would be the best approach? The Pope had described the update of the Code of Canon Law as *desired* and *expected*. Clearly, the reasons were not only scientific—the advisability of a better theological foundation of law in the Church, the need for and specific juridicity of the canonical norms, etc.—but also, and especially, for pastoral reasons of governance. One reason was already sufficiently clear; although laws are not the same thing as the law, everyone could see that the required esteem and due respect for canonical norms and ecclesiastical discipline had deteriorated.

There had recently been increasing influence from strong subjectivist and relativist philosophical currents that showed no friendliness toward universal truths and objective norms, not to mention canonical norms. Critics who pointed out excessive legalism and juridical rigor also contributed to the deterioration process. In addition, the old *CIC* was incomplete and much of it anachronistic. The reasons it was showing its age and inadequacy may be summarized as follows:

1. *CIC*/1917 had achieved the purpose of being a modern and concise collection of almost all the Church's previous legislation. Although not intentionally, some norms that were hardly applicable anymore had been retained. The defect is understandable, considering the immense amount of material codified. The nine volumes of *Fontes* (which Cardinals Gasparri and Seredi made no claim to being exhaustive) included 26,000 citations from ancient law, 8,500 from Gratian's Decretum and from the Decretals, 1,200 from Ecumenical Councils, 4,000 from Apostolic Constitutions, 11,000 from the records of the Sacred Congregations, and some 800 liturgical books.

2. Over the years there had been an inflated number of dispensations, related, for example, to the so-called minor impediments to marriage, or to certain irregularities in receiving sacred orders, or to the validity or lawfulness of patrimonial transactions, the penalties reserved to the Holy See, and others. Evidently juridical institutions such as dispensations, privileges and special faculties are understandable and useful per se, but using them generally and systematically in the task of governing will bring about a legislative pathology.

3. With successive acts by the Holy See, many of the norms in *CIC*/1917 had been formally abrogated or partially modified (abrogated or derogated), but the changes were not inserted into the text of the Code,

12. Cf. J. HERRANZ, "Génesis del nuevo Cuerpo legislativo de la Iglesia," in *Ius Canonicum* 23 (1983), pp. 491ff.

against the express provision by Benedict XV in art. III of the *Motu proprio* issued shortly after promulgation.[13]

4. There were new juridical institutions that were a reality of life in the Church (for example, the development of associative law), and they had not been inserted in the Code with the necessary variations and additional canons.

5. Codified norms that had perhaps been reasonable at the time the Code was promulgated (for example, suspension of a member of the clergy "ex informata conscientia"), were no longer appropriate or at least caused general perplexity in the juridical, ethical and social context of the 1950's, when the particular juridical-positive importance given to human rights was one of the most significant cultural movements.

6. Progress in juridical science had led many scholars of canonical dogma to wish, among other things, that Church law were also shaped to include technical concepts such as general decrees, instructions, statutes, singular administrative acts so as to better ensure the principle of the hierarchy of norms and to facilitate the correct exercise of the power of governance.

All of these objective and clearly delineated reasons led many canonists to think that the necessary updating of *CIC*/1917 would be a relatively simple task that could be completed in a short period of time. There were even some who, when the Code Commission was created, requested that a complete list of the abrogated canons and the corrected text of others modified by the legislator after 1917 be prepared and published immediately in *Acta Apostolicae Sedis*. After that, the Code Commission would be able to complete its task by adding any necessary norms, which were contained in a relatively small number of sources compared with the number of sources the codifiers actually had to use. Finally, they could rearrange all the canons and make necessary systematic touch-ups.

There was another reason that could also be adduced in favor of this possible method. The scope and substance of suggestions for reform of the Code and ecclesiastical discipline that had been sent in during the preparatory phase of the Council by bishops, dicasteries of the Roman Curia and ecclesiastical faculties were really no greater than anything found in the reasons summarized above.[14]

But was this simple and speedy touchup job with technical improvements the right road for the Code Commission to follow? Would not a more realistic and ambitious purpose and a deeper-reaching methodology require a mandate from the legislator? Would it not be necessary and prudent to avoid the temptation of an easy but precarious immediate result

13. BENEDICT XV, mp *Cum Iuris Canonici*, April 15, 1917, in *AAS* 9 (1917), pp. 483–484.
14. Cf. *Acta et documenta Concilio Oecumenico Vaticano II apparando, series I* (Typis polyglottis Vaticanis 1961).

and instead establish a greater convergence of the desired legislative reform and the results of the ecclesiological thinking taking place in the Ecumenical Council? We have already alluded to John XXIII's presentation of the reform as the *crown* of the Council, and the very origin of the Code Commission, created in the manner described above,[15] clearly shows that the new body had been conceived as a stable instrument and the most adequate for giving juridical form to the Council's disciplinary decisions.

The Code Commission met for the first time in plenary session on November 13, 1963. With these two methodological options before them, the members voted heavily in favor of the second option: "Sodales, post aliquam discussionem, convenerunt cum Praeside, Card. Ciriaci, formales labores recognitionis Codicis differendos esse post conclusionem Concilii Vaticani II, attamen initium dari posse modo privato laboribus praeparatoriis."[16] For this meeting a Report had been prepared on the working method followed by the compilers of *CIC*/1917, but since the historical, doctrinal and technical circumstances of the two Codes were so different, it was decided to delay beginning the legislative reform work properly speaking until all conciliar Decrees had been promulgated. Already in November of 1963, before the dogmatic Constitution *Lumen gentium* was promulgated on November 21, 1964, the Code Commission was aware that the profound ecclesiological changes being initiated at the Council had to precede and guide the work of legislative reform. Meanwhile close cooperation among the Code Commission and the Council became a fact. Not a few proposals and suggestions came from the conciliar Commissions and from the general Assemblies or Congregations at the Council, and these were addressed to the Code Commission because they were specifically normative or juridical. For example, all the canonical norms on marriage and a goodly number of other more strictly disciplinary problems and questions were expressly drawn up for the revision of the Code.[17] All of which showed that a codification that was simply a collection of old norms or a superposition of institutions and new canons upon the juridical and ecclesiological system of 1917 would never meet the new pastoral needs of the Church nor the doctrinal changes that the Council was contributing.

15. A few months later, December 8, 1963, in addition to the 30 Cardinals appointed to the Commission at its inception, John XXIII named 12 more members, an Eastern Patriarch and 11 diocesan Archbishops. The Cardinals were: Ignacio Gabriel Tappouni, Patriarch of Antioch, Syria; Normann T. Gilroy, Archbishop of Sydney; Santiago de Barros Cámara, Archbishop of Río de Janeiro; Josef Frings, Archbishop of Cologne; Antonio Caggiano, Archbishop of Buenos Aires; Stefan Wyszynski, Archbishop of Gniezno and Warsaw; Valerian Gracias, Archbishop of Bombay; Franz König, Archbishop of Vienna; Albert G. Meyer, Archbishop of Chicago; Joseph Lefèbvre, Archbishop of Bourges; Bernard J. Alfrink, Archbishop of Utrecht; Laurean Rugambwa, bishop of Bukoba (*L'Osservatore Romano*, June 8, 1963, p. 1).

16. *Comm.* 1 (1969), p. 36.

17. Cf. V. FAGIOLO, *Il Codice del postconcilio* (Rome 1984), p. 31.

The basic approach was confirmed by Paul VI in his discourse on November 20, 1965 at the conclusion of the second Plenary Assembly of the Code Commission, which had been held specifically to commission the legislative reform formally and publically. Because, the Pope stated, in the process of legislative revision "*Codex Iuris Canonici veluti ducis munere fungitur...*" some have inadequately interpreted it in a partial, unilateral sense. Comparing this statement by Paul VI with a statement he made to the Rota twelve years later,[18] they felt that the legislator had a smaller vision in 1965 of what the revision of the Code should be. But this alleged comparison is not legitimate; it would show a *change* in the legislator's mind or in the purpose and development of the Code Commission's work. To understand the statement, we must look at the entire quotation from the first of the two discourses, because, after alluding to *CIC*/1917, Paul VI said in 1965 to the Code Commission charged with the legislative reform, "*Concilium Oecumenicum Vaticanum Secundum quasi lineamenta praebet operis novi.*"

C. *The Body of Consultors and the "Quaestiones fundamentales"*

The explanation given above also shows that the President and the Secretary of the Code Commission wished to include a large number of broadly representative consultors and persons with both scientific competence and a familiarity with the letter and spirit of the conciliar Decrees. Thus nearly all the secretaries of conciliar Commissions who dealt with matters related to discipline were among the 70 consultors named by Paul VI on April 17, 1964: Willy Onclin (bishops and diocesan governance), Alvaro del Portillo (discipline of the clergy), Giuseppe Rousseau (institutes of consecrated life), Achille Glorieux (apostolate of laity), Raimundo Bidagor (marriage), Albino Galletto (means of social communication), Saverio Paventi (missions), and others. There were also conciliar experts outstanding for their contribution to the work of Vatican II: Klaus Mörsdorf, Jorge Medina, Giorgio Berutti, O.P., and others.[19]

The first general meetings of the consultors took place from May 6–8, 1965 "ad consilia inter se communicanda de praeparatoriis laboribus, qui utiliter expedienti viderentur."[20] The three questions to be studied were the following:

18. "Codicis Iuris canonici recognitio non esse potest sola emendatio prioris quatenus res in aptum ordinem rediguntur, iis additis, quae inducenda visa sunt, atque iis omissis, quae non amplius vigent, sed instrumentum vitae Ecclesiae quam maxime accommodatum post celebratum Concilium Vaticanum II evadat oportet," in *Comm.* 9 (1977), p. 24.

19. By 1968 there were 123 consultors. All told, there were 183 who worked on the *Code* in the course of its development. Cf. the complete list in F. D'OSTILIO, *E' pronto il nuovo Codice di Diritto Canonico* (Vatican City 1982), pp. 97–101.

20. Letter of convocation from Card. Ciriaci, President, March 22, 1965 (Prot. N. 151/65).

1. Usefulness and timeliness of drafting a single Code for the entire Church or two Codes, one for the Latin Church and the other for the Eastern Catholic Churches. In case of two Codes, examining the possibility of preceding the two Codes with a *Fundamental Code*. A study of this last possibility was proposed by Paul VI to Card. Ciriaci upon a suggestion made by Card. Döpfner, Archbishop of Munich.[21] The idea resulted in the long and laborious study *process* of the *Lex Ecclesiae Fundamentalis* and in a way was inspired by the constitutional legal technique of States, but it was especially inspired by the ecumenical hopes of achieving a minimal fundamental legislation that would of course be faithful to Christ's foundational wishes and could be accepted by all Churches and Christian communities desirous of re-establishing full communion with the Catholic Church.

2. Bylaws and regulations for the Code Commission concerning how to form its various internal bodies (Card. Döpfner had also made suggestions on this matter) and concrete procedures for performing the work.

3. How to distribute the various parts of the *CIC* or homogeneous groups of canons to the subcommissions that would be formed, even though provisionally, with the hope of later being able to establish the final organization of the new legislative corpus.

These meetings were directed by Card. Ciriaci and the new Secretary of the Code Commission, Father Raimundo Bidagor, S.J.[22] In addition to a general exchange of opinions on these questions, three subcommissions of consultors were formed to study each of the three questions in more detail. Their respective secretaries were Father Daniel Faltin, O.F.M., Msgr. Aurelio Sabattani and Father Giuseppe Rousseau, O.M.I. They met separately in the succeeding months as often as necessary, until completion of the three reports, which were combined into a single document entitled *Quaestiones fundamentales* by the Secretariat of the Code Commission.[23] The fascicle was printed in October and sent to all the Cardinal members of the Code Commission[24] for examination, together with the convocation to the second Plenary Assembly, to be held on November 25, 1965, immediately after the closure of Vatican Council II.

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21. Letter of February 4, 1964, filed in the archive of the PCCICOR.
22. On February 23, 1965, Rev. Bidagor, S.J., Dean of the Faculty of Canon Law at the Gregorian University, succeeded Msgr. Giacomo Violardo (appointed Secretary of the S. Congr. on the Sacraments). To assist Father Bidagor, who was an outstanding canonist, but of advanced age, some months later, November 14, 1965, Paul VI also appointed an Adjunct Secretary, Msgr. Willy Onclin, Dean of the Faculty of Canon Law at the University of Louvain.
23. Code Commission, *Quaestiones fundamentales* (Typis polyglottis Vaticanis 1965), pp. 1–60; cf. also *Comm.* 1 (1969), p. 37.
24. Note that, as further proof of the interest with which he followed the reform of canonical legislation inherited from John XXIII, on November 14, 1965 Paul VI added another 21 Cardinals to the 42 existing members of the Code Commission (cf. *L'Osservatore Romano*, November 14, 1965, p. 1).

The questions previously studied by the consultors and proposed for discussion and vote by the members of the Code Commission were formulated as follows:

"I. An conficere expediat unum vel duplicem Codicem Iuris Canonici, distinctum pro Orientalibus et pro aliis, simul cum aliquo Codice Fundamentali.

"II. An possit esse basis studii Codicis Fundamentalis textus in prima Relatione propositus.

"III. An parandus sit Ordo quo labores procedant sicut in secunda Relatione indicatur.

"IV. An et quomodo approbanda sit divisio materiae pertractandae prout in tertia Relatione suggeritur."[25]

The first question was certainly the most important, and in a way it was prejudicial to the others. Furthermore, it was a problem that interested the entire Catholic Church, and so the Patriarchs Paul II Cheikho of Babylon of the Chaldees, and Ignatius Peter XVI Batanian of Cilicia of the Armenians, were also invited to this plenary meeting in addition to the Eastern Cardinal members of the Code Commission, Ignatius Gabriel Tapponi, Syrian Patriarch of Antioch; Maximus IV Saigh, Maronite Patriarch of Antioch; Stephen I Sidarouss, Coptic Patriarch of Alexandria; and Josyf Slipyj, the Major Ukranian Archbishop of Leopolis (Lviv).

Although some members of the Plenary Assembly said that lack of time did not allow the necessary depth of study, all expressed their opinions, which may be summarized as follows: *a)* The great majority of Fathers (33 against and five only in favor of a single Code of Canon Law) voted for two different Codes, one for the Latin Church and the other for the Eastern Churches.[26] *b)* A majority (27 Fathers) also approved studying the possibility of drawing up a constitutional or Fundamental Code or Law

25. *Comm.* 1 (1969), p. 42.

26. The relevant text from the proceedings of the Plenary Assembly, signed by Father Bidagor, Secretary, and Msgr. Onclin, Adjunct Secretary, reads in part: "Argumenta quae allegantur in favorem huius sententiae praesertim sunt sequentia: unitas Ecclesiae sane requirit ut habeatur unitas in fide, sed non requirit unitatem disciplinae, sicut nec in liturgia: Codex autem semper remanere debet norma agendorum, non autem est norma credendorum; unus Codex, qui simul pro Latinis et Orientalibus valeret, esset gravis error, etiam sub respectu oecumenico; insuper omnino contrarius esset tum litterae tum spiritui Constitutionis 'Lumen gentium' et Decreti de Ecclesiis Orientalibus, in quibus affirmatur Ecclesias Orientis sicut et Occidentis iure pollere et officio teneri se secundum proprias disciplinas regendi; ad facilitatem studiorum quod attinet, potest haberi unica editio, quae textum duorum Codicum contineat."

for the entire Church.[27] They agreed that the project in the fascicle *Quaestiones fundamentales* would not be taken as indicative but only as a first working basis.

The other two subjects, the possible Regulations and bylaws and the distribution of the subjects of *CIC*/1917 to subcommissions, were scarcely examined. It was decided that they should serve as a preliminary orientation for the now official beginning of the work to revise the CIC.

D. *First Consultation with the Episcopate and Formation of Study Groups*

With this second Plenary Assembly and Paul VI's Audience and Discourse to the Code Commission on November 20, 1965, official and public work on the legislative reform began. In January 1966 three initiatives put the orientation received into practice. The three initiatives were the following: to request the direct collaboration of the entire Episcopate in the work of revising the *CIC*, to create study groups for consultors to begin preparing the legislative *schemata*, and simultaneously to begin preparing the new project, the so-called *Codex* or *Lex Fundamentalis*.

The President of the Code Commission and all of us who were working on it were fully convinced that because the legislative reform had been desired and ordered by the Roman Pontiff, final approval and promulgation of the new legislative corpus should be the fruit of true primatial acts of the Successor of St. Peter, using his supreme personal power. However, there was at the same time a keen awareness of the opportunity and the

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27. In support of the content of the *Codex fundamentalis* and the form it was to take, the following arguments and considerations were adduced in the proceedings of the Plenary Assembly:
"Argumenta in favorem huius Codicis fundamentalis allegantur: hoc Codice fundamentali elucebit Ecclesiae unitas; opportunum etiam esse videtur pro ipso oecumenismo ut talis Codex fundamentalis conficiatur, ut omnes sciant quaenam sunt fundamentalia quae ad Ecclesiae ordinationem pertinent.
"Animadversiones de hoc Codice fundamentali factae: a) hic Codex fundamentalis debet continere solas fundamentales dispositiones omnibus Ritibus communes, sed simul debet remittere ad particularitates unicuique Ritui proprias (unus Pater); b) Codex fundamentalis debet normas practicas statuere de ordinatione potestatum in Ecclesia, vel potius in exercitio potestatum, scilicet legislativae, administrativae et iudiciariae, in Ecclesia (unus Pater); c) in eo distingui debent v.g. quae ad ipsum Primatum pertinent et ea quae ad exercitium Primatus attinent, quarum quidem non pauca Auctoritatibus Ecclesiarum conceduntur (unus Pater); d) Codex fundamentalis certo non potest esse tractatus theologiae, sed debet esse Codex legum seu normarum practicarum, licet quaedam leges in veritatibus theologicis nitantur (duo Patres); e) Codex fundamentalis sola fundamentalia quaedam complecti debet, quibus omnes christifideles certo tenentur, non vero alia, ne ulla adsit suspicio latinisationis Ecclesiarum orientalium (unus Pater); f) in hoc Codice conficiendo, audiri debent Orientales (unus Pater); g) in hoc Codice fundamentali conficiendo, audiri debent etiam theologi, quia in eo subiacens est theologia de Ecclesia (unus Pater)."

need to carry out the legislative reform work in constant contact with the entire Catholic Episcopate. Therefore, on January 15, 1966, Card. Ciriaci sent a letter to the Conferences of Bishops requesting their direct collaboration in the task that the legislator had entrusted to the Code Commission, *"ita vero ut in opere Codicis recognitionis activam quantum fieri possit partem habeant universi mundi Episcopi."*[28] This request was in no way a mere formality or simple show of courtesy, but asked for the bishops' collaboration on three specific points: 1) to formulate all proposals "de revisendo Codice" they wished to submit for technical study by the Code Commission; 2) to suggest guidelines for the best way to maintain continuous contact between the Conferences of Bishops and the Code Commission during the work; 3) and, to submit to the Code Commission Secretariat a list of canonists in their respective countries from which new consultors or collaborators could be chosen and named. The letter closed with these significant words: *"Spes quidem ita validissima adest fore ut, cunctis Episcopis ex toto catholico orbe cooperantibus, redactio novi Codicis efficienter progrediatur atque feliciter absolvatur."* There were numerous proposals concerning the first point. But suggestions concerning the contact between the bishops conferences and the Code Commission were fewer, less consistent and less representative than were the comments sent by the Episcopate when, years later, it was consulted about the text of the *schemata* for the canons. The third point of Card. Ciriaci's request drew the greatest and most specific response: with all the names suggested by the Conferences, the number of consultors from the different geographical areas and schools was increased.[29]

On January 19, 1966, based on the preferences indicated by the consultors themselves, ten study groups were formed according to the provisional distribution approved at the Plenary Assembly. Later, a central Group for coordinating the work was created. It was made up of the reporters from all Groups. Later they were also charged with examining the new project of the *Lex Ecclesiae Fundamentalis* and the *Principia quae Codicis Iuris Canonici recognitionem dirigant.*

The ten study Groups were each composed of 8–15 consultors and were distributed as follows: *De normis generalibus*; *De clericis* (later called *De Sacra Hierarchia*); *De religiosis* (later called *De Institutis vitae consecratae per professionem consiliorum evangelicorum* and before, *De institutis perfectionis*); *De laicis* (later called *De laicis deque associationibus fidelium* and *De christifidelium iuribus et associationibus deque laicis*); *De Magisterio ecclesiastico*; *De Sacramentis* (except marriage); *De matrimonio*; *De bonis Ecclesiae temporalibus* (later called *De iure patrimoniali Ecclesiae*); *De iure poenali*; *De processibus*. In 1967

28. Letter Prot. N. 242/66, later published in *Comm.* 1 (1969), pp. 42–43.
29. See above, note 19.

a special Group was formed and at first named *De quaestionibus specialibus Libri II*. They were to study possible new canons on a number of mainly technical matters that in *CIC*/1917 had been covered in *Liber* II (*De personis*); but because they were general norms, it seemed best from the beginning to include them in *Liber* I of the future Code if *Liber* I was to continue being called *De normis generalibus* as it was in the earlier Code. The subjects included canons on physical and juridical persons, juridical acts, ecclesiastical offices and ordinary and delegated powers.[30] Still later, in 1971, two more study Groups were formed: *De procedura administrativa* and *De locis et temporibus sacris deque cultu divino*.

An attempt was later made to publish the detailed *process* of the work of the study Groups in the official publication of the Code Commission named *Communicationes*. The successive changes in the names of the Groups reflect the maturing of ideas and the accumulation of experience that suggested progressive improvement in the work. For example, because of the clear doctrinal distinction between the concepts of faithful and lay, in the first session of the *De laicis* Group it was found that before taking on the specific rights and obligations of laypersons they had first to tackle a preliminary question. As indicated in the *Principia*, that was the question of the fundamental rights and obligations of "omnium christifidelium," clerics and laypersons alike. When the personal aspect was separated from the institutional, it was also found that legislation on associations of faithful could not be included under the title *De laicis* as it had been in *CIC*/1917 since those associations were not composed only of laity but could also be clerics or even mixed. When the name of the *De institutis perfectionis* Group was changed, from *De religiosis*, an important option was opened up for the arrangement of the canons whereby the concept of "religious institute" and the equivalent "society of common life without vows" became the broader concept of "institute of perfection" and then "institute of consecrated life." Thus the number of institutions to whom the norms of the *schema* were applicable was increased, while at the same time their legitimate variety was respected.

For preparing the *schema* of the Fundamental Code or Law, and taking into account the opinions and comments of the Plenary Assembly and some earlier private proposals, the Cardinal President charged Msgr. Onclin with drawing up a new draft as a basis for study and discussion. This project was entitled *Codex Ecclesiae Fundamentalis (Prima quaedam adumbratio propositionis)* and was submitted July 26–27, 1966 for study

30. To this particular study group, composed of consultors from the Group *De normis generalibus*, was given, in succession, the names *Quaestiones speciales Libri II*, *De personis physicis et moralibus*, *De personis physicis et iuridicis* and, finally, when its normative function had merged with the other general norms, *De normis generalibus deque personis physicis et iuridicis*.

by a private commission created by Card. Ciriaci himself. Thus began a laborious *process* of study. Its basic stages were the following.[31]

— A new draft of the *schema* was rewritten based on comments submitted. Its title was *Altera quaedam adumbratio propositionis* (January 1, 1967) and it was examined by the central Group of consultors (session of April 3–7, 1967).

— The study Group called *De Lege Ecclesiae Fundamentali* was formally created (April 27, 1967).

— Three working sessions of the special study Group were held, during which it completed preparation of the first *Schema Legis Ecclesiae Fundamentalis cum Relatione* by June 1969.

— Cardinal members of the Code Commission and members of the ITC were consulted about the project (1970).

— Two more sessions of the study Group *De Lege Ecclesiae Fundamentali* were held to amend the *schema* in accordance with comments received (1970).

— The *Schema Legis Ecclesiae Fundamentalis. Textus emendatus cum Relatione* was completed. Then it was sent for consultation to the entire Catholic Episcopate, the dicasteries of the Holy See and the Union of Superiors General (1971).

— The comments received were studied and a *Schematis secundum generales Episcoporum animadversiones emendati quaedam adumbratio* was prepared (1972-1973).

— The new *schema* was revised by a special mixed East-West Commission established by Paul VI and presided by Card. Felici, with Card. Perecattil as Vice President at the sessions of April 1974, March 1975 and February 1976.

— A new *Schema emendatum,* based on the revision, was prepared and sent for consultation to all members of the Code Commission and the PCCICOR in 1976-1977.

— Comments received by the special mixed Commission were studied. The final *schema* of the *LEF* was completed at the sessions of September 1979 and January 1980.

— The *Relatio de labore in apparando schemate LEF, de eiusdem contentu atque de quibusdam difficultatibus agitatis adversus opportunitatem ipsius LEF* was completed January 5, 1981.

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31. For two reasons we consider it appropriate to briefly summarize here the work of the *LEF*: so as to be able, later on, to chart in isolation the legal *process* which the preparation for the new *Code* followed, and to highlight how these two studies (of the *CIC* and the *LEF*) proceeded in parallel to one another.

— A special *Coetus Praesulum* met. It was created by John Paul II to deliberate on whether to promulgate the final draft of the *Lex Ecclesiae Fundamentalis seu Ecclesiae Catholicae universae Lex Canonica Fundamentalis* (March 3, 1981).

The project for a *Lex Ecclesiae Fundamentalis* was eventually abandoned after its many vicissitudes and after the Audience granted by the Holy Father to the Card. President and then Secretary of the Code Commission, His Excellency Msgr. Castillo Lara on July 1, 1981, although perhaps not definitively. "Bene, tantus labor non sit cassus," said the Pope to Card. Felici at the close of the Audience.[32] And it was found to be quite true, for 38 of the 86 canons of the *LEF*'s last *schema* were immediately included in the new *CIC*.[33] They contained norms on the supreme authority of the Church, the rights and obligations of all faithful, etc., that could not be omitted from the new legislative corpus of the universal Church.

II. The Council's Postulates and "Principia Directiva"

A. *Specific Conciliar Postulates*

The ecclesiological doctrine of Vatican II inspired the criteria and principles for guiding the legislative reform, but although and perhaps even because it was chiefly pastoral doctrine, in the same text of its documents the Council also expressed a good number of specific, strictly canonical postulates and norms. In the conciliar Decrees there were indeed quite a few new juridical institutes, even explicit mandates referring to the new codification. *Christus Dominus,* 44 concludes, "The Sacrosanct Council decrees that when the Code of Canon Law is revised, the laws must be adequately defined in accordance with the principles set forth in this Decree. Advice from commissions or the conciliar Fathers must also be taken into consideration." *Apostolicam actuositatem,* 1 states, "In the Decree the Council proposes to explain the nature, character and variety of the secular apostolate, to state fundamental principles and give pastoral instructions to give it greater effect; all of which is to be held to be the norm for revising canon law in matters concerning the secular apostolate." Instructions of this type are also found in *Presbyterorum Ordinis,* on the life and ministry of presbyters; in *Perfectae caritatis,* on institutes of consecrated life; and in other documents.

32. Cf. the *Foglio d'Udienza,* filed in the archive of the Code Commission.
33. Later, these very canons were also included in the *Codex canonum Ecclesiarum Orientalium,* promulgated October 18, 1990.

The Code Commission's efforts to follow conciliar mandates is evident upon examination of the sources of the new Code.[34] In addition to normative material on disciplinary and juridical matters directly provided in the conciliar documents, reference had to be made to new institutions or bodies and to the strictly juridical criteria explicitly sanctioned by the Council.

The following are among the referenced institutions:

— The College of Bishops. Based on *Lumen Gentium*, and the respective *pen*, it is the explicit subject, together with the Roman Pontiff (cc. 331–335), of the supreme authority of the Church. Its official acts are solemnly presented at Ecumenical Councils (cf. cc. 336–341);

— The Synod of Bishops. Under the auspices of *Christus Dominus*, 5, it was established by Paul VI in the mp *Apostolica sollicitudo*, of April 15, 1965, as an assistant and advisory body to the Pope in governing the universal Church (cf. cc. 342–348);

— Conferences of Bishops. They are mainly dealt with in *Christus Dominus*, 37–38 (cf. also *ES* I, 41, of August 6, 1966, and *REU*, 50–51, of August 15, 1967), which defines and specifies their structure, jurisdiction and purpose (cf. cc. 447–459);

— Personal prelatures. They are covered in *Presbyterorum Ordinis*, 10 and *AG*, 20, notes 4, 27 and 28 (cf. also *ES* I, 4 and *REU*, 49 § 1), for carrying out peculiar pastoral or missionary activities (cf. cc. 294–297);

— Presbyteral councils. Sanctioned in *Christus Dominus*, 17, and *Presbyterorum Ordinis*, 7, they were established under the norms of *Ecclesiae Sanctae* I, 15, to assist bishops in diocesan governance (cf. cc. 495–502);

— Pastoral councils. Treated in *Christus Dominus*, 17 and *Ecclesiae Sanctae* I, 16, their purpose is to study and propose operating conclusions with respect to diocesan pastoral activity (cf. cc. 511–514);

— Other bodies (commissions and councils) that refer to particular aspects of the diocesan pastoral; secretariats and permanent commissions for Christian unity, promotion of justice and peace in the world, etc. Also under the auspices of the Council, they are not explicitly regulated by the Code, but they are included in the special law on the organization of the Roman Curia (cf. c. 360).

34. Upon the dissolution of Code Commission with the formation of the "Pontificia Commissio Codici Iuris Canonici Authentice Interpretando" (cf. mp *Recognito Iuris Canonici Codice*, January 2, 1984), the latter assumed the task of overseeing the preparation of the *Codex Iuris Canonici fontium annotatione et indice analytico-alphabetico auctus* (Vatican City 1989).

The list could be longer if we added to the institutions the strictly juridical criteria explicitly sanctioned by the Council. The following are among the most relevant and significant:

— Abolition of the system of benefices, which was regulated by more than eighty canons in *CIC*/1917, and reform of ecclesiastical offices (cf. *PO*, 20);

— Principles and norms for revising and erecting ecclesiastical circumscriptions (cf. *CD*, 39–41);

— Provision for pastoral functions and interdiocesan ecclesiastical offices (cf. *CD*, 41 *et passim*);

— Reform of the institute of incardination (cf. *PO*, 10);

— Norms on the constitution and governance of major and minor seminaries (cf. *OT*, 3-7);

— Norms on spiritual life and the permanent formation of sacred ministers, their adequate distribution and social assistance (cf. *PO*, 10, 18–20 *et passim*);

— Norms on renouncing an episcopal ministry (cf. *CD*, 21);

— Instituting a permanent diaconate (cf. *LG*, 29);

— Full juridical recognition of the right to associate in the Church and norms on the various types of associations of the faithful (cf. *AA*, 19 and 24; *PO*, 8);

— Specific statements and details on many fundamental rights of the faithful (cf. *LG*, 9, 32, 33, 37; *AA*, 3, 7, 19, 24; *GS*, 43; etc.).

B. *Guiding Principles*

In addition to expressing these explicit Council mandates in canons, it was clearly necessary from the beginning to imbue the contents of all the *schemata* commended to the study Groups with the ecclesiastical doctrinal requirements of Vatican Council II and at the same time for canonical legislation to maintain its own characteristics. Therefore, following a suggestion from Paul VI to Card. Ciriaci, in October of 1966 the Secretariat of the Code Commission took under consideration the advisability of drawing up doctrinal and technical criteria or principles that would serve to guide all the preparatory work for the new Code. They requested the consultor members of the coordination Group to send *in scriptis* all personal proposals they considered opportune. It was the new President of the Code Commission, Archbishop Pericle Felici,[35] who ordered the pro-

35. Archbishop Pericle Felici, titular Archbishop of Samosata, and Secretary General of Vatican Council II, on February 21, 1967 succeeded Card. Ciriaci, who had died on December 30, 1966. Created Cardinal on June 26, 1967, he was also appointed President of the Code Commission that same month, on the 30th.

posals, completed by the Secretary, Father Bidagor, and arranged in a single fascicle, to be studied and discussed at the meeting that the central or coordinating Group held on April 3-8, 1967.

The document that resulted from the meeting, *Principia quae Codicis Iuris Canonici recognitionem dirigant*, was sent to Paul VI a few days later. The Pope examined it together with Archbishop Felici, whom he asked to reread the text, at the Audience granted to the Pro-President of the Code Commission on the 22nd of April.[36] At the Audience, Paul VI reaffirmed his wish that the guidelines for the new codification be submitted for examination by the first General Assembly of the Synod of Bishops, which was scheduled for October of that year. And so it was that the ten Principles were approved by a large majority of the synodal Fathers.[37] The guidelines were very useful, at least as doctrinal orientation, in the preparatory phase of the *schemata*, in the revision phase after consultation, and finally in the phase of preparing them for the last Plenary Assembly of 1981 and in writing up the final draft of the new Code. So Card. Felici stated in 1974.[38] Even those who were strongly negative about the Code Commission's work have had to admit the technical validity and pastoral importance of the guidelines. When there was criticism, it referred rather to what some considered to be an inadequate application of some of the principles.[39]

Setting aside the historical review for the moment, it appears necessary to comment on some of the *Principia*. They were published by the Code Commission in the first volume of *Communicationes*[40] and summarized in the Preface to the Code. Clearly not all the guidelines in the ten points were equally important in preparing the new norms. However, even the principles that were not sufficiently defined and developed provided the necessary basis for a technical and doctrinal enrichment that matured throughout the work. Here we should mention the guidelines that had the greatest influence.

1. *The Juridicity of canon law*

It is clear that the juridical nature of the canonical norms, which was stated in the first of the guiding Principles, was duly maintained in the new Code. There were a few anti-juridical opinions that were somewhat

36. Cf. J. HERRANZ, "Presidente della Pontificia Commissione per la revisione del CIC," in *Il Cardinale Pericle Felici* (Rome 1992), pp. 195–223.

37. Cf. *Comm.* 1 (1969), p. 100.

38. "Orationem a Societate Austriaca Iuris Ecclesiastica," January 18, 1974, in *Comm.* 6 (1974), p. 108.

39. Cf. R. HUYSMANS, "Osservazioni critiche di un canonista sul progetto del nuovo diritto canonico," in *Concilium* 17 (1981), pp. 33–43.

40. This journal was an outgrowth of the *Conventus Internationalis Canonistorum*, which was sponsored by the Commission for the Revision of the *CIC*/1917 and met in Rome May 20–25, 1968.

inspired by the radical rejection expressed by the Protestant theologian Rudolf Sohm. They were counteracted by the vigorous efforts of the Code Commission, especially consultors like Mörsdorf, Lombardía and Bertrams, to point out the need for and legitimacy of law in the Church. They also showed the specific nature of the law's juridicity and the close relationship between divine law, Revelation and canon law. The juridical nature of canon law is based on the social nature of the Church and on the power of governance or jurisdiction conferred by Jesus Christ upon the Hierarchy. But it is also and more concretely based on the fact that the norms of the Code have the essential purpose of establishing and protecting the obligations and rights of Pastors and the other faithful. Everything in the Code is designed for the orderly and peaceful co-existence of the people of God and the salvation of souls, "*quae in Ecclesia suprema semper lex esse debet*" (c. 1752, the last canon of the *CIC*).

In the final analysis, the juridical element resides in the very nature of the Church, a community of faith, hope and charity, and at the same time a visible body, a hierarchical society whereby the Spirit of Christ spreads truth and grace to all (cf. *LG*, 8). The juridical nature of canonical legislation shows the complex relationship of communion—in both horizontal and vertical senses—among the members of the people of God. The relationship is horizontal with the participation in the goods that the Church dispenses and in the achievement of the same ends. It is vertical for the hierarchical communion between individuals, their various groups, pastors and God. It is a relationship of ecclesial communion to which Christians belong through faith and baptism. It has it roots and center in the Holy Eucharist, which is the source and creative force of a special unity among all members of the Church.

The law of the Church has a specific juridicity that is particular and not identifiable with purely human law. Thus the norms in the Church's Code refer not only to acts and relationships that are evident in the external forum, but also, as stated in the second guiding Principle, to the necessary norms for the internal forum when the supreme law of the *salus animarum* so requires. The work of the new codification cannot fail to show the tensions that have traditionally existed between law and morality, between what is public and what is occult, in defining the object of canon law. It is widely recognized that when canonical science generally delimits the internal and external forums, it is above all echoing the distinction between what is public (what has social relevance and is manifest) and what is occult (limited to a private environment and without obvious or at least direct manifestation). This excludes the intimate environment of the conscience, which belongs more to morality alone. It places the accent on the visible Church and on behavior that has external effects on the framework of relationships of the people of God.

2. *"Communio" and co-responsibility*

As soon as the new Code was promulgated,[41] something that the legislator had already noted[42] was being pointed out. The ecclesiology of communion developed by Vatican Council II was duly set forth with regard to discipline, in the new legislative corpus of the Latin Church and especially in *Liber* II (*De Populo Dei*). It suffices to see how the first canon of *Liber* II (c. 204), the true backbone of the entire Code, presented the parameters of a fundamental concept in a perfect theological-juridical synthesis; but as presented in c. 87 of *CIC*/1917 the concept had lacunae. We are referring to the concept of *christifidelis*, of the *persona in Ecclesia Christi*, and it is at the very foundation of the ecclesiastical community. Canon 204 § 1 reads, "Christ's faithful are those who, since they are incorporated into Christ through baptism, are constituted the people of God. For this reason they participate in their own way in the priestly, prophetic and kingly office of Christ. They are called, each according to his or her particular condition, to exercise the mission which God entrusted to the Church to fulfill in the world." Starting with this basic concept of the *subject* of ecclesiastical communion, which is communion in faith, hope and charity, and also communion in the sacraments and ecclesiastical governance (cf. c. 205), the new Code begins to structure its norms:

1. As personal juridical statutes, which begin with one that affirms the fundamental rights and obligations of all the faithful, that make "vera aequalitas quoad dignitatem et actionem" (c. 208) real, which in turn starts with the primary obligation of all to live in ecclesiastical communion (c. 209).

2. As structures that embody and organize the people of God, with a harmonious relationship between the universal Church and particular churches "in quibus et ex quibus una et unica Ecclesia catholica exsistit," (c. 368) which is also the wording in *Lumen Gentium* 23. The harmonious relationship is seen mostly in two forms: in hierarchical communion, which unites bishops, who are successors to the Apostles, with the Supreme Pontiff, who is the successor to St. Peter, in a College (c. 330); and in the solicitude of bishops for the universal Church (c. 782 § 2), with the primary duty of each in his own particular church to promote and foster the discipline which is common to the people of God (c. 392 § 2).

In perhaps too radical a contrast to *CIC*/1917, some said that the *protagonist* subject of the new legislative corpus is no longer the ecclesiastical organization, but the faithful. It would perhaps be more realistic to say

41. Cf. R. Castillo Lara, "Discurso en el acto de Presentación del nuevo Código de Derecho Canónico," February 3, 1983, in *Comm.* 15 (1983), pp. 27–35; J. Hamer, "Il Codice e il Concilio," in *L'Osservatore Romano*, January 26, 1983, p. 1.

42. Cf. John Paul II, *SDL*, and "Discurso de Presentación del nuevo Código a la Iglesia," February 3, 1983, in *Comm.* 15 (1983), pp. 9–16.

that the protagonist subject of the new code is the people of God, not just the governing structures, but the "communitas fidelium" organized hierarchically as the Church, in which all faithful are *active members*, and all faithful are *co-responsible* for achieving the Church's mission, depending upon a variety of personal conditions and offices. This doctrinal reality was emphatically underlined by the council (*PO*, 2; cf. also *LG*, 32; *AA*, 2 *et passim*). Juridically it could be defined as *the principle of co-responsibility* broken down into two fundamental and complementary considerations, each of which has a particular influence on the norms of the new Code. The two considerations cannot be disregarded; they are the following:

1. There is an *equality* in the people of God that we can describe as fundamental or radical. In *Lumen Gentium*, 32 we read, "Although by Christ's will some are established as teachers, dispensers of the mysteries and pastors for the others, there remains, nevertheless, a true equality between all with regard to the dignity and to the activity which is common to all the faithful in the building up of the Body of Christ." Canonists very familiar with the ecclesiological development of the Council[43] immediately pointed out the juridical scope of this statement of doctrine. The Code Commission said in the sixth guiding Principle, "For the future Code, in consideration of the radical equality that must reside among all faithful because of their human dignity and their baptism, it is proposed with good reason to set forth a *juridical statute* common to all before stating the rights and obligations that belong to the various ecclesiastical offices."[44] That is the origin of the title "De omnium christifidelium obligationibus et iuribus" (cc. 208–223).

Some of the topics set forth under that title, each with its foundation in specific sources from conciliar documents, are the following: the right to the apostolate, the right to the sacraments and the spiritual goods of the Church, the right of association, the right of initiative and promotion of apostolic activity, the right to petition the ecclesiastical administration, the right to a solid religious doctrinal formation depending upon one's condition in life, the faculty to give counsel, the right to free choice of state, the right to practice one's own form of spirituality within the Church's common doctrine. Along with the praise and tributes given this positivization in the Code of the fundamental rights and obligations of all faithful, there has been a small amount of sharp criticism. For example, some have regretted that the following two so-called rights were not included: the right of women to receive the sacrament of orders and the right of the faithful to be informed of all matters of ecclesiastic governance by the Hierarchy. Others criticized the exclusion from the Eucharist

43. Cf. especially A. DEL PORTILLO, *Fieles y laicos en la Iglesia. Bases de sus respectivos estatutos jurídicos*, Pamplona 1969 (English edition: *Faithful and Laity in the Church*, Shannon 1972).
44. Cf. *Comm.* 1 (1969), pp. 82–83.

of divorced Catholics and of Catholics united in civil marriage, and the norms restricting cases of collective absolution in the sacrament of Penitence as "unjust discrimination," contrary to the basic equality of all faithful.[45] Of course, those critics generically invoked "the spirit of the Council," but were unable to cite a single conciliar or subsequent Magisterial text in support of their theses.

2. The second consideration referred to above is that besides the fundamental equality of all faithful there is a diversity in the people of God that might be said to be functional: diversity of juridical states and condition, of office, and so forth. But, above all, there is an ontological diversity, from divine law, based on the sacrament of orders: "So that all faithful may be united in a single body in which, however, not all members fill the same office (Rom 12, 4), Our Lord made some of them ministers so that within the society of faithful they would have the sacred power of Order" (*PO*, 2; cf. *LG*, 18 *et passim*). These ministers, besides the common priesthood conferred by baptism, have received hierarchical priesthood; they perform *nomine et auctoritate Christi Capitis* the triple function of teaching, sanctifying and governing the people of God with personal power *ratione Sacramenti* (cf. *LG*, 21; *PO*, 2), although lay faithful may cooperate in the exercise of this power, as amply provided in the new Code.[46]

This doctrinal reality means that the principle of co-responsibility, that is, participation of all faithful in the Church's unique mission, is not understood nor applied in the new legislative corpus in a *democratic* sense. In recent years, after starting from a true supposition, the co-responsibility of all faithful, an erroneous conclusion has frequently been drawn—the democratic participation with deliberative function of all faithful in the governance of the Church, which is actually the proper task of the Hierarchy. Thus the principle of co-responsibility, founded on a common priesthood, should be substituted by a different principle that in the terms used by different authors is *the synodal principle,* the principle of *broadened collegiality,* the principle of *democratic participation* or, simply, the principle of *governance co-responsibility.* In *Concilium* it was written, "Fulfilling this requirement would bring the advantage of eliminating the opposition and distinction that have been too long maintained and exacerbated between ministers and non-ministers, between clerics and laity."[47] Consequently it was requested, for example, that diocesan and parochial pastoral councils not be councils proper—that is, consultative bodies—but deliberative bodies that link together the authority of the

45. Cf., for example, R. HUYSMANS, *Osservazioni critiche...*, op. cit., pp. 36–40.

46. Cf. c. 129 § 2 *et passim*. Regarding the definitive redaction of these texts, cf. U. BETTI, OFM, "In margine al nuovo Codice di Diritto Canonico," in *Antonianum* 58 (1983), pp. 629–630.

47. O. TER REEGEN, "Les droits du laïc," in *Concilium* 4 (1968), p. 38.

"pastor proprius," bishop or parish priest,[48] but neither the Code Commission nor the consultative bodies nor the legislator accepted the proposals.

3. *Collegiality*

A number of ecclesiologists and pastoralists have wondered about the exact meaning of the terms "co-responsibility" and "collegiality" in the Church, and how the two are related; but they have not always reached the same conclusions or conclusions that agree with one another. From a juridical point of view, the response is probably that the difference between them is the same as the difference between genus and species. Collegiality is the exercise of co-responsibility for decisions in the task of governance, exercised in collegial acts. This can be done only by the physical persons who constitute a college. However, the words "collegiality" and "collegial" are frequently used with little juridical precision; when referring to members of the College of Bishops, the words are easily confused with collegial acts which are merely the manifestation of "affectus collegialis," to which the Council also referred (cf. *LG*, 22-24 and *pen*; *CD*, 4-6 and 36-38).

Thus in work on the norms for ecclesiastical organization, it was necessary to recall frequently a juridical notion with which theologians are not usually very familiar; the word *college* is applied exclusively to a lawfully established group of persons, who *aequo iure et aequali modo* concur in their deliberative vote to shape and express the will of the group. They thus perform juridical acts that are described as *collegial*. That is how a *college* is distinguished from other groups of physical persons (for example, *councils* or other similar institutions: pastoral councils, and also presbyteral councils and even a Synod of Bishops). These other groups per se have no deliberative powers, only the faculty of advice *ad normam iuris*. A college is also distinguished from other forms of co-responsibility and acts in common (for example, from *collective acts* that may be performed by a Conference of Bishops if the legislative faculty granted and regulated by the Code is not put into play; cf. cc. 455 and 456). With this need for juridical clarity in mind, the principle of collegiality was applied in the new Code not to the common participation of all faithful in the Church's mission (which is, to repeat, the area of co-responsibility), but to *certain forms of carrying out the proper mission of the Hierarchy*. First, this takes place in the environment of the Church's supreme authority, although the College of Bishops is not meant to be taken strictly juridically (cf. *pen*, 1). Second, it takes place in the area of joint action by groups of bishops (particular councils, etc.), but in this case, referring to the nature of the acts, we must carefully distinguish the varying theological and juridical content of the term "collegial."

48. P. LENGSFELD, "La revisione del Codice," in *Concilium* 17 (1981), pp. 73–74.

In widely known texts, *Lumen Gentium* first sets forth the doctrine on the nature of the College of Bishops (cf. especially no. 22 and *pen,* 3) and reminds us that the Roman Pontiff holds "full, supreme and universal power over the whole Church, a power which he can always exercise unhindered" over the entire Church. Then it states that the Order of Bishops, "Together with their head, the Supreme Pontiff, and never apart from him, they have supreme and full authority over the universal Church; but this power cannot be exercised without the agreement of the Roman Pontiff." (*LG,* 22; cf. cc. 331 and 336). Canonical doctrine written after the Council specified that "the supreme authority, to be truly supreme, *must necessarily be unique.* Thus we can say that in the Church there is a supreme authority that, however, has available to it two inadequately distinguished bodies; they are the College of Bishops, which includes the Supreme Pontiff, its Head, and the Supreme Pontiff himself, Head of the College."[49] This unique supreme authority may be exercised by either body; that is, *personally* by the Roman Pontiff, or *collegially,* by the Roman Pontiff together with the bishops whether or not they are gathered at an Ecumenical Council. It is for the Supreme Pontiff to decide freely (cf. *pen,* 3) when this unique supreme authority should be exercised personally or collegially. The norms of the new Code on the subjects of supreme power in the Church are based on this clear doctrine (cf. cc. 330–341).

Naturally, the norms in the Code on collegial power, meaning on the strictly collegial acts of the College of Bishops, do not prejudice the many other manifestations that have and have always had the "collegial spirit" and "belonging to the college"—the "bond of unity, charity and peace" (*LG* 22a)—that unites the members of the College of Bishops with each other and with the Head of the College, the Roman Pontiff. We are referring to particular councils, patriarchal synods and more recently, to the Synod of Bishops and Conferences of Bishops. But evidently, if there is no College of Bishops—because only some of its members are present—they cannot perform "collegial acts," acts of the College as such (and even less so if their Head, the Successor to St. Peter, is absent). They would surely be manifestations of collegiality and collegial responsibility as a consequence of the collegial spirit and belonging to the college—but they would not be acts of the College of Bishops. At these other meetings of bishops, they may perform "collegial acts" only in the technical-juridical sense explained above. These acts will be lawful if they are performed *ad normam iuris,* that is, in accordance with the requirements established by the supreme authority in the universal law of the Church, with reference to each specific "coetus Episcoporum" (particular councils, Conferences of Bishops, etc.).

49. Cf. W. ONCLIN, "Le pouvoir de l'evêque et le principe de la collegialité," in *Ephemerides Iuris Canonici* 26 (1970), pp. 25–50; J.L. GUTIÉRREZ, "El Obispo diocesano y la Conferencia Episcopal," in *Ius Canonicum* 21 (1981), pp. 507–542.

4. *The pastoral character of canonical norms*

"In setting forth Canon Law… attention must be paid to the Mystery of the Church according to the dogmatic Constitution *De Ecclesia*," states conciliar Decree *Optatam Totius* 16. It is evident that an effort has been made to keep this criterion in mind as carefully as possible "in iure canonico exponendo" and especially "in iure canonico recognoscendo."[50] The canonists who worked on it were never lacking in theological and pastoral sensitivity. They were aware of devoting themselves to a law that was not merely human, but that was also based on, and in part contained, the *ius divinum*. It is therefore included in the salvific action whereby the Church through time continues the mission of its divine founder. As we have said before, this means that the sacramental, hierarchical and juridical structures of the Church serve as a means of communicating divine grace to the people of God. Canon law fulfills this instrumental function without ceasing to be what it is: law with its own technical, methodological and terminological requirements.

The abuses that could occur and sometimes have occurred due to a mistaken rhetorical application of the adjective "pastoral" to canon law have been noted by authorized voices during work on the new codification and were recently recalled by the Pope.[51] The abuses see the pastoral quality as an addition, a kind of new clothing, instead of an essential element, as the Code Commission recalled in the third guiding Principle: "Therefore, the Church's juridical system, laws and precepts, and rights and obligations that devolve therefrom shall be consonant with the supernatural purpose. Because, in the mystery of the Church, law is like a sacrament or sign of the supernatural life of the faithful; it imprints its mark upon and promotes supernatural life. Although not all juridical norms are issued for the direct purpose of promoting the search for the supernatural end or to favor pastoral care, it is still necessary for the norms to be in harmony with the achievement of the supernatural end of men."[52]

The specific manifestations of the pastoral character of canon law are substantial and numerous in the new Code. There was already pastorality in the traditional principles of *aequitas* and *epikeia*, through which the legislator's *caritas pastoralis* demonstrates his desire to have justice enriched with prudence, benignity and comprehension towards the persons of the subjects. However, clearly the pastoral character of the canon-

50. Cf., for example, PAUL VI, *Discurso al Tribunal de la S. Rota*, February 8, 1973, in *AAS* 65 (1973), p. 95.
51. Cf. *Discurso inaugural* (Card. P. FELICI) and *Discurso de clausura* (Card. S. BAGGIO), of the *III Congreso Internacional de Derecho Canónico*, in *La norma en el Derecho Canónico. Actas del Congreso* (Pamplona 1979), pp. 13–20, 867–877; JOHN PAUL II, "Discurso al Tribunal de la Rota Romana," January 18, 1990, in *L'Osservatore Romano*, January 19, 1990, p. 1 (English edition: *L'Osservatore Romano*, January 29, 1990, p. 6–7).
52. *Principles*, 3.

ical norms is not limited to this, nor is it limited to other peculiar technical characteristics of the Church's legislation. Here are some examples: not imposing juridical obligations when the desired aim may be reached by exhortation, being careful to minimize the number of laws on the nullity of juridical acts or the disqualification of persons, the profound reform in procedural and penal law in the new Code by introducing oral procedures, and the notable reduction of *latae sententiae* penalties.

But the pastoral character of the new corpus of legislation goes much farther. Above all, the norms that try to channel fulfillment of the *munus apostolicum* of the Sacred Pastors in the most perfect and effective way possible are all imbued with pastoral character. They are the norms that in a broader sense make the whole organization of ecclesiastical offices more flexible and dynamic; they also stimulate, protect and guide active participation of all the faithful in the life and unique mission of the people of God in an orderly manner. We could even say that this fact is the buttress that supports the pastoral function of the norms in the new Code. When Vatican Council II looked more deeply into pastoral structures, as recalled by the Code Commission in the eighth guiding Principle, and when the Council considered the profound cultural and sociological changes in modern society, it clearly saw the need to adapt the Church's pastoral and missionary activities juridically and otherwise to the new circumstances. Thus an effort was made to improve the ecclesiastical organization as configured in the Pio-Benedictine Code. The system was not only strongly hierarchical, but extremely static, as was the mainly agricultural and rural society that served as the reference point for the pastoral theology underlying its norms.

5. *Subsidiarity*

In his consistorial speech on February 20, 1946, Pius XII had mentioned "a generally valid principle," expressed by his predecessor Pius XI in the Enc. *Quadragessimo anno*,[53] that all social activities by their very nature are subsidiary. "These words are certainly enlightening," continued Pius XII. "They apply to all levels of social life, *and also to Church life, without prejudice to its hierarchical structure.*"[54] The Code Commission included this criterion as the fifth of its guiding Principles; the Commission deemed it in harmony with the ecclesiology of Vatican II, correctly taken. Even though they did not use the word "subsidiarity," the Council applied the principle broadly to the life of the Church, as summarized in the following two aspects:

1. As previously mentioned, the Council proclaimed the basic equality of all faithful in general, within the diversity of functions and their common participation in the Church's mission as a divine institution, and

53. *AAS* 23 (1931), p. 203.
54. *AAS* 38 (1946), p. 145.

the task of lay faithful cannot be merely collaborative in the aspects that properly fall within the jurisdiction of the Hierarchy.[55] Consequently, *within the area of ecclesiastical communion and respecting its requirements* (*AA* 3), all faithful have a legitimate area of apostolic initiative. Within this area of initiative and communion there are a number of rights to which we have referred: for example, the right to freely associate for an apostolic purpose (cf. *AA* 16–19 and 24; *PO* 8; cc. 215, 278, 298ff.).

2. The principle of subsidiarity is also applied within the hierarchic organization, but this does not at all presuppose any prejudice to the primatial function of the Roman Pontiff. To him belongs the untransferable governance of all the Church. He carries out his task in accordance with the divine constitution, by virtue of which the Episcopate also exists. The bishops govern each of the particular churches with their own immediate and ordinary powers, "although exercising them is in the final analysis regulated by the supreme authority of the Church and may be circumscribed within certain limits according to the needs of the Church or the faithful" (*LG* 27; cf. *CD* 8a). The words "according to the needs of the Church or the faithful" must be emphasized because they determine the reason why the supreme authority, in addition to exercising the functions that fall inalienably within his jurisdiction, can and must reserve for his exclusive decision or the decision of another authority, any cases that in themselves might fall to the diocesan bishop.

In specifically applying the principle of subsidiarity, the new Code shows three typical characteristics:

a) First, there is a constant tendency to preserve the unity of the canonical system in the essential norms and general institutions. The Code leaves it to particular or specific law to make concrete determinations and more detailed norms that can better accommodate to the circumstances of time and place. This can be seen clearly, for example, in the legislation on chapters of canons, institutes of consecrated life and associations of faithful.

b) The question of appropriate decentralization is basic to the organization of ecclesiastical government. During the Council, Paul VI considerably broadened the bishops' faculties[56] and then decided that dispensations from general laws would be reserved to the Holy See.[57] All of those norms that granted each bishop great autonomy in governing his diocese were included in the new Code.

c) However, the most important problem in the decentralization process was not determining the jurisdiction of the Roman Curia, but establishing which questions were to be the object of uniform regulation in an

55. On this question, cf. J.L. GUTIÉRREZ, "El principio de subsidiariedad y la igualdad radical de los fieles," in *Ius Canonicum* 11 (1971), pp. 413–444.

56. Cf. *PM*, in *AAS* 56 (1964), pp. 5–12.

57. Cf. *EM*, in *AAS* 58 (1966), pp. 467–472.

intermediate body between the Holy See and the diocesan bishops, specifically, the Conferences of Bishops. There was a risk of decentralizing with respect to Rome, but centralizing even further in the Conference of Bishops with prejudice to the authority that by divine law belonged to each bishop in his own particular church. Paul VI had already issued a warning about this danger, saying that a bishop could find himself confronting "the temptation to transfer to the collegial body what he could only perform on his own responsibility." He immediately added, "Each Bishop entirely retains his own responsibility; each Bishop must with the assistance of his Presbyterate, personally resolve his own immediate problems." [58]

To achieve the necessary balance in the new Code, the material prepared at the extraordinary Assembly of the Synod of Bishops in 1969 was very useful, and especially, consultation with the bishops of the entire world on the *schemata*.[59] As a result of the consultation, there was clear evidence that the majority of bishops considered it opportune to reduce markedly the jurisdiction that the Code Commission had at first thought to give the Conferences of Bishops.[60] In the definitive text of the Code there are 21 questions that must be regulated by particular legislation at Conferences of Bishops and 22 questions that may be regulated by them.[61]

C. *Organization of the New CIC*

After the decision was made to prepare the guiding Principles, at the same meeting of the central Group of consultors held April 3-7, 1967, reference was made to the need to revise the arrangement of the Code. Therefore, the Principles included the following in the last point: "Deductio in praxim principiorum quae super enucleata sunt structuram Codicis Iuris Canonici postulare videtur haud leviter novam. Inde sequitur eius ordinem esse innovandum."[62] As soon as the directives were approved by the Synod of Bishops and by the legislator, studies on the new arrangement of the *CIC* were begun. In addition to Lombardía, who had been asked for a preliminary study in 1967, the opinion of other prestigious canonists from various schools and nationalities was also solicited. Among them were Stickler, Kuttner, Mörsdorf and Dordett. A special study Group was created, *De ordinatione systematica novi Codicis*, for which Stickler was the reporter.

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58. *Discurso a la XII Asamblea de la Conferencia Episcopal Italiana*, June 6, 1975, in *AAS* 67 (1975), p. 378.
59. Cf. J. HERRANZ, "L'apport de l'épiscopat à la nouvelle codification canonique," in *L'Année Canonique* 22 (1979), pp. 275–288.
60. Cf. *Comm.* 14 (1982), p. 199.
61. Cf. Letter of the Secretary of State, Card. Casaroli, to the Presidents of bishops' Conferences (Prot. N. 120.568/236, November 8, 1983), in *Comm.* 15 (1983), pp. 137–139.
62. Cf. *Comm.* 1 (1969), p. 85.

An earlier question that had to be resolved was "whether in setting out the new Code the arrangement of the current Code should be retained, with adjustments, or whether a new arrangement should be adopted and if so, on what principles it should be based."[63] In their decisive vote,[64] the consultors agreed upon the following points: *a)* The old arrangement of *CIC*/1917 should be replaced with a new one. *b)* Constitutional law was a part of the law of the Church and therefore should be treated in canonical legislation. There was no clear vote on whether it should be included with an autonomous fundamental law, the same for the Latin and Eastern Churches, or whether it should be included now in the Latin Code. *c)* A systematic arrangement should be adopted for the new Code that would be more consistent with the statement made about the Church in the Magisterium of Vatican II.

The consultors also took into account various proposals privately submitted by other canonists for totally revamping the Code's arrangement. These proposals were based on doctrinal principles of undoubted value, for example, the sacramental roots of canon law, the missionary task of the Church, the basic community aspect of the people of God, the ecumenical movement, and so forth. But even though they were theologically valid, none of these principles was adequate to properly frame the juridical norms that were to safeguard the entire social order of the Church.

During the days April 2–4, 1968, the study Group held a collegial working session that arrived at the following conclusions: 1) Liturgical laws as such should remain outside the Code, following the same criterion as c. 2 of *CIC*/1917. 2) Juridical provision for the processes of beatification and canonization should remit to norms of another order, norms that should be written outside the Code's legislation because they are such special procedures. 3) The special norms on relations between the Church and State should be included in the *LEF* project. 4) The personal statute of rights and obligations for all faithful should be included in the part of the Code that treats the structure and organization of the people of God. It should also define the rights and obligations of the various types of faithful depending upon their personal condition and mission in the Church. 5) The structure of *Liber* III of *CIC*/1917, which contained miscellaneous matters, needed to be revised and changed.[65] The consultors also agreed on the need to treat the legislation on the "tria munera" and on other matters such as patrimonial law and penal law in different parts.[66]

The specific proposals that resulted from this study were submitted on May 28, 1968 at the Third Plenary Assembly of the Code Commission. The proposals were based on the following criteria:

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63. Cf. *Comm.* 1 (1969), p. 102.
64. Cf. *Comm.* 1 (1969), pp. 104–105.
65. Cf. *Comm.* 1 (1969), p. 106.
66. Cf. *Comm.* 1 (1969), pp. 107–110.

1. It was best to discard the celebrated tripartite division that dated back to the "Institutions" of Gaius, later adopted by Justinian and also kept in *CIC*/1917: "omne ius quo utimur vel ad personas pertinet vel ad res vel ad actiones."

2. The new Code had to be adapted to the rich ecclesiological doctrine of Vatican Council II in both content and as far as possible also in form. That meant adapting it to the systematic layout of the constitutive norms while still following the exigencies of law.

3. Among the various conclusions reached in the work of the different study Groups as they examined their subjects more deeply, there had been from the beginning some practical orientation. For example, at least generally, they tried to follow the same arrangement as *Lumen Gentium*, beginning with the presentation in *Liber* II (after *Liber* I, on general norms) of the universal norms on the composition and organization of the people of God. They divided the subject matter of *Liber* II of *CIC*/1917 into separate books and eliminated the heading "De rebus" so as to avoid continuing to call the sacraments, divine worship, the ecclesiastical magisterium, *things (res)*. Finally, they wanted to see if was possible to frame most if not all the canonical norms within the triple theological division of the *munera Ecclesiae*.

The provisional *schema*[67] was prepared on the basis of these criteria and divided into 6 books. It was approved by the Plenary Assembly with 27 *placet*, 1 *non placet* and 12 *placet iuxta modum*.[68]

III. Writing and Revising the "Schemata"

A. *Working Method*

One of the methodological criteria of the Code Commission in the working *process* was not to stray too far from the ordinary procedure followed in other dicasteries of the Holy See. An effort was made to designate the different phases of preparation and revision of the legislative *schemata*, and the subsequent complementary work by the body of consultors and members of the Code Commission itself was a factor kept in mind.

The study Groups were composed of 8 to 15 consultors each and met weekly. Their sessions were usually both morning and afternoon so as to maximize the time spent in Rome by the numerous members who had to travel from other cities and countries. They proceeded according to an

67. Collected in *Comm.* 1 (1969), pp. 111–112.
68. Cf. *Comm.* 1 (1969), p. 113.

Ordo laboris that divided the work into two phases: personal preparation of votes or opinions, and collegial discussion and decisions on the new text of the canons. The minutes of all meetings, including voting, were printed and bound to avoid losing track of documents and to facilitate publication when the time came.[69] During the first phase, when the *schemata* were being prepared, technical guidance of the study Groups was divided between the Secretary, Father Raimundo Bidagor, and the Assistant Secretary, Msgr. Willy Onclin. Father Bidagor directed the work of the following Groups: *De religiosis*, *De matrimonio*, *De bonis Ecclesiae temporalibus*, *De processibus* y *De delictis et poenis*; Msgr. Onclin directed *De normis generalibus* (also *Quaestiones speciales Libri II*), *De clericis* (later *De Sacra Hierarchia*), *De laicis*, *De sacramentis*, *De Magisterio Ecclesiastico*.[70] Each study Group had a reporter chosen by the President of the Code Commission from among the Group's consultors. Their work was especially useful at the beginning. To them fell the task of extracting hermeneutic and doctrinal questions on their subject matter and proposing the first drafts of canons, which served as a basis for collegial analysis and discussion at the weekly meetings of each Group. Among the consultors who worked most tirelessly as reporters, the following were outstanding: Klaus Mörsdorf (*De Sacra Hierarchia*); Alvaro del Portillo (*De Sacra Hierarchia* and *De laicis*); Tarcisio A. Amaral, C.SS.R., and Mark Said, O.P. (*De Institutis vitae consacratae*); Peter Huizing, S.J. (*De matrimonio*); Aurelio Sabattani (*De processibus*) and Pio Ciprotti (*De delictis et poenis*).

In May of 1975 Rosalio José Castillo Lara, S.D.B., titular bishop of Precausa, was named to succeed Father Bidagor, who had resigned because of advanced age and illness. The new Secretary, together with Msgr. Onclin,[71] personally directed all tasks in the second and third phases of the work, which included revision of the *schemata* after consultation and preparation of the completed draft.

Ten years went by from the beginning of preparation of the first *schema* until the last was completed in July of 1976.[72] As each *schema* was prepared, the President of the Code Commission would send it to the Leg-

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69. For an overview of the tasks assumed in each meeting of the study groups, cf. J. FOX and G. CORBELLINI, "Synthesis generalis laboris Pontificiae Commissionis Codicis Iuris Canonici Recognoscendo," in *Comm.* 19 (1987), pp. 166–304. For a brief history of the work done in preparation for the *Schema novissimum* of 1982, cf. F. D'OSTILIO, *E' pronto il nuovo Codice di Diritto Canonico*, op. cit.

70. Msgr. Onclin also spent fifteen years as the diligent and tireless *relator* of the particular study group (afterwards the *Comissio mixta*) *De Lege Ecclesiae Fundamentali*.

71. Msgr. Willy Onclin, who always managed to harmonize his work as the adjunct Secretary of the Commission with his responsibilities as an instructor at the University of Louvain—an institution to which he was deeply committed—was appointed Apostolic Protonotary by His Holiness, Paul VI.

72. Cf. Card. P. FELICI, *Discurso inaugural del III Congreso Internacional de Derecho Canónico*, op. cit.; cf. also "Relatio Cardinalis Praesidis" addressed to the fourth Plenary Assembly of the Commission, May 24, 1977, in *Comm.* 9 (1977), pp. 62–79.

islator, at the Office of the Secretary of State. The President would receive in return the responses, any observations and necessary explanations. If the draft was deemed ready, a request for permission to submit it for examination to the Episcopate and other consultative bodies was also received. In 1970 Paul VI had already established that the Code Commission should solicit the opinion of the Pastors of the Church on each of the *schemata*. In a discourse to the College of Cardinals, he announced, "After approval of the guiding principles and of the systematic arrangement of the new legislation, some *schemata* are already in final phase. Soon the examination by the Episcopate will begin."[73] Later he decided that the dicasteries of the Roman Curia, ecclesiastical universities and faculties, the Union of Religious Superiors General and other institutions should also be consulted.

After each study Group had prepared the *schema* of its canons, the drafts were sent to the Cardinal members of the Code Commission for them to make any comments and proposals they saw fit. Then, to learn from a collegial debate what the members of the Code Commission thought about some of the more important questions on marriage law and penal law, a fourth Plenary Assembly was held May 24–27, 1977.[74] The questions considered were the following:

— Whether to include in the new Code a definition of marriage, and to include in it the concept of "coniunctio vitae" ("communio," "consortium") as an expression of the personal aspect of marriage, and indicate its relevance to validity;

— Whether to retain the principle of "favor iuris" as a presumption for the validity of marriage;

— Whether to empower the Conferences of Bishops to create impediments to marriage, that would also be diriment;

— Whether to admit a notion of excommunication in which penitence and anointing of the sick were excepted from the general prohibition against excommunicated persons receiving the sacraments;

— Whether to apply the principle of legality more strictly in canonical penal law.[75]

B. *Scope of Consultation*

When Paul VI announced his wish that the Episcopate actively collaborate even more in preparing the new canonical codification, he warned, "The work of consultation and another examination will no doubt require a fair amount of time. But it is time used wisely, not only because

73. PAUL VI, *Discurso al Colegio Cardenalicio*, June 23, 1970, in *AAS* 62 (1970), p. 518.
74. Cf. *Comm.* 9 (1977), p. 62.
75. *Comm.* 9 (1977), pp. 79–80.

by consultation the law will potentially become more effective, but because the time can become ripe for a more fruitful reception of the new legislation, which should be for those who believe in and love Christ and the Church 'lex vitae et disciplinae' (Ecl 45, 6). Without it the Holy Spirit may be extinguished (cf. 1 Tim 5, 19)."[76] Indeed, the history of the Code Commission and archived data show that the contribution of the Episcopate to the new Codification was much more profound, diversified, constant and effective than to *CIC*/1917.[77]

Considering the high number of general and particular comments sent in by the bishops in spite of the relatively short time (six months for each consultation) given for studying and preparing the comments, the actual contribution of the universal Episcopate as a consultative body to the legislator was very important. Among the Conferences of Bishops who always responded fully to the requests for advice on the *schemata* were the larger national Episcopates (such as Brazil, Italy, the United States, France, Spain, Mexico, Argentina, Germany, the Philippines and Canada) and the Conferences of Bishops from countries with a minority of Catholics but which were geographically and culturally representative (such as Japan, Australia, Indonesia, Zaire, India, Korea and Angola). This shows that the numerical and sociological value of the Episcopate's responses was very high. In effect, about 90% of the bishops on the five continents expressed their own opinions on the Code Commission's draft legislation either through their Conference of Bishops or by sending in their responses directly.

Even more than the high number of general and particular comments sent in by the bishops, what helped the work of refining the *schemata* more specifically and effectively was the pastoral significance of the contributions, whether in praise of the content of the norms or when criticizing and proposing emendations.[78] Among the most important contributions of the Episcopate, the following may be cited:

— Questions on the *ecclesiastical organization* of the universal Church or particular Churches: specifically, the relationship of the different bishops and the Conferences of Bishops with the Holy See; conditions

76. Cf. PAUL VI, *Discurso al Colegio Cardenalicio*, op. cit., p. 518.

77. The advice of the bishops was solicited on seven successive occasions: 1) on February 10, 1971 regarding the plan for the eventual *schema De lege Ecclesiae Fundamentali*; 2) on April 20, 1972 regarding the *schema De procedura administrativa*; 3) on December 1, 1973 regarding the *schema De disciplina sanctionum seu poenarum*; 4) on February 2, 1975 regarding the *schema De sacramentis*; 5) on June 3, 1976 regarding the *schema De modo procedendi pro tutela iurium seu de processibus*; 6) on February 2, 1977 regarding the *schema De institutis vitae consecratae per professionem consiliorum evangelicorum*; 7) on June 15, 1977 regarding the systematic organization of the new Code and the *schemata*: *De normis generalibus, De locis et temporibus sacris deque cultu divino, De Populo Dei, De Ecclesiae munere docendi, De iure patrimoniali.*

78. Cf. J. HERRANZ, *Studi sulla nuova legislazione della Chiesa* (Milan 1990), pp. 92–96.

and limitations on the legislative power of the Conferences of Bishops; which matters would be subject to decisions of the Conferences of Bishops that would bind the immediate powers of diocesan bishops; formation of presbyteral councils and colleges of consultors, and questions on which a bishop was obligated to hear their advice; the jurisdiction of auxiliary bishops, vicars general and episcopal vicars; updating the institution of parishes.

— Questions relating to *pastoral practice*: method of naming and removing parish priests; norms on administering the sacraments; at what age the Eucharist, confirmation, sacred orders (diaconate, presbyterate and episcopate) can be received and marriage celebrated; feast days of precept, and fasting and abstinence days; sacred places; norms to stimulate active participation of the lay faithful in the Church's mission (family pastoral, catechesis, apostolate in the workplace, liturgical functions, pastoral advice, associations, etc.); relations between bishops and institutes of consecrated life; regulations for chaplains.

— Questions on the *life and discipline of the clergy*: particularly the rights and obligations of sacred ministries; norms on the institution and purposes of major and minor seminaries; ecclesiastical offices with a residence obligation; ongoing formation of the clergy; age limits for parish priests; use of social means of communication by clergy and religious.

— Questions on *marriage*, more specifically: the nature and purpose of marriage; its essential properties and the inseparability of contract and sacrament among the baptized; matrimonial pastoral (prematrimonial preparation, examining the spouses, publication, etc); impediments to marriage (types and possibilities for dispensation); which marriages require a license from the local Ordinary; canonical form; mixed marriages and pastoral problems related thereto.

— Questions on *patrimonial law*, in particular: questions related to the elimination of the system of benefices; foundations, pious intentions and Mass obligations; creating an aggregate of diocesan goods for supporting the clergy and other needs; different forms (contributions, taxes, etc.) for the faithful to assist the Church's financial needs.

— Finally, some special questions on *penal and procedural law*, such as reducing *latae sententiae* penalties; the best way to define some of the graver offenses; simplification of reservations; marriage procedures; creating interdiocesan tribunals of the first and second levels; administrative recourses.

During this advisory phase and when the *schemata* were then revised, there were three interrelated factors that contributed to enrich the great assistance received by the Code Commission from the consultation ordered by the legislator. That consultation has rightly been called the

greatest of any up to the present in the juridical life of the Church.[79] It was the variety of advisory bodies that enabled the comments sent to the Code Commission to be so rich in the following three aspects: 1) in administrative doctrine and practice due to the comments from the CDF and the other dicasteries of the Roman Curia; 2) in their technical character and canonistic and theological research, through comments from ecclesiastical universities and faculties; 3) in direct pastoral experience, particularly important in the special and not always easy circumstances following Vatican II, through comments from the Conferences of Bishops or sent directly by the different bishops.

C. *The Complete "Schema" of the New CIC*

According to an approximate calculation made by the Secretariat, the general and particular proposals for revision exceeded 90,000. Six years were required to examine and discuss them, from 1974 to 1980. There was not a single amendment proposed that was not carefully evaluated even when, as frequently occurred, there were contradictory proposals. Attention was paid to the sociological value of each comment (the number of advisory bodies and persons who proposed it), and especially to the doctrinal and pastoral value, conformity with conciliar sources, and, for technical and scientific aspects, consistency with the canonical juridical system. It was difficult work, requiring constant reexamination and refinement, not only because of the magnitude of the task undertaken, but for the diversity of opinions that had to be pondered and coordinated, as Card. Felici noted in his Report to the 1980 Synod of Bishops.[80]

This patient labor of redrafting was also carried out by the study Groups, which were changed and enlarged to permit more flexibility in the work and to avoid having the examination and evaluation of the proposed amendments performed solely by the same advisors who had prepared the *schemata*.

On the Solemnity of Saints Peter and Paul, the twenty-ninth of June in 1980, the complete draft of the new Code was printed to be sent to all members of the Code Commission (*Patribus Commissionis reservatum*). It was entitled "Schema Codicis Iuris Canonici," with an explanatory subtitle, "iuxta animadversiones S.R.E. Cardinalium, Episcoporum Conferentiarum, Dicasteriorum Curiae Romanae, Universitatum Facultatumque ecclesiasticarum necnon Superiorum Institutorum vitae consecratae recognitum."[81]

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79. Cf. Card. P. FELICI, *Relatio Cardinalis Praesidis*..., op. cit., pp. 62–79.
80. Cf. *Comm.* 12 (1980), p. 224
81. Cf. *Codex Iuris Canonici. Schema Patribus Commissionis reservatum* (Typis polyglottis Vaticanis 1980).

Included in the presentation of the *schema* was the following significant data on the work performed by the study Groups during the two phases of writing and revising the *schemata* of the seven books in which all the norms of the new Code were arranged:

book I (*De normis generalibus*)

— Consultors who worked on the draft: 21

— Weekly sessions of study Groups: 11

— Total number of meetings: 132

— Total hours of collegial work: 330

book II (*De Populo Dei*)

— Consultors who worked on the draft: 63

— Weekly sessions of study Groups: 62

— Total number of meetings: 744

— Total hours of collegial work: 1860

book III (*De Ecclesiae munere docendi*)

— Consultors who worked on the draft: 22

— Weekly sessions of study Groups: 12

— Total number of meetings: 144

— Total hours of collegial work: 360

book IV (*De Ecclesiae munere sanctificandi*)

— Consultors who worked on the draft: 49

— Weekly sessions of study Groups: 48

— Total number of meetings: 576

— Total hours of collegial work: 1440

book V (*De Ecclesiae bonis temporalibus*)

— Consultors who worked on the draft: 18

— Weekly sessions of study Groups: 11

— Total number of meetings: 132

— Total hours of collegial work: 330

book VI (*De sanctionibus in Ecclesia*)

— Consultors who worked on the draft: 11

— Weekly sessions of study Groups: 15

— Total number of meetings: 180

— Total hours of collegial work: 450

book VII (*De processibus*)

— Consultors who worked on the draft: 22

— Weekly sessions of study Groups: 22

— Total number of meetings: 252

— Total hours of collegial work: 660

Therefore, not counting the many other meetings of the Central Group of advisors, the special Group *De Lege Ecclesiae Fundamentali* and the mixed Working Commissions of consultors in the various Groups, there were 181 weekly sessions of study Groups, with 2160 meetings and 5430 hours of collegial work. If the count includes the 945 hours of meetings by the so-called "parvi coetus" or small groups of consultors that were sometimes found necessary, the total is 6375 hours of collegial work ordered and directed by the Office of the President and the Secretariat of the Code Commission.

IV. THE FINAL PLENARY ASSEMBLY AND THE 1982 "SCHEMA NOVISSIMUM"

A. *Preparation for and Development of the Plenary Assembly*

When the completed draft of the new Code was sent to the Cardinal members of the Code Commission, they were asked to make any comments and proposed emendations they deemed necessary "*in scriptis*," with a view to preparing for a Plenary meeting to examine collegially the *schema* before submitting it to the legislator. The same was asked of the new Prelates who were named to the Code Commission to complete its membership. Of the 65 Cardinals who in 1963 made up the Code Commission, and in spite of having named 30 more members in the years following, with the passing of time the number fell to only 35. That left a number of sectors of the Church with no further representation. Card. Felici then proposed to the Holy Father to increase the number of members to ensure a better representation of the entire Catholic Episcopate.[82] The Pope was aware of the importance of their collaboration and added 36 more Cardinals, Archbishops and bishops[83] to the Code Commission in April of 1981 so as to obtain greater representation from the various geographical and cultural areas.[84]

Several bishops and a Bishops' Conference had sent the Pope the suggestion that it would be a good idea to submit the amended *schemata* of the new *CIC* a second time for advice from all the Conferences of Bishops so that they could make further comments. After studying these petitions, the Pope—in September of 1978 it was John Paul I and afterwards

82. Cf. Card. P. FELICI, "Il significato di un voto," in *Comm.* 13 (1981), p. 445.

83. The names of these prelates and of all the members summoned to the fifth Plenary Assembly of the Code Commission were published in *Comm.* 13 (1981), pp. 259–261.

84. Cf. JOHN PAUL II, "Allocutio ad Plenariam," in *Comm.* 13 (1981), p. 257.

John Paul II—did not think a second general consultation with the Episcopate was opportune; it would risk excessively delaying promulgation of the new Code.[85] He also excluded the possibility of having a legislative text of more than 1700 canons examined by a Synod of Bishops, which, furthermore, for the general Assembly of 1980 had already been assigned another subject matter. The legislator had decided to submit the complete *Schema* of the new Code to the Plenary Assembly of the Code Commission for examination, after the new members of the Episcopate from the five continents had joined it to give it the desired greater representation. Furthermore, the Conferences of Bishops that wished to continue the work of revision based on their comments could do so by consulting the official review *Communicationes.*[86]

From October 1980 to June 1981 the Secretariat of the Code Commission, assisted by Groups of consultors who were experts in the various matters, collected, classified and examined all comments sent in by members for the completed *Schema* of the *CIC*, and the most suitable response to each was written. From that work came the long report or study—a 359-page book—entitled "Relatio complectens synthesim animadversionum ab Em.mis atque Exc.mi Patribus Commissionis ad novissimum schema Codicis Iuris Canonici exhibitarum, cum responsionibus a Secretaria et a Consultoribus datis."[87] The "Relatio" was sent in July of 1981 to all members of the Code Commission; it served as the working basis for the last plenary meeting, which was held October 20–29, 1981.

The objective of this Plenary Assembly was to study in detail some questions of major importance because of their particular influence on discipline. The Code Commission also conducted the final and collegial examination of the complete *Schema* of the new *CIC*. The six special questions proposed "ex officio" for discussion by the Assembly can be summarized as follows:[88] 1) lay participation in exercising the power of governance; 2) the need for two concordant decisions in a case of nullity of marriage; 3) whether the resignation decree of a religious of perpetual vows must be confirmed by the Holy See; 4) the possibility of second marriage for widowed permanent deacons; 5) ecclesiastical penalties for masonry; 6) whether it was obligatory to create administrative tribunals within Conferences of Bishops.

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85. Cf. Letter of the Secretary of State, N. 6172, February 22, 1979, to Card. Felici, published in PCILT, *Acta et Documenta Pontificiae Commissionis Codici Iuris Canonici Recognoscendo. Congregatio Plenaria diebus 20–29 octobris 1981 habita* (Typis polyglottis Vaticanis 1991), p. 7.

86. This solution was suggested to the Holy Father in a vote of the Code Commission sent with a letter, Prot. N. 4413/79, to the Secretary of State, April 5, 1979; cf. *Congregatio Plenaria...*, op. cit., pp. 9–11.

87. Typis polyglottis Vaticanis 1981.

88. For complete information on all the matters dealt with in this Assembly, cf. *Congregatio Plenaria...*, op. cit.

Many other questions were added to these six by members of the Plenary Assembly, including the Office of the President and the Secretariat. Almost all were discussed and voted upon at the meeting, although not always with the necessary depth, calm and technical precision, especially for lack of time and an adequate methodology. The principal questions added were the following:

— Insertion in the *CIC* of the canons of the *schema* for *Lex Ecclesiae Fundamentalis* on the Supreme authority of the Church, fundamental rights and obligations of all the faithful, and a few others;

— the systematic arrangement of certain parts of *Liber* II (rights and obligations of laypersons, particular churches, norms on religious);

— relationship of the new *CIC* with the preceding legislation;

— admission of candidates to a major Seminary;

— whether to include the norm on the loss of "ius eligendi Summum Pontificem" for octogenarian Cardinals;

— certain norms on particular councils and Conferences of Bishops;

— whether to make personal prelatures generally equivalent to particular churches;

— the definition of secular institutes;

— "*De consensu matrimoniali*" norms in relation to "*incapacitas matrimonium contrahendi*";

— "*De scientia ad matrimonium necessaria*" norms and "*dolus*" as a defect of consent;

— error concerning the sacramental dignity of marriage;

— norms on hearing the confessions of women;

— whether to make major Superiors of clerical secular institutes of pontifical law generally equivalent to Ordinaries;

— norms on the loss of clerical condition;

— administration of sacraments to non-Catholic Christians and other norms related to ecumenism;

— publication of procedural records;

— conditions for hierarchical recourse;

— Conferences of religious Superiors.

In a final vote the responses were approved that were given in the "Relatio" to all the other comments previously made *in scriptis* by the members. Furthermore, in a final vote the Assembly approved immediate submission of the final *schema* for the legislator's new Code as soon as the decisions made in the Plenary Assembly were executed and the necessary corrections were made to the style.[89]

89. Cf. *Comm.* 13 (1981), pp. 268–269.

B. *Writing the "Schema novissimum"*

The delicate task of completing and refining the general *schema* of the new *CIC* after examination by the Plenary Assembly was entrusted to the President and the Secretariat of the Code Commission,[90] who immediately began working on it. The first thing they did was to insert the 38 canons from the draft of the *LEF* into the proper places in the *schema.* To avoid repetitions and inconsistencies in the text of the new *CIC*, a second task was the minute revision of each and every canon in accordance with the comments and modifications voted in the Plenary Assembly or obviously necessary. A third purpose of the task was to achieve the required consistency of terminology, so important in juridical texts, which require particular technical precision to avoid difficulties or confusion when interpreting and applying the law. Finally, the "perpolitio latini sermonis" was undertaken with the assistance of a team of Latin scholars. The final text of 1776 canons was completed in March of 1982.

When the "Schema novissimum" of the *CIC*, "iuxta placita Patrum Commissionis emendatum,"[91] was submitted by Msgr. Onclin and the other members of the Secretariat to the Holy Father on April 22, 1982,[92] John Paul II used the same words—"arduum sane munus"—as Saint Pius X had when describing the draft of the first codification, and he smiled broadly and warmly. Although for reasons of health S.E. Msgr. Castillo Lara, Secretary of the Code Commission, could not be present at the Audience, conversations echoed some of the reasons for urgency that he had given at the 1980 Synod of Bishops and at the last Plenary Assembly of the Code Commission.[93] The reasons were not timeliness or usefulness, as in the case of *CIC*/1917, but the particular responsibility of governance; more than fifteen years had passed since the close of Vatican Council II, and it was not just necessary, but urgent, to promulgate the new *CIC* as a disciplinary application of the decisions of the Council.

At the Audience, John Paul II simply and clearly addressed the Code Commission representatives present and said that he was very grateful for all the help lent to the Legislator during so many years of intense work; but after the Code Commission—as requested by the Pope—had solicited and pondered the opinions of the advisory bodies and primarily of the Episcopate, he felt a grave moral duty to personally examine the draft that had been submitted to him because from this time onward, "the responsibility is all mine," he said.[94]

90. Cf. Card. P. FELICI, "Il significato di un voto...," op. cit., p. 446.
91. Typis polyglottis Vaticanis 1982.
92. Card. Felici was unable to present it himself as he had died unexpectedly the month before, March 22, 1982, while presiding over an emotionally moving celebration in honor of the Blessed Virgin: cf. *Comm.* 14 (1982), pp. 3–4.
93. Cf. *Comm.* 14 (1982), pp. 116ff.
94. Cf. J. HERRANZ, *Studi sulla nuova legislazione...*, op. cit., p. 101.

V. FINAL REVISION AND PROMULGATION

In effect, the Roman Pontiff wanted to revise the "Schema novissimum" for the new *CIC* with the help of two successive small commissions. One was a commission of "experts" and the other was made up of bishops.[95] They worked from May to December of 1982. The purpose of this final study was not only to examine the *CIC* draft but also to evaluate some of the new comments addressed to the Legislator by some of the Conferences of Bishops (all the Conferences had been invited in mid-May, 1982, in a circular letter from the Secretariat of State, to submit any proposals and suggestions that they still considered suitable or necessary).[96] The new study material was duly taken into account. But, as one of the members of the expert commission wrote, "Neither the caprice of unachievable perfection nor the offer of substitute options could prevail over the completed fact. The 1982 *Schema* was the fruit of nearly twenty years of specialized studies that reflected a plurality of cultures and tendencies; it had already been examined by representatives of the Episcopate of the entire world. And so the Pope was more than justified in placing his confidence in the project. The decision to read it carefully, canon by canon, was dictated only by the responsibility to ensure that it fully corresponded to the Church's expectations. And indeed, in promulgating the new Code, the Pope would 'perform one of the most important accomplishments that the mission of Successor to Saint Peter can include' (Card. A. Casaroli, Discourse at the solemn presentation of the new *CIC*, February 3, 1983)."[97]

The group or commission of experts held eleven meetings in June, July and September, in which the Pro-President of the Code Commission, H.E. Msgr. Castillo Lara also participated.[98] Many of the proposed questions were resolved by common accord; but for others (39), it was deemed necessary to submit to the Holy Father for a final decision. He examined them together with the small commission of three Cardinals and one

95. The members of the first commission were Msgr. E. Egan (USA), Msgr. S. Mester (Hungary), Msgr. Z. Grocholewski (Poland), P.H. Betti OFM (Italy), P.J. Ochoa CMF (Spain), Rev. E. Corecco (Switzerland), P.L. Díez García CMF (Spain; official of the Secretariat of State); the members of the second commission were Card. A. Casaroli (Secretary of State), Card. J. Ratzinger (Prefect of the Congregation for the Doctrine of the Faith), Card. N. Jubany Arnau (Archbishop of Barcelona), Archbishop V. Fagiolo (Archbishop of Chieti).

96. There were not lacking among the proposals some that—based on the personal opinions of some authors or in the interests of a certain group—attempted to bring about a complete reworking of the *schema*, or tried to halt, *sine die*, the promulgation of the new *Code*, for example, until the common *Code* for the Eastern Churches had been prepared [cf. U. BETTI, OFM, "In margine al nuovo Codice di Diritto Canonico," in *Antonianum* 58 (1983), pp. 629–630]. This *Code*, in fact, would not be published until nine years later.

97. U. BETTI, "In margine al nuovo Codice...," op. cit., p. 630.

98. After the death of Card. Pericle Felici, March 22, 1982, the Commission was left without a President. The Holy Father appointed as Pro-President, Archbishop Rosalio José Castillo Lara, S.D.B., with the title of Precausa, May 17, 1982.

bishop referred to above[99] on the 1, 7, 9, 14, 21 and 22 of December 1982. The Pro-President of the Code Commission also participated in these meetings. The 39 questions examined were the following, with a reference given to the number of each canon in the 1982 "Schema novissimum":

— Not subjecting non-Catholic Christians to the laws of the Church (c. 11 § 2);

— sources of suppletory law (c. 19);

— the baptism of children of parents from different rituals (c. 111 § 1);

— the difference between public and private juridical persons (c. 116);

— precedence (c. 123);

— lay participation in exercising the power of jurisdiction (c. 129);

— the systematic order of stating the rights and obligations of clergy and lay persons;

— the priority proposed by someone of particular churches over the universal Church in the arrangement of *Liber* II;

— formative value of the doctrine of Saint Thomas Aquinas (c. 252 § 3);

— second marriage for widowed permanent deacons (c. 279 § 2);

— election and consequent power of the Roman Pontiff (c. 331 § 1);

— the College of Cardinals (c. 347);

— Conferences of Bishops (c. 447);

— frequency of diocesan synods (c. 461);

— diocesan pastoral councils (cc. 511, 513);

— definitions of heresy and schism (c. 755);

— lay participation in "munus sanctificandi" (c. 835 § 4);

— "Communicatio in sacris" (c. 844);

— baptism, without the consent of the parents, of children of non-Catholics in danger of death (c. 868 § 2);

— first confession prior to communion (c. 912);

— the paschal precept (c. 918);

— confession of women outside the confessional (c. 964 § 3);

— Cardinals' faculty to confess "ubique terrarum" (c. 967 § 1);

— purpose of matrimonial consent (c. 1057 § 2);

— examination of the spouses and marriage banns (c. 1067);

— fraud as a cause of nullity of marriage (c. 1098);

— canonical form of the marriage ceremony (c. 1108);

99. Cf. note 95.

— mixed marriages (c. 1124);

— dissolution of a marriage "in favorem fidei" (c. 1150 § 1);

— holy days of obligation in the universal Church (c. 1246);

— gradual elimination of the system of benefices (c. 1272);

— penalties for offenses of apostasy, heresy and schism (c. 1363);

— the penalty for making a physical attempt against a Bishop (c. 1370 § 2);

— the penalty for being a Mason (c. 1374);

— penalties for absolving an accomplice, violating the sacramental seal and "sollicitatio ad turpia" (cc. 1378 § 1; 1388 § 1; 1387);

— causes for beatification (c. 1403);

— publication of records of process (c. 1598 § 1);

— administrative declaration of the nullity of a marriage;

— administrative recourses against the decrees of bishops (cc. 1736-1763).[100]

Of all the changes introduced in the "Schema novissimum" when these questions were examined, perhaps the most significant were the following: elimination of the canons on the establishment and workings of first and second degree administrative tribunals within Conferences of Bishops (cc. 1737-1740; 1745-1746; 1750-1763), a problem that had been examined before among the six principal questions submitted to the Plenary Assembly of the Code Commission for study in October of 1981; elimination of the canons on dissolution of marriage "in favorem fidei" and for unbaptized persons (cc. 1150; 1707–1710); and modification of c. 129 on lay participation in the power of jurisdiction, which was not an attempt to avoid the much debated theological question with its compromise "*ad normam iuris cooperari possunt*," but to leave it open.[101] The same small commission or some of its members also decided at the last moment to move the canons of personal prelatures (cc. 573–576) to pt. I of *Liber* II, the reason being that in spite of their hierarchical jurisdictional structure, sanctioned by members of the Code Commission,[102] they should not be included in the norms "De Ecclesiis particularibus" (section II). Even afterwards, when the text of the new Code was in its second proofing at the printer, some changes "minoris momenti" were introduced without convoking the other members of the small commission for lack of time; in-

100. Cf. V. FAGIOLO, *Il Codice del postconcilio* (Rome 1984), pp. 45–46.

101. Cf. U. BETTI, "In margine al nuovo Codice...," op. cit., pp. 634–642. The author, who at this point gathers various opinions drawn from the work of theologians and canonists (Ratzinger, Stickler, Aymans, Beyer, etc.), also offers his own opinion, based on the concept of intrinsically hierarchical ecclesiastical offices.

102. Effectively, in the proposal of Card. Ratzinger, approved in the Plenary Assembly of October, 1981, the text regarding these Prelatures figures as canon 341 §1: that is, within part II of book II: *De Ecclesiae structura hierarchica* (cf. *Congregatio Plenaria...*, op. cit, pp. 377–379).

deed, promulgation was to take place on January 25, 1983 on the same Feast of St. Paul's Conversion on which, 24 years earlier, John XXIII had announced Vatican Council II and the reform of *CIC*/1917.

And thus it transpired. In an act that was short and simple but of great importance for the life of all the people of God, on Tuesday January 25, 1983, soon after 12:30 noon, John Paul II, in the Hall of the Consistory in the Vatican's Apostolic Palace, promulgated the new "Codex Iuris Canonici" by signing the Apostolic Constitution *Sacrae Disciplinae LE*. "Today," said the Pope, signing three copies of the Constitution and three of the new Code "we shall make no discourse, but give thanks to the Cardinals, Archbishops, bishops, officials and everyone who worked for so long."

The Legislator officially presented the new Code of Canon Law to the Church on the morning of February 3, 1983 in the Hall of Benedictions. The ceremony took place before the College of Cardinals, the Diplomatic Corps accredited to the Holy See, members, officials and consultors of the Pontifical Code Commission, many Archbishops and bishops from the different continents, many Superiors and officials from the various dicasteries of the Roman Curia, and professors from ecclesiastical Universities and Faculties. First H.E. Msg. Castillo Lara and Card. Casaroli spoke; then the Holy Father gave his Discourse.[103]

VI. RELATIONSHIP TO PRIOR LEGISLATION

The interest naturally aroused, and the generally very positive scholarly evaluation of the new canonical legislation[104] even more, show that

103. For a brief description of the acts and the text of the Discourses, cf. Code Commission, *Promulgazione e presentazione ufficiale del Codice di Diritto Canonico* (Vatican City 1983).

104. Cf. for example: *Il nuovo Codice di Diritto Canonico. Aspetti fondamentali della codificazione postconciliare* (Bologna 1983); *Perchè un Codice nella Chiesa* (Bologna 1984); *Temas fundamentales en el nuevo Código de Derecho Canónico* (Salamanca 1984); *Struttura e dinamicità del nuovo Codice di Diritto Canonico* (Bari 1985); *La normativa del nuovo Codice* (Brescia 1985); R. CASTILLO LARA, "La communion ecclésiale dans le nouveau Code de Droit Canonique," in *Studia Canonica* 17 (1983), pp. 331–355; "Criteri di lettura e comprensione del nuovo Codice," in *Apollinaris* 56 (1983), pp. 345–369; J. HERRANZ, "Génesis del nuevo Cuerpo legislativo de la Iglesia," op. cit., pp. 491–526; G. THILS, "Le nouveau Code de Droit Canonique et l'ecclésiologie de Vatican II," in *Revue Théologique de Louvain* 14 (1983), pp. 289–301; J. BEYER, "Le nouveau Code de Droit Canonique. Esprit et structures," in *Nouvelle Revue Théologique* 106 (1984), pp. 360–382, 566–583; J. IMBERT, "Le Code de Droit Canonique de 1983 et de le Droit Romain," in *L'Anneé canonique* 28 (1984), pp. 1–12; A. CASIRAGHI, "Il diritto di famiglia nel nuovo Codice di Diritto Canonico," in *Il Diritto ecclesiastico e Rassegna di diritto matrimoniale* 96 (1985), I, pp. 604–632; J. OTADUY, "Funciones del Código en la recepción de la legislación postconciliar," in *Ius Canonicum* 25 (1985), pp. 479–516; L. PIVONKA, "The Revised Code of Canon Law: Ecumenical Implications," in *The Jurist* 45 (1985), pp. 521–548; M.D. PLACE, "A Theologian Looks at the Revised Code of Canon Law," in *The Jurist* 45 (1985), pp. 259–274; S. BWANA, "L'impatto del nuovo Codice in Africa," in *Concilium* 22 (1986), pp. 460–468; E. CORECCO, "Fondamenti ecclesiologici del nuovo Codice di Diritto Canonico," in *Concilium* 22 (1986), pp. 339–351; R. VOELTZEL, "Une lecture protestante du nouveau Code de Droit Canonique," in *Revue d'Histoire et Philosophie religieuses* 66 (1986), pp. 109–121.

this was not simply a superficial revision of the preceding Code. That would have belied its richness of doctrine and defrauded the requests by the Council for reform; but neither was it a legislative revolution. That would have subverted *a fundamentis* the basic principles of the canonical system, and also the constitutional structure and discipline of the Church.

Simple superficial revisions, poor and insufficient cosmetic touch-ups to legislation, are the work of a feeble authority. Out of a false idea of tradition and a weak sense of history, they look nervously and myopically to the future. *Revolutions* are typical of totalitarian regimes, dictatorships in which the tyrannical and irrational will of the leader of a small and closed oligarchy, operating under the impulse of an illicit personal charisma, thinks it is authorized to subvert everything, including the most deeply rooted institutions. On the other hand, in wise and prudent systems of governments such as, by the grace of God, the Catholic Church, in which authority is neither weak and timid nor totalitarian and dictatorial, legislative reforms are carried out with profound and even fundamental changes, but the essential structures upon which society has been built and has grown are respected. Thus John Paul II could say at the solemn presentation of the new Code, "As an indication and reminder, I would like to draw an ideal triangle for you. At the top is the Holy Scripture; on one side, the *Actas* of Vatican Councill II; and on the other side, the new Code of Canon Law. To start from these two books drawn up by the 20th-century Church and coherently and systematically reach the supreme and immutable vertex, *it will be necessary to move* along the sides of the triangle, neglecting and omitting nothing, *respecting the necessary connections*: I mean, all the Magisterium of prior Ecumenical councils, and also (without the outdated and abrogated norms) the patrimony of juridical wisdom that belongs to the Church."

As expressly stated in c. 6 § 1, 1° and 2°, the new body of universal laws of the Latin Church has abrogated the prior Code of Canon Law and all other contrary laws, universal or particular. But it has done more, because in contrast to the 1917 Code, the new Code no longer explicitly states a general intention to preserve prior discipline. Indeed, the statement that formerly was so opportune and necessary, "Codex vigentem hucusque disciplinam plerumque retinet," was eliminated (c. 6 *CIC*/1917). Why so? The diverse reactions aroused by promulgation of the first Code are well known, in reference to the scope of the methodological innovation relative to prior law and canonical tradition. The statement was explained by some, Cabreros de Anta, for example, as follows: "Changing the law is odious and therefore canonical legislation did not change it when it carried out the codification of ecclesiastical Law. In the preamble to c. 6 this principle is stated (...) This demonstrates the traditional nature of canon Law."[105] Other canonists, however, in spite of the "plerumque reti-

105. *Código de Derecho canónico. Comentarios al Libro I* (Madrid 1949), p. 6.

net" in c. 6, saw the Pius-Benedictine Code as a complete break with the Church's canonical tradition. In his commemorative discourse on the fiftieth anniversary of the promulgation of Gasparri's Code (*CIC*/1917), Kuttner said, "It is necessary to emphasize that with the promulgation of the Code, the documents of the preceding law had lost their formal nature as laws even in cases where they substantially continued being discipline in force in the form of new canons. They had been transformed into interpretative instruments, although doubtless endowed with the greatest authority, but only because of the legal force of the canons in the Code and no longer in themselves."[106]

What, then, can be said of the new Code? Why was the preamble to c. 6 in *CIC*/1917 eliminated, when it attenuated the so-called break with prior law? As we have seen, the answer lies in the historic origin and the purpose of the reform carried out. It was not merely an updating of the prior Code, but a thorough renovation of the Church's universal law in the light of the letter and the spirit of the magisterium, of the Vatican II Ecumenical Council. "When the first *Codex Iuris Canonici* was promulgated," wrote Stickler, "its great architect, Cardinal Gasparri, wanted to record in a somewhat prolix prologue the long history of the creation and compilation of the ecclesiastical Laws. With the second Code, which replaces the first one after scarcely 65 years, it is not necessary to explain the detailed history of the prior collections, among other reasons because this time, more than a collection we have a renovation of discipline."[107]

It is indeed a renovation of both the text of the law—to accommodate it to new historical, social and cultural circumstances—and the ecclesiology that constitutes the substrate of the law. It is an ecclesiology of communion and co-responsibility that enriches the *rationale legis* of the new legislative corpus with doctrinal and pastoral values that were difficult to perceive—or, at least, to ponder sufficiently—at the dawning of the twentieth century. It retains not only the objective of methodological order pursued by the first codifiers, which was the form of a single modern corpus to facilitate the task of ecclesiastical government and canonical teaching; it also retains a clear line of fidelity and respect for all the Church's perennial legislation, both from divine law and from ancient and proved tradition and experience. Such fidelity would not have been possible if the new Code had, as some wished, adopted the form of a simple *framework law* or enunciation of principles; that would have endangered the very unity of government and the essential common discipline of the universal Church.

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106. "Il Codice di Diritto Canonico nella Storia," in *Commemorazione del Cinquantesimo della promulgazione del Codex Iuris Canonici*, (Vatican City 1968), pp. 28–29.
107. A. STICKLER, "Sguardo storico sull'evoluzione del Diritto canonico," in *L'Osservatore Romano*, January 26, 1983, p. 2.

Fidelity to the past in no way diminishes, but dignifies the value of the reform carried out. Among others, the following reasons give witness thereto:

1. The statement in c. 6 § 2 of the new Code to have recourse to canonical tradition when examining the norms that refer to the ancient law: "*Canones huius Codicis, quatenus ius vetus referunt, aestimandi sunt ratione etiam canonicae traditionis habita*";

2. In spite of the many changes in content and the broad but theologically correct application of the principle of subsidiarity, there are many canons in the new Code that "*ius vetus referunt*," also with respect to merely technical questions;

3. With regard to the interpretation of the law and to the sources of suppletory law, cc. 17 and 19 of the new legislative corpus reiterate the same criteria of prudence and normative continuity as in the preceding canonical legislation, such as parallel places, the general principles of law, jurisprudence and the practice of the Roman Curia, and the common and continuous "*doctorum sententia.*"

Fidelity to the past and openness to the future—two characteristic motifs of the new Code of Canon Law. They were also motifs for the Ecumenical Council and must serve in rightly applying it. In the Ap. Const. *Sacrae disciplinae leges*, the Legislator predicted, "Considering all these things, it is hoped that the new canonical legislation will be an effective instrument to enable the Church to shape itself in accordance with the spirit of Vatican Council II, ever better prepared to fulfill its salvific mission in this world."[108]

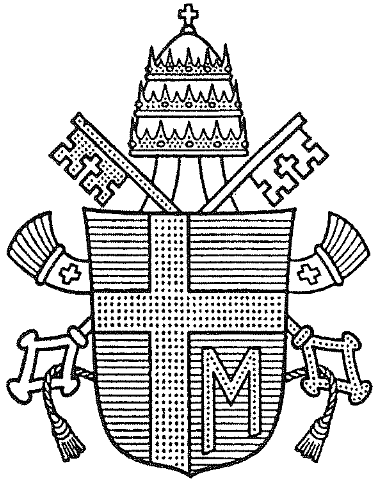
108. *SDL*, p. XIII.

CODEX IURIS CANONICI

AUCTORITATE

IOANNIS PAULI PP.II

PROMULGATUS



VENERABILIBUS FRATRIBUS
CARDINALIBUS, ARCHIEPISCOPIS, EPISCOPIS,
PRESBYTERIS, DIACONIS
CETERISQUE POPULI DEI MEMBRIS

IOANNES PAULUS EPISCOPUS

SERVUS SERVORUM DEI
AD PERPETUAM REI MEMORIAM

SACRÆ DISCIPLINÆ LEGES Catholica Ecclesia, procedente tempore, reformare ac renovare consuevit, ut, fidelitate erga Divinum Conditorem semper servata, eædem cum salvifica missione ipsi concredita apte congruerent. Non alio ducti proposito Nos, exspectationem totius catholici orbis tandem explentes, hac die xxv mensis Ianuarii, anno MCMLXXXIII, Codicem luris Canonici recognitum foras dari iubemus. Quod dum facimus, ad eandem diem anni *MCMLIX cogitatio Nostra convolat, qua Decessor* Noster fel. rec. Ioannes XXIII primum publice nuntiavit captum ab se consilium reformandi vigens Corpus legum canonicarum, quod anno MCMXVII, in sollemnitate Pentecostes, fuerat promulgatum.

Quod quidem consilium Codicis renovandi una cum duobus aliis initum est, de quibus ille Pontifex eadem die est locutus, quæ spectant ad voluntatem Synodum diœcesis Romanæ celebrandi et Concilium Œcumenicum convocandi. Quorum eventuum, etsi prior non multum ad Codicis reformationem attineat, alter tamen, hoc est Concilium, maximi momenti est ad rem nostram quod spectat et cum eius substantia arcte coniungitur.

Quod si quæstio ponatur cur Ioannes XXIII necessitatem persenserit vigentis *Codicis reformandi, responsio fortasse in eodem Codice*, anno MCMXVII promulgato, invenitur. Attamen alia quoque responsio est, eademque præcipua: scilicet reformatio Codicis luris Canonici prorsus posci

TO OUR VENERABLE BROTHERS
THE CARDINALS, ARCHBISHOPS, BISHOPS
PRIESTS, DEACONS
AND TO THE OTHER MEMBERS OF THE PEOPLE OF GOD

JOHN PAUL, BISHOP

SERVANT OF THE SERVANTS OF GOD
OR AN EVERLASTING MEMORIAL [1]

Over the course of time, the Catholic Church has been wont to revise and renew the laws of its sacred discipline so that, maintaining always fidelity to the Divine Founder, these laws may be truly in accord with the salvific mission entrusted to the Church. With this sole aim in view, we today, 25 January 1983, bring to fulfillment the anticipation of the whole Catholic world, and decree the publication of the revised *Code of Canon Law*. In doing so, our thoughts turn back to this same date in 1959, when our predecessor, John XXIII of happy memory, first publicly announced his personal decision to reform the current body of canonical laws which had been promulgated on the feast of Pentecost 1917.

This decision to renew the Code was taken with two others, of which that Pontiff spoke on the same day: they concerned his desire to hold a synod of the diocese of Rome and to convoke an Ecumenical Council. Even if the former does not have much bearing on the reform of the Code, the latter on the other hand, namely the Council, is of the greatest importance for our theme and is closely linked with its substance.

1. This English-language translation of *Sacræ disciplinæ leges* is taken from *The Code of Canon Law in English translation*, London, Collins, 1983, pp. xi-xv, and includes corrections made by the translators subsequent to publication as well as minor editorial changes made for the present publication to ensure consistency with the rest of this work.

atque expeti videbatur ab ipso Concilio, quod in Ecclesiam maximopere considerationem suam converterat.

Ut omnino patet, cum primum de Codice recognoscendo nuntium datum est, Concilium negotium erat quod totum ad futurum tempus pertinebat. Accedit quod eius magisterii acta ac præsertim eius de Ecclesia doctrina annis MCMLXII-MCMLXV perficienda erant; attamen animi perceptionem Ioannis XXIII fuisse verissimam nemo non videt, eiusque consilium iure merito dicendum est in longinquum Ecclesiæ bono prospexisse.

Quapropter novus Codex, qui hodie in publicum prodit, præviam Concilii operam necessario postulavit; et quamquam una cum œcumenico illo cœtu est prænuntiatus, tamen tempore eundem sequitur, quia labores, ad illum apparandum suscepti, cum in Concilio niti deberent, nonnisi post idem absolutum incipere potuerunt.

Mentem autem hodie convertentes ad exordium illius itineris, hoc est ad diem illam xxv Ianuarii anno MCMLIX, atque ad ipsum Ioannem XXIII, Codicis recognitionis initiatorem, fateri debemus hunc Codicem ab uno eodemque proposito profluxisse, rei christianæ scilicet restaurandæ; a quo quidem proposito totum Concilii opus suas normas suumque ductum præsertim accepit.

Quod si nunc considerationem intendimus ad naturam laborum, qui Codicis promulgationem præcesserunt, itemque ad modum quo iidem confecti sunt, præsertim inter Pontificatus Pauli VI et Ioannis Pauli I, ac deinceps usque ad præsentem diem, id claro in lumine ponatur omnino oportet, huiusmodi labores spiritu insigniter *collegiali* ad exitum esse perductos; idque non solum respicit externam operis compositionem, verum etiam ipsam conditarum legum substantiam penitus afficit.

Hæc vero nota collegialitatis, qua processus originis huius Codicis eminenter distinguitur, cum magisterio et indole Concilii Vaticani II plane congruit. Quare Codex non modo ob ea quæ continet, sed etiam iam in suo ortu præ se fert afflatum huius Concilii, in cuius documentis Ecclesia, universale sacramentum salutis (cfr. Const. *Lumen gentium*, n. 9, 48), tamquam Populus Dei ostenditur eiusque hierarchica constitutio in Collegio Episcoporum una cum Capite suo nixa perhibetur.

Hac igitur de causa Episcopi et Episcopatus invitati sunt ad sociam operam præstandam in novo Codice apparando, ut per tam longum iter, ratione quantum fieri posset collegiali, paulatim formulæ iuridicæ maturescerent, quæ, deinde, in usum universæ Ecclesiæ inservire deberent. Omnibus vero huius negotii temporibus labores participaverunt etiam *periti*, viri scilicet peculiari scientia præditi in theologica doctrina, in historia ac maxime in iure canonico, qui ex universis terrarum orbis regionibus sunt arcessiti.

Quibus singulis universis hodie gratissimi animi sensus ultro proferimus.

If one asks why John XXIII had clearly perceived the need to reform the current Code, perhaps the answer is found in the 1917 Code itself. There is however another reason, the principal one, namely that the reform of the *Code of Canon Law* was seen to be directly sought and requested by the Council itself, which had particularly concentrated its attention upon the Church.

As is quite clear, when the first announcement of the revision of the Code was made, the Council was something totally in the future. Moreover, the acts of its teaching authority, and particularly its teaching on the Church, were to be developed over the years 1962-65. Nevertheless, one cannot fail to see that John XXIII's insight was most accurate, and his proposal must rightly be acknowledged as one which looked well ahead to the good of the Church.

Therefore, the new Code which appears today necessarily required the prior work of the Council and, although it was announced together with that ecumenical gathering, it follows it in order of time, since the tasks needed for its preparation could not begin until the Council had ended.

Turning our thoughts today to the beginning of that long journey, that is to 25 January 1959 and to John XXIII himself, the originator of the review of the Code, we must acknowledge that this Code drew its origin from one and the same intention, namely the renewal of Christian life. All the work of the Council drew its norms and its shape principally from that same intention.

If we now turn our attention to the nature of the labours which preceded the promulgation of the Code and to the manner in which they were performed, especially during the pontificates of Paul VI, John Paul I and then up to this present day, it is vital to make quite clear that these labours were brought to their conclusion in an eminently collegial spirit. This not only relates to the external composition of the work, but it affects also the very substance of the laws which have been drawn up.

This mark of collegiality by which the process of this Code's origin was prominently characterised, is entirely in harmony with the teaching authority and the nature of the Second Vatican Council. The Code therefore, not only because of its content but because also of its origin, demonstrates the spirit of this Council in whose documents the Church, the universal sacrament of salvation (*LG* 9 and 48), is presented as the people of God, and its hierarchical constitution is shown as founded on the College of Bishops together with its Head.

For this reason therefore, the Bishops and Bishops' Conferences were invited to associate themselves with the work of preparing the new Code, so that through a task of such length, in as collegial a manner as possible, little by little the juridical formulæ would come to maturity and would then serve the whole Church. During the whole period of this task,

In primis ob oculos Nostros obversantur Cardinales vita functi, qui Commissioni præparatoriæ præfuerunt: Cardinalis Petrus Ciriaci, qui opus inchoavit, et Cardinalis Pericles Felici, qui complures per annos laborum iter moderatus est, fere usque ad metam. Cogitamus deinde Secretarios eiusdem Commissionis: Rev.mum D. Iacobum Violardo, postmodum Cardinalem, ac P. Raimundum Bidagor, Societatis Iesu sodalem, qui ambo in hoc munere explendo doctrinæ ac sapientiæ suæ dona profuderunt. Simul cum illis recolimus Cardinales, Archiepiscopos, Episcopos, quotquot illius Commissionis membra fuerunt, necnon Consultores singulorum Cœtuum a studiis hisce annis ad tam strenuum opus adhibitos, quos Deus interim ad æterna præmia vocavit. Pro his omnibus suffragans precatio Nostra ad Deum ascendit.

Sed placet etiam commemorare viventes, in primisque hodiernum Commissionis Pro-Præsidem, nempe Venerabilem Fratrem Rosalium Castillo Lara, qui diutissime tanto muneri operam navavit egregiam; ac, post illum, dilectum filium Villelmum Onclin, sacerdotem, qui assidua diligentique cura ad felicem operis exitum valde contulit, ceterosque qui in eadem Commissione sive ut Sodales Cardinales, sive ut Officiales, Consultores Cooperatoresque in Cœtibus a studiis vel in aliis Officiis, suas maximi pretii partes contulerunt, ad tantæ molis tantæque implicationis opus elaborandum atque perficiendum.

Codicem itaque hodie promulgantes, Nos plane conscii sumus hunc actum a Nostra quidem Pontificis auctoritate proficisci, ac proinde induere *naturam primatialem*. Attamen pariter conscii sumus hunc Codicem, ad materiam quod attinet, in se referre *collegialem sollicitudinem* de Ecclesia omnium Nostrorum in Episcopatu Fratrum; quinimmo, quasi ex quadam similitudine ipsius Concilii, idem Codex habendus est veluti fructus *collegialis cooperationis*, quæ orta est ex expertorum hominum institutorumque viribus per universam Ecclesiam in unum coalescentibus.

Altera oritur quæstio, quidnam sit Codex luris Canonici. Cui interrogationi ut rite respondeatur, mente repetenda est longinqua illa hereditas iuris, quæ in libris Veteris et Novi Testamenti continetur, ex qua tota traditio iuridica et legifera Ecclesiæ, tamquam a suo primo fonte, originem ducit.

Christus enim Dominus uberrimam hereditatem Legis et Prophetarum, quæ ex historia et experientia Populi Dei in Vetere Testamento paulatim creverat, minime destruxit, sed implevit (cfr. *Mt* 5, 17), ita ut ipsa novo et altiore modo ad hereditatem Novi Testamenti pertineret. Quamvis ergo Sanctus Paulus, mysterium paschale exponens, doceat iustificationem non ex legis operibus, sed ex fide dari (cfr. *Rm* 3, 28; cfr. *Gal* 2, 16), tamen nec vim obligantem Decalogi excludit (cfr. *Rm* 13, 8-10; cfr. *Gal* 5, 13-25; 6, 2), nec momentum disciplinæ in Ecclesia Dei negat (cfr. *1 Cor*, cap. 5 et 6). Sic Novi Testamenti scripta sinunt, ut nos multo magis percipiamus hoc ipsum disciplinæ momentum, utque melius intellegere valea-

experts also took part, people endowed with particular academic standing in the areas of theology, history and especially canon law, drawn from all parts of the world.

To each and every one of them we express our deepest gratitude today.

We recall, first of all, those Cardinals, now deceased, who headed the preparatory Commission, Cardinal Pietro Ciriaci who began the work, and Cardinal Pericle Felici who over a period of several years guided the labours almost to their goal. We think then of the Secretaries of this Commission, Monsignor, later Cardinal, Giacomo Violardo and Father Ramón Bidagor, S.J., both of whom lavished their talents of learning and wisdom on their role. Together with them, we recall the cardinals, archbishops and bishops, and all who were members of this Commission, as well as the consultors of the individual study groups engaged over these years in that strenuous task. God has called these to their eternal reward in the meantime. For all of them our suppliant prayer is raised to God.

With pleasure we also refer to the living: in the first place, to the present Pro-President of the Commission, our venerable brother Rosalio Castillo Lara, who has worked so outstandingly for so long in a role of such responsibility. Next, we refer to our beloved son, Monsignor William Onclin, who has contributed to the successful outcome of the task with assiduous and diligent care. Then there are others who played an inestimable part in this Commission, in developing and completing a task of such volume and complexity, whether as Cardinal members, or as officials, consultors and collaborators in the various study groups or in other roles.

In promulgating this Code today, therefore, we are fully conscious that this act stems from our pontifical authority itself, and so assumes a primatial nature. Yet we are no less aware that in its content this Code reflects the collegial solicitude for the Church of all our brothers in the episcopate. Indeed, by a certain analogy with the Council itself, the Code must be viewed as the fruit of collegial cooperation, which derives from the combined energies of experienced people and institutions throughout the whole Church.

A second question arises: what is the Code? For an accurate answer to this question, it is necessary to remind ourselves of that distant heritage of law contained in the books of the Old and New Testaments. It is from this, as from its first source, that the whole juridical and legislative tradition of the Church derives.

For Christ the Lord in no way abolished the bountiful heritage of the law and the prophets which grew little by little from the history and experience of the people of God in the Old Testament. Rather he fulfilled it (cf. Mt 5:17), so that it could, in a new and more sublime way, lead to the heritage of the New Testament. Accordingly, although St. Paul in expounding the mystery of salvation teaches that justification is not obtained through

mus vincula, quæ illud arctiore modo coniungunt cum indole salvifica ipsius Evangelii nuntii.

Quæ cum ita sint, satis apparet finem Codicis minime illum esse, ut in vita Ecclesiæ vel christifidelium fides, gratia, charismata ac præsertim caritas substituantur. Ex contrario, Codex eo potius spectat, ut talem gignat ordinem in ecclesiali societate, qui, præcipuas tribuens partes amori, gratiæ atque charismatibus, eodem tempore faciliorem reddat ordinatam eorum progressionem in vita sive ecclesialis societatis, sive etiam singulorum hominum, qui ad illam pertinent.

Codex, utpote cum sit primarium documentum legiferum Ecclesiæ, innixum in hereditate iuridica et legifera Revelationis atque Traditionis, pernecessarium instrumentum censendum est, quo debitus servetur ordo tum in vita individuali atque sociali, tum in ipsa Ecclesiæ navitate. Quare, præter elementa fundamentalia structuræ hierarchicæ et organicæ Ecclesiæ a Divino Conditore statuta vel in apostolica aut ceteroqui in antiquissima traditione fundata, ac præter præcipuas normas spectantes ad exercitium triplicis muneris ipsi Ecclesiæ demandati, Codex quasdam etiam regulas atque agendi normas definiat oportet.

Instrumentum, quod Codex est, plane congruit cum natura Ecclesiæ, qualis præsertim proponitur per magisterium Concilii Vaticani II in universum spectatum, peculiarique ratione per eius ecclesiologicam doctrinam. Immo, certo quodam modo, novus hic Codex concipi potest veluti magnus nisus transferendi in sermonem *canonisticum* hanc ipsam doctrinam, ecclesiologiam scilicet conciliarem. Quod si fieri nequit, ut imago Ecclesiæ per doctrinam Concilii descripta perfecte in linguam *canonisticam* convertatur, nihilominus ad hanc ipsam imaginem semper Codex est referendus tamquam ad primarium exemplum, cuius lineamenta is in se, quantum fieri potest, suapte natura exprimere debet.

Inde nonnullæ profluunt fundamentales normæ, quibus totus regitur novus Codex, intra fines quidem materiæ illi propriæ, necnon ipsius linguæ, quæ cum ea materia cohæret.

Quinimmo affirmari licet inde etiam proficisci notam illam, qua Codex habetur veluti complementum magisterii a Concilio Vaticano II propositi, peculiari modo quod attinet ad duas Constitutiones, dogmaticam nempe atque pastoralem.

Hinc sequitur, ut fundamentalis illa ratio *novitatis*, quæ, a traditione legifera Ecclesiæ numquam discedens, reperitur in Concilio Vaticano II, præsertim quod spectat ad eius ecclesiologicam doctrinam, efficiat etiam rationem *novitatis* in novo Codice.

Ex elementis autem, quæ veram ac propriam Ecclesiæ imaginem exprimunt, hæc sunt præcipue recensenda: doctrina qua Ecclesia ut Populus Dei (cfr. Const. *Lumen gentium, 2)* et auctoritas hierarchica uti servitium proponitur *(ibid., 3)*, doctrina præterea quæ Ecclesiam uti *communio-*

the works of the law but through faith (cf. Rom 3:28; Gal 2:16), nonetheless he does not exclude the binding force of the Decalogue (cf. Rom 13:8-10; Gal 5:13-25; 6:2), nor does he deny the importance of discipline in the Church (cf. 1 Cor 5-6). Thus the writings of the New Testament allow us to perceive more clearly the great importance of this discipline and to understand better the bonds which link it ever more closely with the salvific character of the Gospel message.

Granted this, it is sufficiently clear that the purpose of the Code is not in any way to replace faith, grace, charisms and above all charity in the life of the Church or of Christ's faithful. On the contrary, the Code rather looks towards the achievement of order in the ecclesial society, such that while attributing a primacy to love, grace and the charisms, it facilitates at the same time an orderly development in the life both of the ecclesial society and of the individual persons who belong to it.

As the Church's fundamental legislative document, and because it is based on the juridical and legislative heritage of revelation and tradition, the Code must be regarded as the essential instrument for the preservation of right order, both in individual and social life and in the Church's zeal. Therefore, over and above the fundamental elements of the hierarchical and organic structure of the Church established by the Divine Founder, based on apostolic or other no less ancient tradition, and besides the principal norms which concern the exercise of the threefold office entrusted to the Church, it is necessary for the Code to define also certain rules and norms of action.

The instrument, such as the Code is, fully accords with the nature of the Church, particularly as presented in the authentic teaching of the Second Vatican Council seen as a whole, and especially in its ecclesiological doctrine. In fact, in a certain sense, this new Code can be viewed as a great effort to translate the conciliar ecclesiological teaching into canonical terms. If it is impossible perfectly to transpose the image of the Church described by conciliar doctrine into canonical language, nevertheless the Code must always be related to that image as to its primary pattern, whose outlines, given its nature, the Code must express as far as is possible.

Hence flow certain fundamental principles by which the whole of the new Code is governed, within the limits of its proper subject and of its expression, which must reflect that subject. Indeed it is possible to assert that from this derives that characteristic whereby the Code is regarded as a complement to the authentic teaching proposed by the Second Vatican Council and particularly to its dogmatic and pastoral constitutions.

From this it follows that the fundamental basis of the `newness' which, while never straying from the Church's legislative tradition, is found in the Second Vatican Council and especially in its ecclesiological teaching, generates also the mark of `newness' in the new Code.

nem ostendit ac proinde mutuas statuit necessitudines quæ inter Ecclesiam particularem et universalem, atque inter collegialitatem ac primatum intercedere debent; item doctrina qua omnia membra Populi Dei, modo sibi proprio, triplex Christi munus participant, sacerdotale scilicet propheticum atque regale, cui doctrinæ ea etiam adnectitur, quæ respicit officia ac iura christifidelium, ac nominatim laicorum; studium denique ab Ecclesia in œcumenismum impendendum.

Si igitur Concilium Vaticanum II ex Traditionis thesauro vetera et nova protulit, eiusque novitas hisce aliisque elementis continetur, manifesto patet Codicem eandem notam fidelitatis in novitate et novitatis in fidelitate in se recipere, eique conformari pro materia sibi propria suaque peculiari loquendi ratione.

Novus Codex Iuris Canonici eo tempore in lucem prodit, quo Episcopi totius Ecclesiæ eius promulgationem non tantum postulant, verum etiam instanter vehementerque efflagitant.

Ac revera Codex Iuris Canonici Ecclesiæ omnino necessarius est. Cum ad modum etiam socialis visibilisque compaginis sit constituta, ipsa normis indiget, ut eius hierarchica et organica structura adspectabilis fiat, ut exercitium munerum ipsi divinitus creditorum, sacræ præsertim potestatis et administrationis sacramentorum rite ordinetur, ut secundum iustitiam in caritate innixam mutuæ christifidelium necessitudines componantur, singulorum iuribus in tuto positis atque definitis, ut denique communia incepta, quæ ad christianam vitam perfectius usque vivendam suscipiuntur, per leges canonicas fulciantur, muniantur ac promoveantur.

Demum canonicæ leges suapte natura observantiam exigunt; qua de causa quam maxima diligentia adhibita est, ut in diuturna Codicis præparatione, accurata fieret normarum expressio eædemque in solido iuridico, canonico ac theologico fundamento inniterentur.

Quibus omnibus consideratis, optandum sane est, ut nova canonica legislatio efficax instrumentum evadat, cuius ope Ecclesia valeat se ipsam perficere secundum Concilii Vaticani II spiritum, ac magis magisque parem se præbeat salutifero suo muneri in hoc mundo exsequendo.

Placet considerationes has Nostras fidenti animo omnibus committere, dum princeps legum ecclesiasticarum Corpus pro Ecclesia latina promulgamus.

Faxit ergo Deus, ut gaudium et pax cum iustitia et obœdientia hunc Codicem commendent, et quod iubetur a capite, servetur in corpore.

Itaque divinæ gratiæ auxilio freti, Beatorum Apostolorum Petri et Pauli auctoritate suffulti, certa scientia atque votis Episcoporum universi orbis adnuentes, qui nobiscum collegiali affectu adlaboraverunt, suprema qua pollemus auctoritate, Constitutione Nostra hac in posterum valitura, præsentem Codicem sic ut digestus et recognitus est, promulgamus, vim legis habere posthac pro universa Ecclesia latina iubemus ac omnium ad

Foremost among the elements which express the true and authentic image of the Church are: the teaching whereby the Church is presented as the people of God (cf. *LG* 2) and its hierarchical authority as service (*LG* 3); the further teaching which portrays the Church as a communion and then spells out the mutual relationships which must intervene between the particular and the universal Church, and between collegiality and primacy; likewise, the teaching by which all members of the people of God share, each in their own measure, in the threefold priestly, prophetic, and kingly office of Christ, with which teaching is associated also that which looks to the duties and rights of Christ's faithful and specifically the laity; and lastly the assiduity which the Church must devote to ecumenism.

If, therefore, the Second Vatican Council drew old and new from the treasury of tradition, and if its newness is contained in these and other elements, it is abundantly clear that the Code receives into itself the same mark of fidelity in newness and newness in fidelity, and that its specific content and corresponding form of expression is in conformity with this aim.

The new *Code of Canon Law* is published precisely at a time when the bishops of the whole Church are not only asking for its promulgation but indeed are insistently and vehemently demanding it.

And in fact a *Code of Canon Law* is absolutely necessary for the Church. Since the Church is established in the form of a social and visible unit, it needs rules, so that its hierarchical and organic structure may be visible; that its exercise of the functions divinely entrusted to it, particularly of sacred power and of the administration of the sacraments, is properly ordered; that the mutual relationships of Christ's faithful are reconciled in justice based on charity, with the rights of each safeguarded and defined; and lastly, that the common initiatives which are undertaken so that Christian life may be ever more perfectly carried out, are supported, strengthened, and promoted by canonical laws.

Finally, canonical laws by their very nature demand observance. For this reason, the greatest care has been taken that during the long preparation of the Code there should be an accurate expression of the norms and that they should depend upon a sound juridical, canonical, and theological foundation.

In view of all this, it is very much to be hoped that the new canonical legislation will be an effective instrument by the help of which the Church will be able to perfect itself in the spirit of the Second Vatican Council, and show itself ever more equal to carry out its salvific role in the world.

It is pleasing to set out these reflections of ours in a trusting spirit as we promulgate this principal body of ecclesiastical laws for the Latin Church.

quos spectat custodiæ ac vigilantiæ tradimus servandum. Quo autem fidentius hæc præscripta omnes probe percontari atque perspecte cognoscere valeant, antequam ad effectum adducantur, edicimus ac iubemus, ut ea vim obligandi sortiantur a die prima Adventus anni MCMLXXXIII. Non obstantibus quibuslibet ordinationibus, constitutionibus, privilegiis etiam speciali vel individua mentione dignis necnon consuetudinibus contrariis.

Omnes ergo filios dilectos hortamur, ut significata præcepta animo sincero ac propensa voluntate exsolvant, spe confisi fore ut Ecclesiæ studiosa disciplina revirescat ac propterea animarum quoque salus magis magisque, auxiliatrice Beatissima Virgine Maria, Ecclesiæ Matre, promoveatur.

Datum Romæ, die xxv Ianuarii, anno MCMLXXXIII, apud Vaticanas ædes, Pontificatus Nostri quinto.

IOANNES PAULUS PP. II

May God grant that joy and peace, with justice and obedience, may commend this Code, and that what is bidden by the head will be obeyed in the body.

Relying, therefore, on the help of divine grace, supported by the authority of the Blessed Apostles Peter and Paul, with certain knowledge and assenting to the pleas of the bishops of the whole world who have laboured with us in collegial good will, by the supreme authority which is ours, and by means of this Constitution of ours which is to have effect for the future, we promulgate this present Code as it has been compiled and reviewed. We order that henceforth it is to have the force of law for the whole Latin Church, and we commit its observance to the care and vigilance of all who are responsible. In order, however, that all may properly investigate these prescriptions and intelligently come to know them before they take effect, we decree and command that they shall come into force from the first day of Advent of the year 1983, all ordinances, constitutions, and privileges, even those meriting special and individual mention, as well as contrary customs, notwithstanding.

We therefore, exhort all our beloved children to observe, with sincere mind and ready will, the precepts laid down, buoyed up by the hope that a zealous Church discipline will flourish anew, and that from it the salvation of souls also will be ever more fervently promoted, with the assistance of the Blessed Virgin Mary, Mother of the Church.

Given at Rome, in the Vatican, on the 25th day of January 1983, in the fifth year of our Pontificate.

JOHN PAUL II

PRÆFATIO

Inde a primævæ Ecclesiæ temporibus mos fuit sacros canones in unum colligere, ut eorum scientia et usus et observantia faciliores evaderent, præsertim sacris ministris, quippe cum «nulli sacerdotum suos liceat canones ignorare», ut iam monuit Cœlestinus Papa in epistola ad episcopos per Apuliam et Calabriam constitutos (die 21 iulii a. 429. Cfr. Jaffé^2, n. 371; Mansi IV, col. 469); quibus verbis consonat Concilium Toletanum IV (a. 633) quod, post restauratam disciplinam Ecclesiæ in regno Visigothorum ab arianismo liberatæ, præscripserat: «sciant sacerdotes scripturas sacras et canones» quia «ignorantia mater cunctorum errorum maxime in sacerdotibus Dei vitanda est» (c. 25: Mansi, X, col. 627).

Revera decursu decem primorum sæculorum passim prope innumeræ effloruerunt ecclesiasticarum legum syllogæ, privato potius consilio compositæ, in quibus normæ a Conciliis potissimum et a Romanis Pontificibus latæ aliæque e fontibus minoribus depromptæ continebantur. Medio sæculo XII huiusmodi coacervatio collectionum et normarum, haud raro inter se pugnantium, item privato inceptu a monacho Gratiano in concordiam legum et collectionum redacta est. Quæ concordia, postea *Decretum Gratiani* nuncupata, primam constituit partem magnæ illius collectionis legum Ecclesiæ quæ, capto exemplo a Corpore Iuris Civilis Justiniani imperatoris, *Corpus Iuris Canonici* appellata est legesque continebat, quæ duorum fere sæculorum tempore ab auctoritate suprema RR. Pontificum conditæ sunt, adiuvantibus iuris canonici peritis, qui glossatores vocabantur. Quod Corpus, præter Gratiani Decretum in quo normæ superiores continebantur, constat *Libro Extra* Gregorii IX, *Libro VI°* Bonifatii VIII, *Clementinis* i.e. collectione Clementis V a Ioanne XXII promulgata, quibus accedunt huius Pontificis *Extravagantes* et *Extravagantes Communes* variorum RR. Pontificum Decretales numquam in collectionem authenticam collectæ. Ius ecclesiasticum, quod hoc Corpus complectitur, *ius classicum* Ecclesiæ catholicæ constituit atque hoc nomine communiter appellatur.

Huic autem Corpori iuris Ecclesiæ Latinæ respondet aliquo modo *Syntagma canonum* vel *Corpus canonum orientale* Ecclesiæ Græcæ.

PREFACE

As far back as the earliest times of the Church, it has been the practice to make collections of the sacred canons so that they could be more easily known, used, and observed by the sacred ministers, for "no priest can be ignorant of the canons" as Pope Celestine said in his letter to the bishops of Apulia and Calabria dated 21 July 429 (cf. Jaffé, 2nd ed., no. 371; Mansi, vol. IV, col. 469). The Fourth Council of Toledo (633) echoed these words when, once ecclesiastical discipline had been restored in the kingdom of Visigoths after the Church was freed from the heresy of Arianism, it prescribed: "Priests must know the sacred Scriptures and canons" because "ignorance, the mother of all errors, must be avoided by the priests of God" (c. 25, in Mansi, vol. X, col. 627).

In fact, over the course of the first ten centuries, there existed a profusion of ecclesiastical law collections, for the most part the result of individual efforts. They contained laws enacted by the councils or by the Roman Pontiffs as well as those emanating from less important sources. In the mid-12th century, this aggregate of collections and rules, often contradicting one another, was reduced to one concordance of laws and collections by the private initiative of the monk Gratian. This concordance, later called the *Decretum Gratiani*, constituted the first part of the great collection of laws of the Church which, modelled after the *Corpus iuris civilis* of the emperor Justinian, was called the *Corpus iuris canonici*. It incorporated the laws established during a period of almost two hundred years by the authority of the Roman Pontiffs with the help of the specialists in canon law, the glossators. Besides the *Decretum Gratiani* which related earlier laws, this collection contains the *Liber Extra* of Gregory IX, the *Liber Sextus* of Boniface VIII, the *Clementinæ*, that is, the collection of Clement V promulgated by John XXII, to which are added the *Extravagantes* of the same Clement V and the *Extravagantes communes*, decretals of various Roman Pontiffs which had never before been gathered in an authentic collection. The law of the Church included in this collection constitutes the *classical law* of the Catholic Church; it is by this name that it is commonly known.

Leges sequentes, præsertim tempore reformationis catholicæ a Concilio Tridentino conditæ atque a variis Curiæ Romanæ Dicasteriis posterius latæ, numquam in unam syllogem digestæ sunt; idque causa fuit cur legislatio extra Corpus Iuris Canonici vagans, procedente tempore, «immensum aliarum super alias coacervatarum legum cumulum» constitueret, in quo non solum inordinatio, verum etiam incertitudo cum inutilitate et lacunis plurimarum legum coniuncta effecerunt, ut ipsa disciplina Ecclesiæ in periculum discrimenque in dies magis adduceretur.

Qua de causa iam tempore præparationis Concilii Vaticani I a multis episcopis quæsitum erat, ut nova et unica legum collectio appararetur, ad curam pastoralem Populi Dei certiore tutioreque modo expediendam. Quod quidem opus, cum per actionem conciliarem ad effectum adduci non potuisset, Apostolica Sedes postea urgentioribus tantum rebus, quæ ad disciplinam propius pertinere videbantur, nova legum ordinatione consuluit. Pius Papa X, denique, vix Pontificatu inito, negotium in se suscepit, cum sibi proposuisset omnes leges ecclesiasticas colligere et reformare, iussit ut opus, duce Cardinali Petro Gasparri, tandem ad effectum deduceretur.

In tam grandi tamque arduo opere peragendo in primis quæstio de forma interna et externa novæ collectionis solvenda fuit. Seposito modo compilationis, quo singulæ leges prolixo suo originario textu referri debuissent, visum est hodiernam codificationis rationem eligere, sicque textus præceptum continentes et proponentes in novam ac breviorem formam redacti sunt; materia autem tota in quinque libris, qui systema institutionum iuris romani de personis, de rebus et de actionibus substantialiter imitantur, est ordinata. Opus duodecim annorum spatio peractum est, sociam ferentibus operam viris peritis, consultoribus et episcopis totius Ecclesiæ. Indoles novi Codicis prooemio can. 6 clare enunitatur: «Codex vigentem huc usque disciplinam plerumque retinet, licet opportunas immutationes afferat». Non agebatur ergo de iure novo condendo, sed præcipue de iure usque ad illud tempus vigente nova ratione ordinando. Pio X vita functo, hæc collectio universalis, exclusiva, authentica, ab eius successore Benedicto XV die 27 maii 1917 promulgata est, et a die 19 maii 1918 vim obligandi obtinuit.

Ius universale huius Codicis Pio-Benedictini consensu omnium comprobatum est, idemque nostra ætate valde contulit ad pastorale munus efficaciter promovendum in tota Ecclesia, quæ interim nova incrementa suscipiebat. Attamen, tum externæ Ecclesiæ condiciones in hoc mundo qui paucis decenniis tam celeres rerum vices ac tam graves morum immutationes expertus est, tum progredientes internæ rationes communitatis ecclesiasticæ, necessario effecerunt, ut nova legum canonicarum reformatio in dies magis urgeret atque expostularetur. Hæc sane temporum signa clare perspexerat Summus Pontifex Ioannes XXIII, qui cum Synodi Romanæ et Concilii Vaticani II primum nuntium dedit die 25 ianuarii 1959,

To a certain extent the *Syntagma canonum* or *Corpus canonum orientale* of the Greek Church corresponds to the corpus of law of the Latin Church.

The laws which followed, especially those of the Council of Trent during the Catholic Reformation and those enacted by the various dicasteries of the Roman Curia, were never gathered into a single collection. The result was that legislation outside of the *Corpus iuris canonici* eventually became "an immense mass of laws piled one on top of the other." This disorder, combined with legal uncertainty, obsolescence, and lacunæ in a large number of laws, led to a critical situation in which the danger to Church discipline accelerated almost by the day.

For this reason, during the preparation of the First Vatican Council, many bishops asked for a new and single collection of laws which would provide for the pastoral care of the people of God with greater certainty and efficacy. As the Council itself could not carry out this work, the Apostolic See eventually regulated the more urgent disciplinary matters through new legislation. Finally, Pope Pius X took control of the situation as one of the first tasks of his pontificate, by resolving to collect and reform all the laws of the Church, and assigning Cardinal Pietro Gasparri to direct the undertaking.

The form of the collection, both internal and external, was the first question to be resolved in this important and difficult task. It was decided to abandon the method of compilation in which each law would be transcribed in its original text, as the modern method of codification would be more expedient. Thus, texts which contained and proposed a precept were drafted in a new, brief form. All of the material was divided into five books which substantially imitated the institutions of Roman law concerning persons, things, and actions. The work was completed in twelve years with the help of experts, consultors, and bishops throughout the Church. In the introduction of c. 6, the character of the new Code was clearly enunciated: "The Code conserves in general the existing discipline unless it introduces appropriate changes." It was not a question of creating new law but rather of presenting the existing legislation in a new fashion. After the death of Pius X, this universal, exclusive, and authentic collection was promulgated by his successor Benedict XV on 27 May 1917 and took effect on 19 May 1918.

The universal law of this Pio-Benedictine Code was approved by all: it made a great contribution to the effective promotion of the pastoral ministry of the Church, which meanwhile was undergoing new growth. Nevertheless, both the external conditions of the Church in a world which had known rapid upheaval and important changes in customs within a few decades, and the evolution of internal change within the ecclesial community, brought about conditions in which a new revision of canon law was urgently needed and requested. Pope John XXIII shrewdly perceived the signs of the times when, on 25 January 1959, he announced the Roman

simul etiam annuntiavit hos eventus necessario fore præparationem ad exoptatam Codicis renovationem instituendam.

Re quidem vera, quamvis Commissio Codici Iuris Canonici recognoscendo die 28 martii 1963, incohato iam Concilio Œcumenico, constituta esset, Præside Card. Petro Ciriaci et Secretario Rev.mo D. Jacobo Violardo, sodales Cardinales in cœtu die 12 novembris eiusdem anni habito una cum Præside convenerunt veros ac proprios recognitionis labores esse differendos, eosque nonnisi post absolutum Concilium incipere posse. Reformatio enim perficienda erat iuxta consilia et principia ab ipso Concilio statuenda. Interea Commissioni a Ioanne XXIII constitutæ eius Successor Paulus VI die 17 aprilis 1964 septuaginta consultores adiunxit, ac postea alios sodales Cardinales nominavit et consultores e toto orbe arcessivit, ut in labore perficiendo operam suam navarent. Die 24 februarii 1965 Summus Pontifex Rev.mum P. Raymundum Bidagor S.J. novum Secretarium Commissionis nominavit, cum Rev.mus D. Violardo ad munus Secretarii Congregationis pro Disciplina Sacramentorum promotus esset, et die 17 novembris eiusdem anni Rev.mum D. Guilelmum Onclin Secretarium Adiunctum Commissionis constituit. Card. Ciriaci vita functo, die 21 februarii 1967 novus Pro-Præses nominatus est Archiepiscopus Pericles Felici, iam Secretarius Generalis Concilii Vaticani II, qui die 26 iunii eiusdem anni in Sacrum Cardinalium Collegium cooptatus est et deinceps munus Præsidis Commissionis suscepit. Cum autem Rev.mus P. Bidagor die 1 novembris 1973 annum octogesimum agens a munere Secretarii cessasset, die 12 februarii 1975 Exc.mus D. Rosalius Castillo Lara S.D.B., episcopus tit. Præcausensis et Coadiutor Truxillensis in Venetiola, novus Secretarius Commissionis renuntiatus est, idemque die 17 maii 1982, Cardinali Pericle Felici præmature e vivis erepto, Pro-Præses Commissionis est constitutus.

Concilio Œcumenico Vaticano II iam ad finem vergente, coram Summo Pontifice Paulo VI die 20 novembris 1965 sollemnis Sessio habita est, cui Cardinales sodales, Secretarii, consultores et officiales Secretariæ, interim constitutæ, interfuerunt, ut publica inauguratio laborum Codici Iuris Canonici recognoscendo celebraretur. In allocutione Summi Pontificis quodammodo fundamenta totius laboris iacta sunt ac revera in memoria revocatur Ius Canonicum e natura Ecclesiæ manare, eius radicem sitam in potestate iurisdictionis a Christo Ecclesiæ tributa, necnon finem in cura animarum ad salutem æternam consequendam esse ponendum; indoles præterea iuris Ecclesiæ illustratur, eius necessitas contra communiores obiectiones vindicatur, historia progressionis iuris et collectionum innuitur, præsertim autem urgens novæ recognitionis necessitas in luce ponitur, ut Ecclesiæ disciplina mutatis rerum condicionibus apte accommodetur.

Summus Pontifex insuper duo elementa Commissioni indicavit, quæ universo labori præesse deberent. Primum nempe non agebantur tantummodo de nova legum ordinatione, quemadmodum in elaborando Codice Pio-Benedictino factum erat, sed etiam ac præsertim de reformatione

Synod and the Ecumenical Council and declared at the same time that these events would constitute the necessary preparation for the desired renewal of the Code.

In fact, although the Code Commission was created on 28 March 1963 with Cardinal Pietro Ciriaci as president and the Rev. Msgr. Giacomo Violardo as secretary, the cardinal members of this Commission decided with the president in their meeting of 12 November of the same year that, since the Ecumenical Council had already begun, the true work of the revision should be deferred until the Council had concluded. The revision, in effect, was to be undertaken according to the directives and principles which the Council itself would adopt. In the meantime, the successor of John XXIII, Paul VI, added seventy consultors to the Commission on 17 April 1965; he subsequently named other cardinal members and added consultors from around the world to assist in the completion of the work. On 24 February 1965, the Supreme Pontiff named Rev. Ramón Bidagor, S.J., as secretary of the Commission since the Rev. Msgr. Violardo had been promoted to Secretary of the Congregation for the Discipline of the Sacraments, and on 17 November of the same year he named Rev. Willy Onclin, deputy secretary to the Commission. Cardinal Ciriaci died on 21 February 1967 and a new pro-president was named in the person of Archbishop Pericle Felici, former Secretary General of Vatican Council II, who on 26 June 1967 became a member of the College of Cardinals and was confirmed in his office of President of the Commission. Rev. Bidagor, having reached eighty years of age on 1 November 1973, ceased his official functions, and on 12 February 1975, Most Reverend Rosalio Castillo Lara, S.D.B., titular bishop of Precausa and coadjutor bishop of Trujillo, Venezuela, was named the new secretary of the Commission. He became pro-president on 17 May 1982 upon the premature death of Cardinal Pericle Felici.

As the Ecumenical Council was nearing its conclusion and to publicly inaugurate the work on 20 November 1965, a solemn Session of the Commission was held in the presence of Pope Paul VI; in attendance were the cardinal members, the secretaries, the consultors, and the officials of the Secretariat that had been named in the meantime. In the allocution of the Supreme Pontiff the foundations of the entire work was, in effect, laid: he recalled that canon law emanates from the nature of the Church, that its roots are situated in the power of jurisdiction given by Christ to the Church, and that its end is to be found in the care of souls in view of obtaining eternal salvation. Furthermore, the proper nature of canon law was illuminated; in refuting current objections, its necessity was demonstrated; the history of the progress of law and its collections was retraced; but most importantly, the emphasis was given to the urgent demand for a new revision that would enable the Church to adapt to changing situations.

The Supreme Pontiff further gave the Commission two principles which were to guide the entire work. In the first place, it was not simply to make a new collection of the laws as had been done in the time of the

normarum novo mentis habitui novisque necessitatibus accommodanda, etsi ius vetus suppeditare fundamentum deberet. Accurate deinde præ oculis habenda erant in hoc recognitionis opere universa Decreta et Acta Concilii Vaticani II, cum in iis propria novationis legislativæ lineamenta invenirentur, sive quia normæ fuerant editæ, quæ instituta nova et disciplinam ecclesiasticam directe respiciebant, sive etiam quia oportebat divitiæ doctrinales huius Concilii, quæ multum tribuerant pastorali vitæ, etiam in canonica legislatione sua consectaria suumque necessarium complementum haberent.

Iteratis allocutionibus, præceptis et consiliis etiam sequentibus annis duo prædicta elementa in mentem membrorum Commissionis revocata sunt a Summo Pontifice, qui quidem universum laborem altius dirigere atque assidue prosequi numquam cessavit.

Ut subcommissiones seu cœtus a studiis opus modo organico aggredi possent, necesse erat ut ante omnia enuclearentur et approbarentur principia quædam, quæ universæ Codicis recognitionis process sequendum statuerent. Cœtus quidam centralis consultorum textum documenti præparavit, quod iussu Summi Pontificis mense octobri 1967 studio Cœtus Generalis Synodi Episcoporum subiectum est. Unanimo fere consensu hæc principia approbata sunt: 1°) In renovando iure indoles iuridica novi Codicis, quam postulat ipsa natura socialis Ecclesiæ, omnino retinenda est. Quare Codicis est normas præbere ut christifideles in vita christiana degenda bonorum ab Ecclesia oblatorum participes fiant, quæ eos ad salutem æternam ducant. Ideoque hunc ad finem Codex iura et obligationes uniuscuiusque erga alios et erga societatem ecclesiasticam definire atque tueri debet, quatenus ad Dei cultum et animarum salutem pertineant. 2°) Inter forum externum et forum internum, quod Ecclesiæ proprium est et per sæcula viguit, exsistat coordinatio, ita ut conflictus inter utrumque vitetur. 3°) Ad curam pastoralem animarum quam maxime fovendam, in novo iure, præter virtutem iustitiæ, rationale habeatur etiam caritatis, temperantiæ, humanitatis, moderationis, quibus æquitati studeatur non solum in applicatione legum ab animarum pastoribus facienda, sed in ipsa legislatione, ac proinde normæ nimis rigidæ seponantur, immo ad exhortationes et suasiones potius recurratur, ubi non adsit necessitas stricti iuris servandi propter bonum publicum et disciplinam ecclesiasticam generalem. 4°) Ut Summus Legislator et Episcopi in cura animarum concordem operam præstent et pastorum munus modo magis positivo appareat, quæ huc usque extraordinariæ erant facultates circa dispensationem a legibus generalibus, ordinariæ fiant, reservatis iis tantum Supremæ potestati Ecclesiæ universalis vel aliis auctoritatibus superioribus, quæ propter bonum commune exceptionem exigant. 5°) Probe attendatur ad principium, quod e superiore eruitur et principium subsidiarietatis vocatur, in Ecclesia eo vel magis applicandum, quod officium episcoporum cum potestatibus adnexis est iuris divini. Hoc principio, dum unitas legislativa et ius universale et generale servantur, convenientia etiam et necessitas propugnantur providendi utilitati præsertim singulorum

Pio-Benedictine Code; foremost, it was to reform the laws to adapt to a new way of thinking and to new demands, even though it was to maintain the ancient law as its foundation. Secondly, in the revision, constant attention was to be paid to the spirit of the decrees and acts of the Second Vatican Council since in them were to be found the features of the new legislation. This was either because rules had already been enacted which directly concerned new institutions and ecclesiastical discipline, or because the doctrinal riches of the Council, which had greatly contributed to the pastoral life, had to find their effects and requisite influence on canonical legislation.

The Supreme Pontiff frequently emphasized these two principles to the members of the Commission, in his allocutions, decisions, and advice. Moreover, he kept watch on the entire work, and never ceased to assiduously follow its progress.

For the subcommissions or study groups to work in an organized manner, it was of critical importance that certain principles be established and identified to guide the complete revision of the Code. A central group of consultors prepared the text of a document which, on the order of the Supreme Pontiff, was submitted to the examination of the General Assembly of the Synod of Bishops in October 1967. With almost unanimous consent, the following principles were ratified: 1) In bringing the law up-to-date, the juridical character of the new Code, demanded by the social nature of the Church, should be preserved. For this reason, it rests with the Code to present the rules in such a manner that by practising the Christian life, the faithful can participate in the blessings offered to them by the Church, and which lead to eternal salvation. For this reason, the Code must specify and preserve the rights and duties of each person towards others and towards the ecclesial society as they pertain to divine worship and the salvation of souls. 2) There is to be a coordination between the external forum and the internal forum, which is proper to the Church and which has been in effect for centuries, so as to avoid conflict between the two fora. 3) To favour the pastoral care of souls, the new law must provide not only for justice, but there must be a place for charity, temperance, humaneness, and moderation by which fairness shall be found not only in the application of the laws by pastors but also in the legislation itself. Consequently, each time that it is not necessary to strictly observe a law for the public good or general ecclesiastical discipline, the extremely rigid rules are to be set aside, exhortation and persuasion should be the first resort. 4) In order that the Supreme legislator and the bishops may work together for the care of souls and exercise their pastoral office more positively, those faculties concerning dispensations from general laws, which until the present time have been extraordinary faculties, will become ordinary ones, with some reservations to the Supreme authority of the Church or to other higher authorities of those faculties which are an exception in view of the common good. 5) Particular attention is to be

institutorum per iura particularia et per sanam autonomiam potestatis exsecutivæ particularis illis agnitam. Eodem igitur principio innixus, novus Codex sive iuribus particularibus sive potestati exsecutivæ demandet, quæ unitati disciplinæ Ecclesiæ universalis necessaria non sint, ita ut sanæ sic dictæ «decentralizationi» opportune provideatur, remoto periculo disgregationis vel constitutionis Ecclesiarum nationalium. 6°) Propter fundamentalem æqualitatem omnium christifidelium et propter diversitatem officiorum et munerum, in ipso ordine hierarchico Ecclesiæ fundatam, expedit ut iura personarum apte definiantur atque in tuto ponantur. Quod efficit ut exercitium potestatis clarius appareat veluti servitium, magis eius usus firmetur, et abusus removeantur. 7°) Quæ ut apte in praxim deducantur, necesse est ut peculiaris cura tribuatur ordinandæ proceduræ, quæ ad iura subiectiva tuenda spectat. In novando igitur iure ad ea attendatur quæ hac in re hucusque magnopere desiderabantur, scilicet ad recursus administrativos et administrationem iustitiæ. Ad hæc obtinenda, necesse est ut varia potestatis ecclesiasticæ munera clare distinguantur, videlicet munus legislativum, administrativum et iudiciale, atque apte definiatur a quibusdam organis singula munera exercenda sint. 8°) Aliquo modo recognoscendum est principium de conservanda indole territoriali in exercitio regiminis ecclesiastici; rationes enim hodierni apostolatus unitates iurisdictionales personales commendare videntur. Principium igitur in iure novo condendo statuatur, quo portio Populi Dei regendi ex regula generali territorio determinetur; sed nihil impediat quominus, ubi utilitas id suadeat, aliæ rationes, saltem una simul cum ratione territoriali admitti possint, tamquam criteria ad communitatem fidelium determinandam. 9°) Circa ius coactivum, cui Ecclesia tamquam societas externa, visibilis et independens renuntiare nequit, pœnæ sint generatim ferendæ sententiæ, et in solo foro externo irrogentur et remittantur. Pœnæ latæ sententiæ ad paucos casus reducantur, tantum contra gravissima delicta irrogandæ. 10°) Denique, ut omnes unanimi admittunt, nova dispositio systematica Codicis, quam postulat nova accommodatio, inde ab initio adumbrari quidem, sed exacte definiri et decerni non potest. Eadem igitur peragenda erit tantum post sufficientem singularum partium recognitionem, immo postquam fere totum opus absolutum erit.

Ex his principiis, quibus novi Codicis recognitionis process dirigi oportebat, manifesto patet necessitas applicandi passim doctrinam de Ecclesia a Concilio Vaticano II enucleatam, quippe quæ statuat ut non solum ad externas ac sociales Corporis Christi Mystici rationes, verum etiam ac præcipue ad eius vitam intimam attendatur.

Ac re vera his principiis consultores in novo Codicis textu elaborando veluti manu ducti sunt.

Interea per epistulam, die 15 ianuarii 1966 ab Em.mo Cardinali Præside Commissionis ad Præsides Conferentiarum Episcoporum missam, Episcopi universi orbis catholici rogati sunt ut vota et consilia proponerent de ipso iure condendo necnon de modo, quo relationes inter Conferentias

given to the principle of subsidiarity which flows from the preceding principle; this principle must be applied in the Church, especially as the office of bishops with its powers is of divine law; in virtue of this principle and provided that legislative unity and universal and general law are respected, provision for the interests of individual institutes by particular laws and a healthy autonomy of particular executive power is recognized as proper and necessary. Based on this principle the new Code entrusts to particular laws or to executive power all that is not required for the unity of the discipline of the universal Church, so as to suitably provide for a healthy "decentralization," while avoiding the danger of disaggregation or the establishment of national Churches. 6) By reason of the fundamental equality of all the faithful and the diversity of offices and functions based on the hierarchical order of the Church, it is fitting that the rights of persons be correctly defined and protected; this brings with it the result that the exercise of power appears more clearly to be one of service, that its use is better established and that abuses are eliminated. 7) In order that these objectives are suitably put into practice, it is necessary that particular attention be given to regulating a procedure which protects subjective rights. For this reason, in revising the Code attention must be given to that which, to date, has been lacking in this domain, namely administrative recourse and the administration of justice; to this end the various functions of ecclesiastical power (i.e., the legislative, administrative, and judicial power) must be clearly distinguished and the organs which are to exercise a given function must be adequately defined. 8) It is necessary to adapt in some manner the principle of territoriality in the exercise of ecclesiastical government; the requirements of the modern apostolate seem, in effect, to call for the creation of personal jurisdictional units; in drafting the new law, it is determined that the general principle according to which the people of God are to be governed is one of territoriality; however, where it is useful, other references along with territoriality can be entered as criteria for determining a community of faithful. 9) For that which concerns coercive law, which the Church as an external, visible, and independant society cannot renounce, penalties are, in general, to be *ferendæ sententiæ*, imposed and remitted in the external forum only; *latæ sententiæ* penalties are to be reduced to a minimum number of cases and inflicted only for the most serious offences. 10) Finally, the new methodical arrangement of the Code required by the revision process can only be outlined at the beginning, and cannot be defined nor decided with precision; this will have to be dealt with once the revision of the individual parts is sufficiently advanced, indeed perhaps only when the work is almost completed.

It is clear from the principles which are to guide the revision process that the doctrine on the Church given by the Second Vatican Council is to be applied everywhere, especially in its determination to consider not only the external and social dimensions of the Mystical Body of Christ, but also and more importantly, its internal life.

episcoporum et Commissionem apte iniri oporteret, ad cooperationem quam maxime hac in re in bonum Ecclesiæ obtinendam. Insuper quæsitum est, ut nomina iuris canonici peritorum ad Secretariam Commissionis mitterentur, qui de iudicio Episcoporum in singulis regionibus doctrina magis eminerent, indicata quoque eorundem speciali peritia, ita ut ex iis consultores et collaboratores seligi ac nominari possent. Revera initio ac decursu laborum, præter Em.mos sodales inter consultores Commissionis Episcopi, sacerdotes, religiosi, laici, iuris canonici necnon theologiæ, curæ pastoralis animarum et iuris civilis periti ex toto orbe christiano allecti sunt, ut operam suam conferrent ad novum Codicem Iuris canonici apparandum. Per totum laborum tempus apud Commissionem, ex quinque Continentibus ac ex 31 nationibus, uti sodales, consultores, aliique collaboratores, operam præstiterunt 105 Patres Cardinales, 77 Archiepiscopi et Episcopi, 73 presbyteri sæculares, 47 presbyteri religiosi, 3 religiosæ, 12 laici.

Iam ante postremam Concilii Vaticani II sessionem, die 6 maii 1965 consultores Commissionis convocati sunt in privatam sessionem, in qua, de consensu Beatissimi Patris, Præses Commissionis tres quæstiones fundamentales eorum studio commisit, quæsitum nempe est, utrum unus an duo Codices, Latinus scilicet et Orientalis, conficiendi essent; quinam ordo laborum in eo redigendo esset sequendus, seu quomodo Commissio eiusque organa procedere deberent; denique quomodo apta fieret divisio laboris variis subcommissionibus, quæ simul agerent, committendi. De his quæstionibus a tribus cœtibus ad id constitutis relationes confectæ sunt, eædemque ad omnes sodales sunt transmissæ.

Circa easdem quæstiones Em.mi Commissionis sodales secundam suam sessionem celebraverent die 25 novembris 1965, in qua rogati sunt, ut ad nonnulla dubia de hac re responderent.

Quoad ordinationem systematicam novi Codicis, ex voto cœtus centralis consultorum, qui a die 3 ad diem 7 apriiis 1967 congregati sunt, principium de hac re redactum est Synodo Episcoporum proponendum. Post sessionem Synodi, opportunum visum est constituere, mense novembri 1967, specialem cœtum consultorum, qui in studium ordinis systematici incumberent. In sessione huius cœtus initio mensis aprilis 1968 habita, omnes concordes fuerunt de non recipiendis in novum Codicem nec legibus proprie liturgicis, nec normis circa processus beatificationis et canonizationis, et ne normis quidem circa relationes Ecclesiæ ad extra. Placuit quoque omnibus ut, in parte ubi de Populo Dei agitur, statutum personale omnium christifidelium poneretur et distincte tractaretur de potestatibus et facultatibus, quæ exercitium diversorum officiorum et munerum respiciunt. Omnes denique convenerunt structuram librorum Codicis Pio-Benedictini in novo Codice integre servari non posse.

In tertia sessione Em.morum sodalium Commissionis die 28 maii 1968 habita, Patres Cardinales approbarunt, quoad substantiam, temporariam ordinationem, iuxta quam cœtus studiorum, qui iam antea constituti

And, indeed, the consultors were guided by these principles in their work.

Meanwhile, on 15 January 1966, His Eminence the Cardinal President of the Commission sent a letter to the presidents of the conferences of bishops by which he asked the bishops of the Catholic world to express their opinions and suggestions concerning the drafting of the new legislation, and also their ideas on structuring the relationship between the conferences and the Commission so as to establish close cooperation for the good of the Church. Furthermore, the bishops were asked to communicate to the Secretariat of the Commission the names of canon lawyers and their particular areas of expertise who, in the judgement of the bishops, had a certain authority in virtue of their knowledge, and who could then be considered and named as consultors or collaborators. In fact, since the beginning of the work, and indeed throughout the entire project, apart from the members of the Commission, many people were gathered from all over the Catholic world to act as consultors; these included bishops, priests and laypeople, experts in canon law, theology, pastoral care, and civil law. During the entire revision process 105 cardinals, 77 archbishops and bishops, 73 secular priests, 47 religious priests, 3 religious women, and 12 laypeople from 5 continents and 31 countries participated as members, consultors or collaborators with the Commission.

Even before the final session of the Second Vatican Council, on 6 May 1965, the consultors of the Commission were convoked a private session in which, with the assent of the Holy Father, the President submitted for their examination three fundamental questions: were there to be drafted two codes, i.e., a Latin Code and an Oriental one? What methodology was to be followed in drafting the Code or how was the Commission and its organs to proceed? Finally, how was the work to be divided among the various subcommissions which were going to be working simultaneously? Three working groups constituted to study these questions submitted their reports to all the Commission members.

The cardinal members of the Commission met for a second session on 25 November 1965, in which they discussed these same questions and others which arose out of them.

Concerning the arrangement of the material of the new Code, the central commission of consultors proposed in meetings on 3-7 April 1967, that the basic principles of these questions be gathered and submitted to the Synod of Bishops. After the session of the Synod, it was deemed expedient to constitute a special commission of consultors in November 1967 to study the internal arrangement of the Code. This commission met early in the month of April 1968. All of the members agreed to eliminate from the new Code strictly liturgical laws as well as norms concerning the process of beatification and canonization, and also those on the external relations of the Church. It was also agreed to put the norms on the juridical status of all the Christian faithful in the section on the people of God and

erant, in novum ordinem sunt dispositi: «De ordinatione systematica Codicis», «De normis generalibus», «De sacra Hierarchia», «De institutis perfectionis», «De laicis», «De personis physicis et moralibus in genere», «De matrimonio», «De sacramentis, excepto matrimonio», «De magisterio ecclesiastico», «De iure patrimoniali Ecclesiæ», «De processibus», «De iure pœnali».

Argumenta a cœtu «De personis physicis et iuridicis» (ita postea vocatus est) pertractata confluxerunt in Librum «De normis generalibus». Item opportunum visum est constituere cœtum «De locis et temporibus sacris deque cultu divino». Ratione amplioris competentiæ mutati sunt tituli aliorum cœtuum: cœtus «De laicis» nomen sumpsit «De fidelium iuribus et consociationibus deque laicis»; cœtus «De religiosis» vocatus est «De institutis perfectionis» et denique «De institutis vitæ consecratæ per professionem consiliorum evangelicorum».

De methodo, quæ in labore recognitionis plus quam 16 annos adhibita est, breviter memorandæ sunt partes principaliores: consultores singulorum cœtuum maxima cum animi deditione operam egregiam præstiterunt, solum ad Ecclesiæ bonum spectantes, sive in præparatione scripto facta votorum circa proprii schematis partes, sive in disceptatione perdurantibus sessionibus, quæ statis temporibus Romæ habebantur, sive in examine animadversionum, votorum et sententiarum quæ de ipso schemate perveniebant ad Commissionem. Modus procedendi hic erat: singulis consultoribus, qui numero ab octo ad quattuordecim singulos cœtus a studiis constituebant, argumentum significabatur quod, iure Codicis vigentis innixum, studio recognitionis subiciendum erat. Unusquisque, post examen quæstionum, votum suum scripto exaratum Secretariæ Commissionis transmittebat eiusque exemplar relatori et, si tempus suppetebat, omnibus cœtus membris tradebatur. In studii sessionibus, Romæ iuxta calendarium laborum habendis, cœtus consultores conveniebant et relatore proponente, omnes quæstiones et sententiæ expendebantur, donec textus canonum etiam per partes suffragio declararetur et in schema redigeretur. In sessione relatori auxilium præstabat officialis, qui actuarii munere fungebatur.

Numerus sessionum pro unoquoque cœtu, secundum argumenta concreta, maior minorve erat, laboresque per annos protrahebantur.

Habebantur, præsertim tempore posteriore, quidam cœtus mixti eo fine constituti, ut a quibusdam consultoribus, e diversis cœtibus in unum convenientibus, argumenta disceptarentur, quæ directe ad plures cœtus spectabant et communi consilio decernerentur oportebat.

Postquam expleta est elaboratio nonnullorum schematum effecta a cœtibus a studiis, concretæ indicationes postulatæ sunt a Supremo Legislatore circa subsequens process in labore sequendum; quod quidem process iuxta normas tunc impertitas hoc erat:

that the powers and faculties concerning the different offices and functions would be treated separately. Finally, all were of the opinion that the order of the books of the Pio-Benedictine Code could not be kept as such in the new Code.

The third session of the cardinal members of the Commission took place on 28 May 1968. They approved substantially that the study groups previously created would be provisionally organized in the following manner: "the methodical organization of the Code," "general norms," "the sacred hierarchy," "institutes of perfections," "laity," "physical and moral persons in general," "marriage," "sacraments other than marriage," "the ecclesial magisterium," "patrimonial law of the Church," "processes," "penal law."

The material examined by the group on "physical and juridical persons" (as it was to be called later) was incorporated into the book on "general norms." Moreover, it was deemed suitable to create a group on "sacred places and times and divine worship." Because of their broader competence, the names of some of the study groups were changed: the group on "the laity" took the name "the rights and associations of the faithful and the laity," and the group on "religious" became "institutes of perfection" and finally "institutes of consecrated life by the profession of the evangelical counsels."

It is important to recall the characteristics of the method which was followed during the more than sixteen years of the revision process. The consultors of each group accomplished their work admirably and with great generosity, with the good of the Church their only consideration. They drafted their proposals concerning their own parts of the schema, discussed various issues in meetings which took place in Rome at fixed dates, and examined the remarks, proposals, and suggestions which were forwarded to the Commission regarding their schema. The process was the following: to each of the consultors, who numbered from eight to fourteen in the individual study groups, was given a question to be studied with regards to the revision process, working with the Code currently in use. Each one, after studying their questions, sent their written opinions to the Secretariat of the Commission, who in turn transmitted them to the reporter and, if there was time, to all the members of the study group. The consultors met in Rome according to a predetermined schedule. Under the guidance of the reporter, all the questions and opinions were debated until, sometimes by a process of voting on the individual parts, the text of the canons was approved and written in draft form. During the session a secretary-clerk assisted the reporter.

The number of sessions for each group varied according to the matters to be studied, and the work lasted for years.

Especially near the end, joint groups were constituted so that some consultors from the different study groups could meet to discuss matters

Schemata, una cum relatione explicativa, mittebantur ad Summum Pontificem, qui decernebat utrum ad consultationem procedendum esset. Post obtentam hanc permissionem, schemata typis edita submittebantur examini universi Episcopatus ceterorumque organorum consultationis (nempe Dicasteriorum Curiæ Romanæ, Universitatum et Facultatum ecclesiasticarum atque Unionis Superiorum Generalium), ut ipsa organa, intra tempus prudenter statutum — non minus quam sex menses — suam sententiam exprimendam curarent. Simul quoque schemata mittebantur ad Em.mos Commissionis sodales, ut inde ab hoc stadio laboris suas observationes sive generales sive particulares facerent.

En ordo quo schemata ad consultationem missa sunt: anno 1972: schema «De procedura administrativa»; anno 1973: «De sanctionibus in Ecclesia»; anno 1975: «De Sacramentis»; anno 1976: «De modo procedendi pro tutela iurium seu de processibus»; anno 1977: «De institutis vitæ consecratæ per professionem consiliorum evangelicorum»; «De normis generalibus»; «De Populo Dei»; «De Ecclesiæ munere docendi»; «De locis et temporibus sacris deque cultu divino»; «De iure patrimoniali Ecclesiæ».

Procul dubio Codex Iuris Canonici recognitus apte apparari non potuisset sine inæstimabili et continua cooperatione, quam Commissioni contulerunt numerosæ ac pervalidæ animadversiones indolis præsertim pastoralis ab Episcopis et Conferentiis Episcoporum exhibitæ. Episcopi enim plurimas scripto animadversiones fecerunt: sive generales quoad schemata in universum considerata, sive particulares quoad singulos canones.

Magna utilitate præterea fuerunt etiam animadversiones, innixæ in propria experientia circa gubernium Ecclesiæ centrale, quas transmiserunt Sacræ Congregationes, Tribunalia aliaque Romanæ Curiæ Instituta, necnon scientificæ atque technicæ propositiones et suggestiones prolatæ ab Universitatibus et Facultatibus ecclesiasticis ad diversas scholas ad diversasque cogitandi vias pertinentibus.

Studium, examen atque discussio collegialis omnium animadversionum generalium et particularium, quæ ad Commissionem transmissæ sunt, ponderosum sane immensumque laborem secum tulerunt, qui per septem annos est protractus. Secretariatus Commissionis ad amussim curavit ut ordinatim disponerentur atque in synthesim redigerentur omnes animadversiones, propositiones et suggestiones, quæ, postquam consultoribus transmissæ fuerant ut ab ipsis attente examinarentur, discussioni deinceps submittebantur in sessionibus collegialis laboris habendis a decem cœtibus a studiis.

Nulla fuit animadversio, quæ perpensa non esset maxima cum cura atque diligentia. Hoc factum est etiam cum de animadversionibus agebatur inter se contrariis (quod non raro evenit), præ oculis habendo non solum earum pondus sociologicum (nempe numerum organorum consultationis ac personarum quæ ipsas proponebant), sed præsertim earum

which directly concerned them all, and upon which it was necessary to reach a consensus.

After a certain number of schemas were drafted by the study groups, the Supreme Legislator was asked to provide further guidelines with regard to the continuation of the work. The norms given were as follows.

The schemas were sent with an explanatory note to the Supreme Pontiff, who decided whether it was necessary to proceed with a consultation. Once this authorization was obtained, the printed schemas were submitted for an examination by the entire episcopate and other consultative organisms (namely, the discasteries of the Roman Curia, ecclesiastical universities and faculties and the Union of Superiors General). These organisms were to give their opinions within a predetermined period of time, which was not to be less than six months. At the same time, the schemas were sent to the cardinal members of the Commission so that they could give their general or particular observations at this stage.

The schemas were sent in the following order: in 1972 the schema on "administrative procedure"; in 1973, "sanctions in the Church"; in 1975, "sacraments"; in 1976, "procedure for the protection of rights or processes"; in 1977, "institutes of consecrated life through the profession of the evangelical counsels," "general norms," "the people of God," "the teaching office of the Church," "sacred places and times and divine worship," and "patrimonial law of the Church."

Without doubt the revised *Code of Canon Law* could not have been suitably prepared without the inestimable and continued assistance given the Commission by the bishops and conferences of bishops, who provided numerous and pertinent observations, especially of a pastoral nature. The bishops, in fact, wrote many observations, either general in nature, on the schemas taken as a whole, or particular ones on the individual canons.

The remarks which were transmitted by the Sacred Congregations, the Tribunals and other organs of the Roman Curia based on their proper experience in the central government of the Church were also of great benefit. The same can be said for the scientific and technical propositions and suggestions made by Catholic universities and faculties, with members from various schools of thought and reflecting diverse mentalities.

The study, examination, and collegial discussion of all the general and particular remarks which were received by the Commission made for a weighty and immense work, which was pursued for seven years. The Secretary of the Commission took great care to classify and synthesize all of the observations, propositions and suggestions. These, after having been transmitted to the consultors for careful study, were discussed again collegially in working sessions conducted by the ten study groups.

Thus, all of the remarks received were examined with great care and attention. This same care was given even with observations which contradicted each other (which happened often). Consideration was given not

valorem doctrinalem ac pastoralem earundemque cohærentiam cum doctrina et normis applicativis Concilii Vaticani II et cum Magisterio pontificio, itemque, ad rationem specifice technicam et scientificam quod attinet, necessariam ipsam congruitatem cum systemate iuridico canonico. Immo, quotiescumque de re dubia agebatur vel quæstiones peculiaris momenti agitabantur, tunc denuo postulabatur sententia Em.morum Commissionis sodalium in sessione plenaria coadunatorum. Aliis vero in casibus, attenta specifica materia de qua disceptabatur, consulebantur etiam Congregatio pro Doctrina Fidei aliaque Curiæ Romanæ Dicasteria. Multæ denique correctiones et immutationes in canonibus priorum Schematum, petentibus aut suggerentibus Episcopis ceterisque organis consultationum, introductæ sunt, adeo ut nonnulla schemata evaserint penitus novata vel emendata.

Retractatis igitur omnibus schematibus, Secretaria Commissionis et consultores in ulteriorem eundemque ponderosum incubuerunt laborem. Agebatur enim de interna coordinatione omnium schematum curanda, de tuenda eorum uniformitate terminologica præsertim sub aspectu technico-iuridico, de redigendis canonibus in breves et concinnas formulas, ac denique de systematica ordinatione definitive statuenda, ita ut omnia et singula schemata, a distinctis cœtibus parata, in unicum atque omni ex parte cohærentem Codicem confluerent.

Nova ordinatio systematica, quæ veluti sua sponte ex labore paulatim maturescente orta est, duobus principiis innititur, quorum alterum spectat ad fidelitatem erga generaliora principia iam pridem a cœtu centrali statuta, alterum vero ad practicam utilitatem, ita ut novus Codex non solum a peritis, sed etiam a Pastoribus, immo et a christifidelibus omnibus facile intellegi atque in usu haberi possit.

Constat ergo novus Codex septem Libris, qui inscribuntur: *De normis generalibus*, *De Populo Dei*, *De Ecclesiæ munere docendi*, *De Ecclesiæ munere sanctificandi*, *De bonis Ecclesiæ temporalibus*, *De sanctionibus in Ecclesia*, *De processibus*. Quamvis ex differentia rubricarum quæ singulis Libris veteris et novi Codicis præponuntur, differentia quoque inter utrumque systema iam satis appareat, nihilominus multo magis ex partibus, sectionibus, titulis eorumque rubricis innovatio ordinis systematici manifesta fit. At pro certo habendum est novam ordinationem non solum materiæ et indoli propriæ iuris canonici magis quam veterem respondere, sed, quod maioris momenti est, magis etiam satisfacere ecclesiologiæ Concilii Vaticani II iisque inde manantibus principiis quæ iam initio recognitionis fuerint proposita.

Schema totius Codicis, die 29 iunii 1980, in sollemnitate Beatorum Apostolorum Petri et Pauli, typis editum, Summo Pontifici oblatum est, qui iussit ut illud definitivi examinis et iudicii peragendi causa singulis Cardinalibus Commissionis membris mitteretur. Quo magis autem in luce poneretur participatio totius Ecclesiæ in postremo quoque phasi laborum stadio, Summus Pontifex decrevit alios sodales: Cardinales et etiam

only to their sociological merit (namely, the number of consultative organs and persons who forwarded them) but most importantly to their doctrinal and pastoral value, their coherence with the doctrine and guiding principles of the Second Vatican Council, and with the pontifical magisterium. Technically and scientifically, their coherence with the canonical system also had to be taken into account. Moreover, whenever a doubtful issue surfaced or questions of particular significance were raised, the cardinal members of the Commission were asked for an opinion during one of their plenary sessions. In other cases, according to the matter under discussion, the Congregation of the Doctrine of the Faith and other dicasteries of the Roman Curia were consulted. Finally, many revisions to the canons of the first schemas were introduced at the request or suggestion of the bishops and other consultative bodies, with the result that certain of the schemas were completely renewed or amended.

Once all of the schemas had been reviewed, the Secretariat of the Commission and the consultors embarked upon yet another weighty task. It involved the internal coordination of the schemas, ensuring a consistent terminology especially of the technico-juridical aspect; the drafting of canons in concise and elegant formulations and finally definitively deciding on a plan so that all and each of the schemas prepared by the different study groups could cohere in a unique, articulate Code.

The new plan, which emerged progressively as the work continued, is based on two principles, the first of which is faithfulness to the very general principles given at the beginning by the central committee, and the second of which is its practical usage, since the new Code must be accessible not only to experts, but also to pastors and all the faithful.

The new Code is made up of seven books, entitled: "General Norms," "The People of God," "The Teaching Office of the Church," "The Sanctifying Office of the Church," "The Temporal Goods of the Church," "Sanctions in the Church," and "Processes." Although the difference in the titles of each of the books in the old and new Code sufficiently points to the difference between the two juridical systems, the novelty of the new system is more apparent when considering the parts, sections, titles, and rubrics of the new Code. The new arrangement is more attuned to the matter and nature of canon law than the old system, and more importantly, it is more in keeping with the ecclesiology of the Second Vatican Council and the consequent principles which were proposed at the outset of the revision.

On 29 June 1980, the solemnity of the Blessed Apostles Peter and Paul, the printed schema of the entire Code was to be sent to each of the cardinal members of the Commission for their examination and definitive judgement. In order to greater emphasize the participation of the entire Church in the final phase of the work, the Supreme Pontiff decided to name new members to the Commission. The cardinals and bishops were named from the entire Church from the proposals of conferences of bishops or councils or groups of conferences of bishops. The members of the

Episcopos, ex universa Ecclesia selectos, Commissioni esse aggregandos — Episcoporum Conferentiis vel Consiliis aut Cœtibus Episcoporum Conferentiarum proponentibus — atque ita eadem Commissio hac vice adaucta est ad numerum 74 sodalium. Quiquidem, initio a. 1981, quam plurimas miserunt animadversiones, quæ deinde a Secretaria Commissionis, operam navantibus consultoribus peculiari peritia præditis in singulis materiis de quibus agebatur, accurato examini, diligenti studio et collegiali discussioni subiectæ sunt. Synthesis omnium animadversionum una cum responsionibus a Secretaria et a consultoribus datis, mense augusto 1981 ad Commissonis membra transmissa est.

Sessio Plenaria, de mandato Summi Pontificis convocata, ut de toto novi Codicis textu deliberaret et suffragia definitiva ferret, a die 20 ad diem 28 octobris 1981 in Aula Synodi Episcoporum celebrata est, in eaque præsertim de sex quæstionibus maioris ponderis et momenti disceptatio instituta est, sed et de aliis etiam per petitionem decem saltem Patrum allatis. Dubio in fine Sessionis Plenariæ proposito, *utrumne Patribus placeret, ut post examinata in Plenaria Schema C.I.C. et emendationes iam inductas, idem Schema, introductis quæ in Plenaria maioritatem obtinuerint, præ oculis quoque habitis aliis quæ datæ fuerint, animadversionibus, atque perpolitione facta quoad stilum et latinitatem (quæ onmia Præsidi et Secretariæ committuntur) dignum habeatur, quod Summo Pontifici, qui tempore et modo, quæ sibi videantur, Codicem edat, quam primum præsentetur* Patres unanimo consensu responderunt: placet.

Textus integer Codicis hoc modo retractatus et approbatus, auctus canonibus schematis Legis Ecclesiæ Fundamentalis, quos ratione materiæ in Codicem inseri oportebat, atque etiam quoad latinitatem perpolitus, tandem rursus typis impressus est atque, ut iam ad promulgationem procedi posset, die 22 aprilis 1982 Summo Pontifici est traditus.

Summus Pontifex, autem, per Se ipsum, adiuvantibus quibusdam peritis auditoque Pro-Præside Pontificiæ Commissionis Codici Iuris canonici recognoscendo, huiusmodi novissimum Schema recognovit atque omnibus mature perpensis, decrevit novum Codicem promulgandum esse die 25 ianuarii 1983, anniversario scilicet primi nuntii, quem Papa Ioannes XXIII dedit de Codicis recognitione instituenda.

Cum autem Pontificia Commissio ad hoc constituta post viginti fere annos arduum sane munus sibi creditum feliciter absolverit, iam Pastoribus et christifidelibus præsto est ius novissimum Ecclesiæ, quod simplicitate, perspicuitate, concinnitate ac veri iuris scientia non caret; insuper, cum sit a caritate, æquitate, humanitate non alienum, atque vero christiano spiritu plene perfusum, id ipsum externæ et internæ indoli Ecclesiæ divinitus datæ respondere studet simulque eius condicionibus ac necessitatibus in mundo huius temporis consulere exoptat. Quod si ob

Commission now numbered 74. At the beginning of 1981, they addressed many observations to the Secretariat of the Commission who, with the help of expert consultors, subjected them to thorough examination, careful study and collegial discussion. A complete synthesis of all the remarks and responses of the Secretariat and the consultors were given to the members of the Commission in August 1981.

A plenary session was convoked on the order of the Supreme Pontiff to deliberate on the entire text of the new Code and to cast definitive votes on it. The session was held on 20-28 October 1981 in the Hall of the Synod of Bishops. There were discussions on six questions of particular importance, as well as other questions which were proposed by at least ten Fathers. At the end of the plenary session the following question was proposed: "Whether it pleased the Fathers that the schema of the *Code of Canon Law* which had been examined in the plenary session along with the amendments already introduced, and with the changes adopted by majority vote in the plenary session, without losing sight of the other remarks which had been proposed with regard to the improvement of the style and language of the text (which were to be entrusted to the president and the Secretary), was worthy to be presented to the Supreme Pontiff as soon as possible, so that he could, when and as deemed most appropriate, promulgate the Code?" The unanimous response to the question was: yes.

Thus corrected, approved and augmented by the canons of the *Fundamental Law of the Church* (which had to be inserted due to the content of the material), and its Latin style further polished, the new Code was printed and presented to the Supreme Pontiff on 22 April 1982, for the purpose of promulgation.

However, the Supreme Pontiff, assisted by certain experts, and advised by the pro-president of the Code Commission, personally reviewed the entire final shema, and after careful consideration decided that the new Code would be promulgated on 25 January 1983; that is, on the anniversary of the day that Pope John XXIII first announced the project of the revision of the Code.

The Pontifical Commission constituted for this purpose has finally and successfully completed the difficult task entrusted to it after nearly twenty years. Today, pastors and other faithful have access to the new law of the Church which is characterized by its simplicity, its clarity, its elegance, and its authentic legal science. Furthermore, since it lacks neither charity, equity, nor humanity, and it is profoundly impregnated with the true Christian spirit, it has attempted to respond to both the external and internal nature given by God to the Church. At the same time it desires to provide for the contemporary conditions and needs of the world. But if, due to the dynamics which affect our human society, certain imperfections in the law arise which necessitate a new revision, the Church possesses such resources that, no less than in past centuries, it will be able to undertake the mission of revising the laws of its life.

nimis celeres hodiernæ humanæ societatis immutationes, quædam iam tempore iuris condendi minus perfecta evaserunt ac deinceps nova recognitione indigebunt, tanta virium ubertate Ecclesia pollet ut, haud secus ac præteritis sæculis, valeat viam renovandi leges vitæ suæ rursus capessere. Nunc autem lex amplius ignorari nequit; Pastores securis potiuntur normis, quibus recte sacri ministerii exercitium dirigant; hinc unicuique copia datur iura et officia sibi propria cognoscendi, et arbitrio in agendo via præcluditur; abusus qui ob carentiam legum in disciplinam ecclesiasticam forte irrepserint, facilius exstirpari ac præpediri poterunt; universa denique apostolatus opera, instituta atque incepta profecto habent unde expedite progrediantur et promoveantur, quia sana ordinatio iuridica prorsus necessaria est ut ecclesiastica communitas vigeat, crescat, floreat. Quod faxit benignissimus Deus, Beatissima Virgine Maria, Ecclesiæ Matre, eius Sponso S. Iosepho, Ecclesiæ Patrono, SS. Petro et Paulo deprecatoribus.

Now, however, the law can be unknown no longer; pastors have access to certain norms to help them in the exercise of the sacred ministry. Every individual may know his or her proper rights and obligations. Arbitrary action is no longer possible, and the abuses which have perhaps been introduced into ecclesiastical discipline due to the lack of legislation can now be easily eradicated and prevented. Finally, the apostolate as a whole is able to progress since a healthy juridical order is indispensable for the ecclesial community to live, grow, and develop. May our most gracious God grant this through the intercession of the Blessed Virgin Mary, Mother of the Church, St. Joseph her spouse, Patron of the Church, and Saints Peter and Paul.

LIBER I
De Normis Generalibus

T. I.	**De legibus ecclesiasticis**
T. II.	**De consuetudine**
T. III.	**De decretis generalibus et de instructionibus**
T. IV.	**De actibus administrativis singularibus**
T. V.	**De statutis et ordinibus**
T. VI.	**De personis physicis et iuridicis**
T. VII.	**De actibus iuridicis**
T. VIII.	**De potestate regiminis**
T. IX.	**De officiis ecclesiasticis**
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BOOK I
General Norms

T. I.	Ecclesiastical Laws
T. II.	Custom
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T. V.	Statutes and Ordinances
T. VI.	Physical and Juridical Persons
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T. XI.	The Reckoning of Time

INTRODUCTION

Gaetano Lo Castro

1. *The underlying ideas*

Great works of legislation, which in modern times have taken the form of a code, not only reflect the juridical order of a society at a moment in time, but express and often promote ideal values that require a juridical

embodiment to be affirmed and become constitutive elements and models of behavior for that society. The more sublime those values have been, the more noble and worthy has been the result of the legislative endeavor. Such was the case with the Napoleonic Code of 1804, the first in modern times, which embodied the ideals of freedom and equality spread by the French Revolution. This has also been the case with the subsequent codes of the Western European states which emulated the example of the Napoleonic Code in ambition, if not necessarily in content. Can we say the same about the codification of Church law? What are its underlying ideals?

The practical purpose pursued by the ecclesiastical legislator with the promulgation of the CIC/1917 was clearly the systematic rationalization and simplification of the immense amount of legislative material accumulated from the collections of decretals in the thirteenth and fourteenth centuries up to our own time. This was done by order of Pius X in the *Motu proprio Arduum sane munus* on March 19, 1904 (which established the pontifical commission entrusted with the task of preparing the Code), and in accordance with the wishes of many prelates and bishops since the time of Vatican Council I, that "universae Ecclesiae leges, ad haec usque tempora edita, lucido ordine distae, in unum colligerentur, amotis inde quae abrogatae essent aut obsoletae, aliis, ubi opus fuerit, ad nostrorum temporum conditionem proprius aptatis."[1] If we wish to attribute meaning to those words, ifor abrogated laws are no longer within the realm of law, it would seem that the task of codifying had been reduced to a reordering of the law then in effect, and of its sources of knowledge. And, in fact, as would also emerge later from the preface to the Code by Cardinal Gasparri, the primary intention of the legislator at the time was to make a compilation of canon law. The Code of 1917 could be considered the last of the great compilations of canon law,[2] although it took a modern form distinct from any used in the past. Of course the 1917 Code was not a mere compilation. Indeed, it was not lacking in innovative spirit, if not always in the content of the provisions, at least in the meaning they

1. Cf. *AAS* 36 (1903–1904), p. 550; also in the same sense, using the same words, the Ap. Const. *Providentissima Mater Ecclesia*, with which Benedict XV, May 27, 1917, promulgated the *Code*. Regarding the codification of 1917 and its connections with Vatican Council I, cf., among many others, F. RUFFINI, "La codificazione del diritto canonico," in *Studi in onore di V. Scialoja*, vol. II (Milan 1905), also published in *Scritti giuridici minori*, vol. I (Milan 1936), pp. 61–96, in particular pp. 80ff; G. FELICIANI, "Il Concilio Vaticano I e la codificazione del diritto canonico," in *Studi in onore di U. Gualazzini*, vol. II, pp. 35–80; idem, "Lineamenti di ricerca sulle origini della codificazione canonica vigente," in *Università di Macerata. Annali della Facoltà di giurisprudenza in onore di A. Moroni* 24 (1982), pp. 207–225; M. TEDESCHI, "La codificazione canonica. Problemi metodologici," in *Il diritto ecclesiastico* 103 (1992), pp. 113–125.

2. Cf. A.M. STICKLER, "Sguardo storico sull'evoluzione del diritto canonico," in *L'Osservatore Romano*, January 26, 1983, pp. 1–2; F.J. URRUTIA, "Il libro I: le norme generali," in *Il nuovo codice di diritto canonico. Studi*, Leumann (TO), 1985, pp. 36–37.

could assume when construed today in light of the system in which they were embedded. The codal form, in fact, was well-suited to form a rational "system" which expressed and imposed the legislator's comprehensive vision of the legal world. In this sense, codes had already proven to be optimal instruments in the service of the dominant ideology in secular systems.

For this reason, though not solely for this reason, it would have been thought that the time was right to reorganize the laws of the Church in a code, considering both its practical usefulness and the indirect benefits that would result from such a step.

In fact, the objective of legislative unification and rationalization could have been sought in various ways. There were, after all, the illustrious precedents of the great collections of decretals in the thirteenth and fourteenth centuries. The practical concerns expressed by Gregory IX when promulgating the *Liber extra* were very similar to those that would inspire the modern code almost seven centuries later.[3] Indeed, considering the prolonged esteem enjoyed by those collections, it was expected that the results of the new code would be no less significant.

Furthermore, the consequences of the codification, which could be easily anticipated, should have given grounds for alarm: a strong movement toward centralization of the activity of producing laws (which reached its zenith in the Church with the establishment of the Commission for the Authentic Interpretation of the Code, the prohibition of the Roman congregations' power to issue new general decrees, and the directive for them to refer, if necessary, to the norms of the Code);[4] a general decline in juridical science (which was reduced to a mere explanation of the legislative text); but most worrisome of all, the displacement of the center of formation of juridical experience from jurisprudence to legislative activity.

This last effect may have deeply influenced the very manner in which the law and its function are understood. In the Church, furthermore, this has been the most visible and specific consequence of the codification, since the other effect, the centralization of the production of norms, in which "the codification myth"[5] has been at work, need not even be considered a necessary consequence, but rather a natural juridical reflection of the theological development of the doctrine of ecclesiastical power. This

3. Cf. Ap. Const. *Rex pacificus*, September 5, 1234, in *Bullarium Rom. Pontificum amplissima collectio*, III (Rome 1740), p. 284; cf. A. POTTHAST, *Regesta Pontificum Romanorum*, I, 9694.

4. Cf. BENEDICT XIV, mp *Cum iuris canonici*, in *AAS* 9 (1917), pp. 483ff.

5. P. LOMBARDÍA, "Codificación y ordenamiento canónico," in *Escritos de derecho canónico y eclesiástico del Estado*, vol. V (Pamplona 1991), p. 171; idem, *Técnica jurídica del nuevo código (una primera aproximación al tema)*, ibid., pp. 219ff; cf. also the authors cited *supra*, in note 1.

doctrine had its magisterial expression in the Const. Dogm. *Pastor aeternus* of Vatican Council I, which proclaimed the primacy of the Roman Pontiff,[6] an effect that would have occurred anyway, independently of the form adopted for the legislative task.

The placement of the legislative act, rather than the jurisprudential one, at the center of ecclesiastical juridical experience has certainly not resulted in the subjection of one power to the other, because in the Church, jurisdiction and legislation are functions that stem from the same body (and thanks to this, the Church has eluded the problems in which many contemporary states have been involved). However, the response to the requirements inherent in that experience has been different from a methodological perspective. No longer is the jurisprudential approach used in the search for, and individualization of, fairness in a particular case (whose results may be used subsequently in similar or analogous situations), but rather an authoritative determination of justice is made by means of an abstract decision.

All of this may not seem entirely normal. According to the modern notion of law within some juridical entities (e.g., countries that follow the *civil code*), the legislator establishes justice precisely through an authoritative, general, and abstract proclamation of law and rights, determining the manner and form in which they shall develop and live, while the judge cooperates from a subordinate position, fulfilling the work of the legislator by recognizing the proclaimed rules and applying them to the conditions of real life.

The Church, however, together with its associated tradition of scholarship, has never failed to recognize the critical truth that the law, which establishes what falls to each (whether individually or collectively), is in essence constituted by God. It is therefore not surprising that the ecclesiastical authority itself, when legislating, has always felt obligated to show that its proposals are not mere arbitrary and volitional propositions of rules nor innovative constitutions of juridical patrimonies, but, first and foremost exercises in recognition of a higher and more objective juridical dimension that operates on the level of history. For that same reason, the function of recognition of the law, in a manner we may broadly term jurisprudential, has prevailed in canonical juridical experience over the strictly legislative activity of proposing new imperative precepts. (This has been true for centuries, since the time of the decretals and the importance they assumed, precisely as vehicles for legislation, for the formation and elaboration of classical canon law.)

This tendency has contributed to the peculiar connotation of stability enjoyed by the Church order through the firmness and preeminence of the principle on which it is founded and to which it continually refers. At

6. Cf. F. Ruffini, "La codificazione del diritto ecclesiastico," cit. p. 84.

the same time, however, and without inconsistency, it retains flexibility in the application of the law, which is inspired by *caritas* and *benignitas*. These are not speculative conceptual categories, but practical operative principles especially valuable in the practice of the judicial function which, by its very nature, is meant to provide a specific answer to a petition for justice arising from an individual. In this way, the norm, and indeed the whole order, utterly loses its ideological character in order to become an instrument of a two-fold "adaptation:" of the human person (necessitated by justice) to God; but also of God, who is benign and merciful, to the human person (the object of divine love).

These fears of displacement were, therefore, more than well-founded insofar as this subtlety might have been destroyed through the prevalence of the normative proclamation of law, with its tendency toward reduction of juridical activity and the consequent atrophy of the jurisprudential function.

Nevertheless, the enthusiasm for codification and the faith in it overcame all reasonable misgivings, but even today it is not easy to say whether, on the whole, the advantages outweigh the disadvantages.

On the other hand, there can be no question as to the magnitude and importance of the enterprise directed by Cardinal Gasparri and of the technical quality of his results. It was, without doubt, a work of high juridical caliber which would have borne even greater fruit if it had been given greater elasticity (either by some means compatible with the chosen format or else in spite of it); if its most important norms had offered a measure of flexibility in their content—in short, if it had not been confined, by wish of the legislator,[7] to a rigid framework impervious to the evolution of juridical experience that eventually determined its rapid aging and early death.

Are the underlying ideas, purposes, and results of the CIC of the same order? It is agreed that the Code is "pernecessarium instrumentum ... quo debitus servetur ordo tum in vita individuali atque sociali, tum in ipsa Ecclesiae navitate;"[8] but such is the generic purpose of all codes (from which the Code of Canon Law could be distinguished, perhaps, in that it was presented as a "primarium documentum legiferum Ecclesiae"). However, the Code is not specifically characterized as such.

It should be admitted that the obsolescence of many provisions in the *CIC*/1917, and their consequent unsuitability to represent, guide, and encourage the development of ecclesial life, could lead to a request for revision, and that this would have been difficult to achieve, for the reasons stated above, while still maintaining the pre-existing structure. The legislator preferred, therefore, a re-thinking of the normative structure as a

7. Cf. *supra*, note 4.
8. *SDL*, *pars* II, p. XI.

whole rather than of the norms themselves. Many of the norms, and certainly all of the fundamental ones, have passed from the old to the new Code. It is as if this structure, in its complexity or, if one prefers, in its systematic dimension and not solely in its individual constitutive elements (the norms), should be put at the service of a new idea: that they are functional or, to use the expression of John Paul II, "complementary" to the great pedagogic task of Vatican Council II.[9]

Here, then, is where the ideological dimension, not nearly as conspicuous in the *CIC*/1917, emerges with brilliant clarity to the extent that it has become possible to envision a new law, or a new way of making law.[10]

If we reflect on this fact and seek to explain it, we must first point out that it has not been imposed by a conception of the normative or codifying function of the Church distinct from that which has been in effect up to now (Vatican Council II). When John Paul II, in the above-mentioned Apostolic Constitution promulgating the Code, states that the Code, as "the Church's fundamental legislative document, ... must be regarded as the essential instrument for the preservation of right order both in individual and social life and in the Church's zeal." When, in relation to its essential function thus defined, he determines its necessary content to be constituted by the "fundamental elements of the hierarchical and organic structure of the Church," by the "principal norms which concern the exercise of the threefold office entrusted to the Church" and, finally, by the definition of "certain rules and norms of action,"[11] he is by no means altering the conceptual categories for understanding the norms or the need for them in the Church which is understood to be a "social and visible body": precisely to display its hierarchical and organic structure; organize the exercise of its functions, especially those of *sacra potestas* and the administration of the sacraments; regulate the relations of the faithful according to the dictates of justice; and sustain, reinforce, and promote common initiatives.[12]

We must ask ourselves what particular effect the "complementary nature" of the Code has had on the new legislation regarding the Council teachings. Although correct, it would be too vague to maintain that the law was intended to have an animating spirit, since that is inherent in all great council deliberations; or, conversely, that it was meant to provide an enforceable juridical skeleton for the work of the Council, which the Council fathers themselves did not intend to present.

The innovations of the Council, which should have inspired the legislative work and constituted its "novelty," mainly referred (*praesertim*), as

9. Ibid., p. XII.
10. Cf. the authors cited *supra*, in note 2.
11. *SDL*, ibid.
12. Ibid.

certified by the *Sacrae disciplinae leges*, to ecclesiological doctrine, and were embodied in the doctrine of the Church as the people of God; of authority as service; of the relations between primatial power and collegiality, and between the universal Church and the particular churches as inspired by the principle of communion; of the universal priesthood of the faithful, with the related rights and duties, particularly those of the laity; and of the commitment to ecumenism.

When considered from a juridical perspective, those innovations should be neither exaggerated nor underestimated.

They should not be exaggerated because it is not true that these doctrinal innovations were capable of destroying the law then in force. By virtue of the continuity characteristic of the law of the Church, those same innovations could have emerged from the pre-existing juridical structures or been added to them in a timely revision. Furthermore, some of them (e.g., authority as service, the attention to ecumenism, the very idea of the Church as God's people) can inspire wide visions of the Church and its mission, and constitute clear guidelines for the development of a juridical construct[13] without giving rise to practical problems of justice, because they do not lend themselves to technical-juridical interpretation. Accordingly, if we focus on the empirical results obtained and recognize certain underpinnings (as, for example, the one referring to the title of book II, *De Populo Dei*), as well as the scant importance given to them in the life of the law, then the legislative innovations, though present, might seem not to be significant.

Neither should the import of these innovations be underestimated, however. In fact, without Vatican II, we would not have the current blend of juridical and pastoral language reflected in, among other things, the large number of doctrinal definitions and propositions contained in the *CIC*, excessive even for a legislative text.[14] Likewise, the more developed vision of the relations between the universal Church and a particular one would not have been articulated, nor would the greater juridical importance assigned to a particular church have been achieved as well through expanding the purview of its competence and making it complementary to universal legislation. That vision has prompted the legislator to invert the scheme of the *CIC*/1917, which was as closed and self-contained as the new Code is open to "continuous and up-to-date legislative production."[15]

13. For the emphasis on the ecumenical dimension in the new *Code*, cf. P. Rodríguez, "El nuevo código de Derecho Canónico en perspectiva teológica," in *Scripta theologica* 15 (1983), p. 763.

14. For a rebuttal, cf. R. Castillo Lara, "Criteri ispiratori della revisione del Codice di diritto canonico," in *La nuova legislazione canonica. Corso sul nuovo Codice di Diritto Canonico* (Rome 1983), p. 23.

15. P. Felici, "Comunità e dignità della persona," in *Persona e ordinamento nella Chiesa. Atti del II Congresso Internazionale di diritto canonico, Milano 10–16 settembre 1973* (Milan 1975), p. 13.

Moreover, the new Code is also more accepting of custom and the role of localities in implementing universal legislation, whether through integration of normative acts and circumstances, including custom, or through exemption from their application. Finally, we would not have gained certain new institutions, both with regard to the structure of the Church, including some at the constitutional level (consider the Synod of Bishops and the personal prelatures), and with regard to the status of persons (consider the listings of the rights and duties of the faithful).

Though we could continue enumerating other innovations, the reason for the codification still remains to be explained: that is, it remains to illuminate not the contingent historical circumstances, but the profound historical motive which forces itself on men, even on those endowed with relatively more responsibility or strength of personality, and acts through them and sometimes in spite of them.

In this vein, others have already discussed the "technical option" and the "pastoral function of a prevalent introductory nature" of the new Code.[16] Certainly, codifying is one of the possible techniques of producing norms; useful, from a practical point of view, in achieving a perfect vision of the complete juridical order. As for its introductory value to the more complex world of norms, this is better conceived as an indirect result, however necessary it may have been, of the pedagogic options of the Second Vatican Council, especially on the theme of regulation of the exercise of power in the Church, than as a model for making laws.

In discussing an approach to the Code, one must mention, in addition to the consequences noted above which are ever-present, the dangers of "seeing the spirit of the law suffocated by its formulation as though by a process of crystallization,"[17] as well as the deep ideological tendency to situate the legislator and the law issued by him at the center of the judicial world. This tendency expresses the widespread conception of the law as the manifestation of authoritative will and of the restraining force of institutions and standards of conduct, a conception which is found commonly in juridical science and especially in canon law. This conception gives rise to the idea, which no one encourages today in light of the negative experience with the *CIC*/1917, and which many have rejected outright[18] but which is still taken for granted in scientific discourse, that the law is synonymous with the Code, together with the added temptation to see all juridical experience as contained in the Code.

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16. P. Lombardía, "Codificación y ordenamiento canónico," cit., *passim*, in particular, p. 194.
17. P. Felici, "Comunità e dignità della persona," cit., p. 13.
18. Cf. P. Lombardía, "Codificación y ordenamiento canónico," cit., p. 185; idem, *Lecciones de derecho canónico* (Madrid 1984), p. 45.

Though it should be qualified it as quasi-official, one proof of how deeply rooted this idea was can be found in the preface of the *CIC*, which states that, after its promulgation, the law shall no longer be ignored; pastors shall possess secure norms; each of the faithful shall be aware of his or her rights and obligations; all possibility of arbitrariness in legal proceedings shall be foreclosed; and abuses introduced into ecclesiastical discipline shall be extirpated and prevented from recurring, etc.

Even if such statements were stripped of anything that might appear to be a justification of the final result, the underlying idea becomes apparent: not only has the Code enriched the juridical patrimony of the Church and of her faithful; not only has it broadened the horizons of law and justice; but it is as though law and justice have been re-founded by the only process appropriate for that end; as if law and justice, previously in fact absent and suppressed, have at last prevailed in the life of the Church. It is as though the pedagogic pronouncements of the Council have been given negative potential, namely to attack the foundations of the previous codification, attributing to juridical experience anarchy, abuse, and ignorance of its own rights and duties, but not the positive force of making law and explaining the goals of justice, for which a new codification has become necessary. Nothing else could expose so effectively the confusion (which is not just metonymical and therefore rhetorical, but substantive and real, at least in the mind of whoever conceived it) of the law with the Code, according to which the crisis of the *CIC*/1917 amounted to nothing less than the crisis of the law itself.

In this ideological and cultural context, the legislator undertook the commitment to provide the Church with a revised code (in order to avoid arbitrariness, fight abuses, and furnish pastors with suitable norms for their ministry), in which the contributions of the Council could be embodied and made clear in the literal formulation of the norms, in their content, and in the systematic arrangement that the Council itself adopted. This, in fact, would not be inspired by Gaius's tripartition (*personae, res, actiones*), as was the 1917 Code, but rather by the idea of making more evident, as far as possible (and it has not always been possible), the nature of the Church as the people of God, with the three functions (*munera*) of governing, teaching, and sanctifying. Thus, book II (devoted to the Church as the people of God and to the regulation of the organization of the governing function), book III (devoted to the teaching function), book IV (the sanctifying function, specifically through the sacraments), together with books V (on temporal goods), VI (on sanctions), and VII (on processes), underline the social dimension of the Church, although with special emphasis shown by the themes discussed in them, and by the manner in which they are treated, on the new sensibilities of Vatican II. book I, for its part, entitled *Normae generales* (as it was in the *CIC*/1917), does not contemplate the sources of law (as it did in the *CIC*/1917 and as the title might lead one to think), but rather a collection of subjects whose common de-

nominators are that they are regulated mostly from a technical-juridical perspective, and that they serve as a general preface to the more specific treatments found in the subsequent books.

2. *Composition and principal themes of book I*

Book I is comprised of 203 canons arranged under 11 titles (some of which are divided into chapters, which in turn are divided, in some cases, into articles).

The provisions in this book can be grouped by subjects into three main themes: sources of law (tit. I–V, considered formally, procedurally, and substantively, but not organically, a perspective taken up in book II); the subject of the law and its juridical acts (tit. VI–VII); and the powers of government—legislative, judicial, and executive—together with the ecclesiastical office (tit. VIII–IX). The provisions given in the final two titles, namely those concerning the acquisition and loss of a subjective right and the freedom from obligation due to the passage of time (canonical statute of limitations), and those concerning the method of calculating time, are in actuality concerned with the juridical purview of these subjects which must be considered from a scientific point of view.

In comparison with book I of the *CIC*/1917, also called *Normae generales*, but concerned only with the sources of law, book I of the *CIC* is distinguished by regulating, in a greater number of canons, subjects that were, in the previous code, contained in other books (for example, subjects of the law and its juridical acts, government authority, and ecclesiastical offices had been contained in book II, *De personis* of the *CIC*/1917, while the statute of limitations had been regulated in the last part of book III under a title devoted to the ways of acquiring ecclesiastical goods), or by regulating the same subject in a different form.

Therefore, not only has there been an attempt to arrange the subjects according to a different systematic criterion, but also, in some cases, they have been supplemented with new legislative provisions, and in other instances they have been simplified, amended, or abrogated.

In particular, elaboration has been given regarding the sources of law (understood in the broad sense), through the distinction of legal norms sanctioned by the legislative function (general laws and decrees, characterized by their generality) and legal provisions issued by way of administrative function, (singular administrative acts, in their various categories, characterized by their singularity). This was done, moreover, in order to differentiate better the multiple functions of the unitary sacred authority so as to make it possible, on the one hand, to individualize the various entities exercising it, and on the other, to allow a more vigorous safeguarding of the rights of the faithful.

In addition, several areas of canon law have been elaborated. To give only two examples: in the legal framework of the subjects of the law, through the anticipation and regulation of the phenomenon of private juridical persons alongside that of public persons; and in the field of juridical acts, through the establishment of liability for damages introduced in c. 128.

The simplifications of canon law norms are numerous; we need only think of the regime governing the statute of limitations and the computation of time to be convinced of this. Moreover, the amendments of the parallel provisions of the *CIC*/1917 are quite numerous and found throughout book I (these will be noted in considering each title separately).

The objectives pursued by the legislator in the composition of book I embrace a wide range.

Among them, we must keep in mind, first and foremost, the systemic purpose that book I shares with the entire Code. Insofar as certain subjects and themes are juxtaposed with others that are unrelated, it would seem that the legislator had intended to collect in book I all that could not be suitably contained in the subsequent books. All the provisions of book I would thus seem to be *omnino generalia*, referring *ad omnes partes codicis*.[19] With a view to stating this fact in a positive way, it has been said that book I is like an invitation to the doctrine to construct "a truly general part" which synthesizes all the fundamental concepts which must be applied to the various branches of the law.[20]

It has also been observed that book I collects the norms which are predominantly of a technical-juridical character, and which are proposed as the "basis of a reliable reading, a correct interpretation and, therefore, a fair application of the rest of the norms of the Code."[21] Once this technical obligation has been fulfilled, the legislator can move more freely in the subsequent books of the Code, to which he can then impart a marked ecclesiological and pastoral character more in keeping with the spiritual nature of the Church.

19. Cf. *Praenotanda* to the *Schema canonum libri I de normis generalibus* (Typis polyglottis Vaticanis 1977), p. 5.

20. P. LOMBARDÍA, *Técnica jurídica del nuevo Código*, cit., p. 206.

21. P.G. MARCUZZI, "Le norme generali del nuovo Codice," in *L'Osservatore Romano*, February 3, 1983; for analogous concepts, cf. G. MAZZONI, "Le norme generali," in E. CAPPELLINI (ed.), *La normativa del nuovo Codice* (Brescia 1983), p. 27; V. DE PAOLIS-A. MONTAN, "Il libro I del Codice: norme generali (cann. 1–203). Presentazione," in *Il diritto nel mistero della Chiesa. A cura del Gruppo Italiano Docenti di Diritto Canónico*, vol. I, 2nd ed. (Rome 1986), p. 220.

3. *An overall judgment*

Although the legislator's overall intentions may be clear, they are not always completely beyond question.

First of all, a measure of doubt arises regarding the criteria governing the allotment of norms among book I and the other books of the Code. In effect, to make a distinction between norms that contemplate institutions relevant to the whole Code (and are, therefore, *omnino generalia*), and those that contemplate only particular institutions does not seem to be a great finding for two reasons. First, even if such a distinction were technically feasible and substantively significant, it would still only have a descriptive function. It would lack any practical juridical import unless these first norms were also endowed with preeminence over all the others. Secondly, no such distinction has been established in actuality, or at least has not been rigorously established, in view of the fact that book I contains some very specific and particular norms while the other books contain some widely applicable ones: general norms, if you will, which express principles that affect the entire juridical system, and whose consideration could not be omitted from the construction of a general part common to all Church law.

Likewise, the distinction between book I as technical and juridical, and the other books as more pastoral or ecclesiological, as understood by the doctrine, produces more than a little confusion if this distinction is taken to mean that the juridical dimension is confined to book I, and that it is less apparent, or that it has been sacrificed or subordinated to other considerations, in the subsequent books. This confusion arises from the fact that a code cannot be anything other than juridical in its entirety, not just in one of its parts. Those parts that were not juridical in nature would either be extraneous to the law, and so would not have a reason to continue to be included in the normative text; or else they would express a derivative aspect of law: coercive imposition. They would be, in other words, ecclesiological or pastoral, imposed by authority, and they would have breached the threshold of free doctrinal discussion. Moreover, this confusion further arises from the fact that, if the pastoral and spiritual were considered necessary for canonical laws, they would then have to affect all other normative aspects of the Church in addition to the one presented in book I, because the pastoral and spiritual are not manifested in the formulation or content of a norm, but in the ends it pursues and the means by which it does so. Thus, a technical norm that contributes to the affirmation of justice in ecclesial society is the proper and specific, the highest and noblest, expression in a particular sector of the spirituality of the Church Herself. Finally, it would be trivial, or rather erroneous, to think that the pastoral and the spiritual cannot arise from technical norms.

Even if those subjects that could threaten the desired pastoral and ecclesiological coherence were deleted from the various parts of the Code and collected in book I; even reduced to these terms, the systematic discourse underlying the formation of book I would turn out to be very impoverished in its consequences. Nevertheless, there are certain traces of this discourse in the preparatory works of the new code. Accordingly, the authority of the regime, which in the *CIC*/1917 was contained within book II, Heading V, *De potestate ordinaria et delegata*, has now been included in book I, *De normis generalibus, ob generalem eiusdem applicationem in universo Ecclesiae iure*.[22] The same was said of the canons on juridical acts, offices, the statute of limitations, and the computation of time.[23] The legislator must have made use of much the same criteria when, upon receiving into the Code the norms proposed by the *Lex ecclesiae fundamentalis*, he deemed it advisable to include in book I the norms on physical and juridical persons.[24]

Of course, just as the mere transferal of subjects from one part of the Code to another on the basis of motivations that arose in the course of preparatory works and which have been accepted by doctrine entails no important consequences, it also lacks any efficacy for a systematic or dogmatic reconstruction of Church law in a scientific way. The transferal arises, perhaps, from mere considerations of external harmony.

Above all, though, if there is really any point to insisting on the systematic argument, it should be applied to the whole Code, and not within each book.

Here arise the greatest difficulties because, to give one example, subdividing the material concerning the subjects of law between books I and II (physical and juridical persons are discussed in book I, the rights of the faithful and the duties of the various entities and associations in book II), one could perhaps discover an explanation in the distinction between the regime of static positions of the Church (book I), and the regime of dynamic positions (book II), or in other similar arguments. However, this would involve explanations which are overly subtle and academic and incapable of revealing the inspiring principles of norms (which are neither works of doctrine nor expressions of scientific purposes).

Returning to book I, the proximity of the treatments of the statute of limitations, the sources of law, the subjects of law and its juridical acts, and government authority and the juridical structures in which it is expressed still leaves unresolved the fundamental problem, which is the fundamental problem of every modern juridical system, of the relation between the principle of authority (manifested in the sources of the law

22. Cf. *Praenotanda*, cit., p. 7.
23. Ibid., pp. 8–10.
24. *Schema Codicis* of 1980 (cc. 96–120).

and the organization of power) and the principle of freedom (manifested in the conception of subjects of the law): is authority or freedom the first principle, the prime mover of the juridical experience of the Church? In the interpretation of the norms and the various juridical institutions, which of the two principles should be consulted as the ultimate point of reference?

An indication or a beginning of a solution to this problem may be glimpsed in the importance that the Code has granted to custom as well as to the custom *contra legem*,[25] as a manifestation of the juridical creativity of the Christian community, as a center of normative production distinct from that corresponding to the legislator, and as a "projection in the canonical order of the shared responsibility 'common to all the faithful in the building up of the Body of Christ' (*LG* 32)."[26] There are other indications of the position of persons in the order of the Church which have recently become highlighted, from the proclamation of the rights and duties of the faithful, considered as such and in the various ecclesial conditions, to the co-participation, on the basis of the common priesthood derived from baptism, and in functions of authority which were previously reserved to those anointed by ministerial priesthood.

Nevertheless, these and other similar indications are not sufficient to undermine the traditional view which has been maintained, not without reason, for centuries: that the fundamental principle underlying the juridical experience of the Church would be that of authority with its normative manifestations; and that freedom, which, for that matter, is translated, practically speaking, into the responsibility or co-responsibility of all the faithful in "the building up of the Body of Christ" (c. 208), would take its strength from the light imparted or autonomy conferred by the authority through the norm, from which it ultimately derives. In short, the Church and its juridical order would be constructed on, and supported by, the norm and its dynamic (a dynamic undoubtedly attentive to the cause of persons), not on the subject and its requirements, which would only be the object of juridical regulation, and not its point of reference. In this respect, a singular coincidence would occur with the most widespread convictions of contemporary secular juridical science of a positivistic type.

25. Regarding the problems related to that type of custom even before the Code now in effect, cf., J. Fornés, "La costumbre *contra legem* hoy," in *La norma en el derecho canónico. Actas del III Congreso Internacional de derecho canónico. Pamplona 10–15 de octubre de 1976*, vol. I (Pamplona 1979), pp. 741–781.

26. P. Lombardía, "Legge e consuetudine nel nuovo Codice," in *Escritos de Derecho Canónico*, vol. III (Pamplona 1974), p. 153; in addition to the works of this author cited in preceding notes, cf. idem, "Ley, costumbre y actos administrativos en el nuevo Código de Derecho Canónico," in *Escritos...*, cit., vol. V, pp. 125ff; regarding the relationship between authority and freedom, cf. idem, "Libertad y autoridad en la Iglesia," in *Escritos...*, cit., vol. III, pp. 471–501.

There is no lack of empirical reasons founded on positive canonical data, which may reinforce such an opinion. Moreover, the Code, both in itself and as a means of constructing the juridical experience, supports such an idea.

In particular, book I of the Code, due to its predominantly technical-juridical nature, may require a treatment of the relationship between norm and person—the most basic expression of the very problem of "juridicity,"[27] from the perspective of dogma, that is, in light of the principles established by positive law. The proximity in this book of aspects concerning the sources of law and of those relating to persons, and the re-evaluation, mentioned above, of certain institutions, from which a greater centrality of the personal element in the order would seem to result, could perhaps lead us to conceive of the legislator as the first (and authorized) person responsible for a new interpretation of dogma in this respect.

Nevertheless, it is for the moment advisable, in the course of interpretation, to resist the temptation to attribute this dogmatic intent to the work accomplished by the legislator, even though there is some evidence for such an assertion.

Excessive dogmatism, detrimental to juridical science, which, however, has a specific tendency toward it, is out of place in the area of legislation, in which disproportionate attention to rational interpretation, and to abstract proclamation of principles, rights and duties, might lead one to think that, in considering these things, the law's mission (and the duty of whoever issues it) would be not just satisfactorily completed but fulfilled to perfection. Moreover the practical embodiment of those principles, in which the work of justice is made incarnate, would be secondary or self-producing if not entrusted to the *extra ordinem* activity of institutional bodies.

As for the rest, the underlying problems that shape juridical communities, those which determine ways of thinking and living, go beyond the dogmas frozen in legislative provisions, go beyond the legislator himself, and reach the very heart of juridicity, which should be attained with a similar efficacy (although for different purposes), by both the legislator and juridical science (which, if it takes into account its own function and dignity, cannot be reduced to mere exegesis, to become the *mosca cocchiera* of legislative will).

For all this, the central problem of the juridical experience of the Church (and the same could be said of any entity founded on law), an experience which is shaped by the Code but which also carries its own requirements (which the Code and the interpretation and application of its norms must take into account in every instance) continues to be the

27. Cf. G. LO CASTRO, "L'uomo e la norma," in S. GHERRO (ed.), *Studi sul primo libro del Codex iuris canonici* (Padova 1993), pp. 37–72, in particular, pp. 49ff.

search for a better balance and a more acceptable relationship, as much in normative provisions as in actual juridical experience, between the objective normative dimension, or everything that is given in the Church (first of all, the Church itself), and the subjective personal dimension, or that which is interpreted in the Church (and the subject who interprets it).

An idea which is not juridical-dogmatic, but rather metajuridical and theological in the true sense of the words, can serve as a guide for the solution to this problem: the idea and the work of Redemption, to which end the Code is also directed, cannot be accomplished by man on the basis of a claim to primacy in a universe that denies the world, the Church, and objective law, and denies the one who has constituted these things, enriched them, and animated them through the whole course of history; but neither has God (much less the Church) wished to do so alone, without man, or at the cost of limiting his freedom. The mystery of grace and salvation, of the paths through which the former operates and the latter is performed, a mystery which has given meaning to the history of humankind and the Church as the history of the redemption of the free individual, thus conditions the juridical experience and the ways of conceiving of the law, and of effecting its progress in the most profound way.

1 Canones huius Codicis unam Ecclesiam latinam respiciunt.

The canons of this Code concern only the Latin Church.

SOURCES: c. 1

CROSS REFERENCES: cc. 111–112, 214, 350 § 3, 383 § 2, 450 § 1, 476, 479 § 2, 518, 846 § 2, 923, 991, 1015 § 2, 1021

COMMENTARY

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This canon restricts the *CIC*'s application to the Latin Church. The Code excludes from its canons all matters concerning the juridical regime of the Eastern Churches, or to be precise, it affirms that these matters lie outside its competence (*non respicit*). Although there were many who supported it, the *CIC* declined to use this supreme declaration of its scope ("Codex iuris canonici pro Ecclesia latina exaratus") as the general title of the Code. The compilers of the *CIC* did not do so for historical and other reasons related to the avowed purpose of the work, namely the revision of the 1917 *Codex iuris canonici*, which did not encompass a change of title.

John Paul II promulgated the *Codex canonum Ecclesiarum Orientalium* (*CCEO*) in the Apostolic Constitution *Sacri canones* of October 18, 1990.[1] This Code contains, in 1546 canons, a catalogue of subjects similar to that of the *CIC*, although in a different order and with a great many subtle differences. Thus two superior systems of norms, which are not mutually complementary, form part of the canonical order, each tending to completion, whose common source and unity derive from the supreme power of the Church. Ever since the projected Fundamental Law of the Church[2] (*Lex Ecclesiae fundamentalis*) was indefinitely postponed, there has been no prospect of a supreme, common, positive law of fundamental scope, since both regulatory systems embrace such fundamental norms.[3]

1. *AAS* 82 (1990), pp. 1033–1044.
2. Cf. D. CENALMOR PALANCA, *La Ley Fundamental de la Iglesia. Historia y análisis de un proyecto legislativo* (Pamplona 1991), especially pp. 191–242.
3. Ibid., pp. 101–109; and also 503–505, wherein are listed the cc. of the *CIC* which were derived from the projected work on the Fundamental Law of the Church.

1. *The codification of Eastern Church law*

The idea of a separate Code of Eastern Church Law[4] dates to the pontificate of Pius IX. By his order, G.B. Pitra undertook the first compilation (unfinished) of sources for Eastern law. During the preliminary work for the First Vatican Council, specific possibilities were proposed for the form such a Code could adopt, namely:[5] a discipline shared by East and West; a common discipline for the West and another for all of the Eastern Churches; or one for the West and one for each of the Eastern Churches. The second option gradually came to be preferred. Several popes, Leo XIII in particular, encouraged many of the Eastern Churches to convene synods for the purpose of systematizing the discipline then current in each Church. Those synods were approved *in forma specifica* by the Pope and produced legislative sources which would prove to be essential in the future work of codification.

The codification of Eastern Church law formally began at the direction of Pius XI, who created a preparatory Commission of Cardinals in 1929 to carry out the necessary historical and canonical studies, compile the sources, and formulate the initial outline of the Code. This Commission carried on its enormous task of compilation until 1934. In 1935 the Pontifical Commission was created, with new membership and competence. This body was charged with writing the Code of Eastern Canon Law, a task completed in 1948. It was decided, however, to promulgate the Code by parts. More than half of the norms of the Code were promulgated in this way, including the canons relating to matrimonial law (*Motu proprio Crebrae allatae*, February 22, 1949),[6] procedural law (*Motu proprio Sollicitudinem nostram*, I.6.1950),[7] the law governing clergy, temporal goods and *de verborum significatione* (*Motu proprio Postquam Apostolicis*, KK.9.1952),[8] and the law of rites and persons (*Motu proprio Cleri sanctitati*, June 2, 1957).[9]

This legislative activity came to a halt during the sessions of the Second Vatican Council. In 1972, Paul VI created a new Commission, superseding the previous one, to revise the Code of Eastern Canon Law with a view to making it more consistent both with the direction of the Council and with the genuine tradition of the East. In March, 1974, the Commission approved the principles governing the codification.[10] The Commis-

4. For a complete historical overview of the codification, one may consult the *Praefatio* of the *CCEO* in *AAS* 82 (1990), pp. 1047–1060.
5. Cf. E. EID, "Le droit latin et les droits orientaux," in *Ius canonicum* 30 (1975), pp. 141–142.
6. *AAS* 41 (1949), pp. 89–119.
7. *AAS* 42 (1950), pp. 5–120.
8. *AAS* 44 (1952), pp. 65–150.
9. *AAS* 49 (1957), pp. 433–600.
10. Cf. *Nuntia* 3 (1976), pp. 3–10.

sion then drew up the text in eight partial drafts which were subjected to widespread consultation and redrafting. This work of revision and consultation resulted in the final draft of 1986, already divided into thirty titles, and which, with certain later amendments, was promulgated by John Paul II on October 18, 1990. The documentation pertinent to this process may be found in the journal *Nuntia*.

There is undoubtedly a strong correspondence in the juridical treatment of subjects in the *CIC* and the *CCEO* (which makes it clear that the *CIC* was consulted as a background model), but there are also clear differences in inspiration, organization, and content. The *CCEO* takes its inspiration not so much from the Eastern canonical tradition, weak and spotty as it is, as from the "sacred canons" of the first universal Councils and some of the great synods of antiquity. Both the second canon of the Council of Trullo (681) and the first canon of the Second Council of Nicaea (787) contain a catalogue of the sources of Eastern law. The purpose of drawing inspiration from the Christian antiquity of the East (and of the West, too, since these origins are common) is, nevertheless, more symbolic than real when we consider the whole body of codified subjects. As for its arrangement, the *CCEO* abandons the principle of organization by books and substitutes titles instead (thirty in all), which is much more fluid and has fewer pretensions to organizational exactitude. With respect to content, over and above the numerous minor distinctions, the *CCEO* emphasizes the different notions of organizational design exhibited by the two Churches.

2. *The Eastern Churches*

When we speak of two superior systems of legislation, we do not mean to say that such legislative systems constitute two institutional structures *per se*. Of course, the Latin Church would, because it has the structural unity inherent in the Patriarchate of the West; but the Eastern Churches do not really correspond to any single institution. Each of them is a ritual Church *sui iuris* (with its own leader and autonomy in matters of regime and discipline). All of them, however, adhere to a common generic tradition, making possible the legislation of the *CCEO*, in which, moreover, there are numerous references to the particular legislation of each Church.

If we follow the definition of the *CCEO*, a ritual *sui iuris* Church is "a group of Christian faithful united by a hierarchy according to the norm of law which the supreme authority of the Church expressly or tacitly recognizes as *sui iuris*" (c. 27 *CCEO*). In turn, the rite would be the basic objective support of each autonomous ritual Church: the liturgical, theological, spiritual, and disciplinary heritage that reflects, in each Church, the manner of living the Catholic faith (cf. c. 28 § 1 *CCEO*). Thus,

the rite cannot strictly be identified with a ritual, autonomous Church, although there may be as many rites as there are ritual Churches *sui iuris*. The rites arise from five original traditions: the Alexandrian, Antiochian, Armenian, Chaldean and Constantinopolitan (cf. c. 28 § 2 *CCEO*). These traditions constitute the basic orientations that encompass the twenty-one ritual Churches *sui iuris*, but they do not establish institutional ties among them. To avoid misunderstandings, it should be noted that occasionally these five original traditions are also called rites, and it is not uncommon for this same expression ("rite") also to be used to denote the subjective condition of a believer in a ritual, autonomous Church.

Ritual churches *sui iuris* differ among each other in their structural forms. The *CCEO* reduced this morphology to four types: patriarchates, major archepiscopal churches, metropolitan churches *sui iuris*, and other churches *sui iuris* dependent on the Apostolic See. Although they possess the self-determination inherent in an autonomous ritual church, they all differ in their juridical attributes. The autonomous Eastern Churches are:[11] those arising from the *Alexandrian tradition*: Coptic (patriarchate) and Ethiopian; those evolving from the *Antiochian* or *Syro-Western tradition:* Malankar, Maronite (patriarchate), and Syrian; from the *Constantinopolitan* or *Byzantine tradition*: Albanian, Belarussian, Bulgarian, Greek, Italo-Albanian, Yugoslavian, Greek Melchite (patriarchate), Rumanian, Russian, Ruthenian, Slovak, Ukranian, and Hungarian; from the *Chaldean* or *Syro-Eastern tradition*: Chaldean (patriarchate) and Malabar; and from the *Armenian tradition*: Armenian (patriarchate).

3. *Interritual law*

It is wise to avoid two interpretations in particular of c. 1 of the *CIC*, both of which, in my opinion, are deficient. The first would be to evaluate that canon by territorial criteria, as if the "Latin Church" referred to in the canon were comprised of the faithful located in the territories of that Church. In fact, the law of the Latin Church, as it interacts with the law of the Eastern Churches, affects each believer singly at the level of the individual, wherever the person may be located: *adhaeret omnibus*. The same could be said of the *CCEO*. The second mistake would be to understand the formula in its literal sense. Canon 1 uses a categorical expression that does not permit exceptions and is less subtle than the ancient version of the *CIC*/1917 ("nisi de iis agatur, quae ex ipsa rei natura etiam Orientalem afficiunt"), and is, therefore, much less exact than that of the parallel canon of the *CCEO* ('nisi, relationes cum Ecclesia latina quod attinet, aliud expresse statuatur'). Although the purpose of c. 1 is to make the

11. Cf. *Annuario Pontificio* (2003), pp. 1690–1692.

applicable exclusively to the Latin Church, the plain fact is that interrelationships never cease to arise, as was noted by some[12] during the codification work, in spite of their great effort to avoid them.[13] All of this will be clearly illustrated by referring to certain points of interritual law.

The relevant interritual law is contained in the *CIC*; therefore, we shall not discuss the law of the *CCEO* that affects the faithful of the Latin rite nor those which govern the interritual relations of the faithful of different Eastern Churches. The interritual law of the *CIC* addresses four distinct legal situations:

a) The most basic application of interritual law, i.e., ascription to the ritual Church *sui iuris*, the complications of which are sketched by the rules of cc. 111 and 112. After ascription, the *CIC* recognizes the right of all faithful to worship God according to the norms of that rite (c. 214).

b) The stable, pastoral care of the faithful of another ritual Church by the pastoral structures of the Latin Church, through episcopal vicars, personal parishes, or even priests (or parishes) of that rite, appointed on the initiative of the Latin diocesan bishop and ascribed to him in some way, as established in cc. 383 § 2, 476, 479 § 2, and 518. This group of canons would constitute the most important assumption of what has been called "the right of interritual mobility."[14] This juridical design had already been presented in *Christus dominus*, 23.

c) The participation of the faithful of the Latin rite in the sacraments of the Eucharist (c. 923) and Penance (in this case it is presented as a right: c. 991), celebrated in the manner of any Catholic rite. The minister, however, should celebrate them according to his own rite (c. 846 § 2). The ordination by a Latin bishop of an individual of the Eastern Church rite is expressly prohibited, unless it is done with apostolic permission (c. 1015 § 2 and 1021).

d) Certain situations arising from the relationship between the Latin hierarchy and that of the Eastern Churches at the level of the College of Cardinals (c. 350 §§ 1 and 3) and the bishops' conferences, to which bishops of another rite may be invited for purposes of consultation, and even allowed a deliberative vote, if the by-laws of that Conference permit it (c. 450 § 1).

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12. PCILT, *Acta et documenta Pontificiae Commissionis CIC recognoscendo. Congregatio Plenaria diebus 20–29 octobris 1981 habita* (Typis polyglottis Vaticanis 1991), pp. 584–585.

13. Ibid., p. 588.

14. W. Aymans-K. Mörsdorf, *Kanonisches Recht. Lehrbuch aufgrund des Codex Iuris Canonici*, I (Paderborn-Munich-Vienna-Zürich 1991), p. 105.

2 **Codex plerumque non definit ritus, qui in actionibus liturgicis celebrandis sunt servandi; quare leges liturgicae hucusque vigentes vim suam retinent, nisi earum aliqua Codicis canonibus sit contraria.**

For the most part the Code does not determine the rites to be observed in the celebration of liturgical actions. Accordingly, liturgical laws which have been in effect hitherto retain their force, except those which may be contrary to the canons of the Code.

SOURCES: c. 2; SCRit Resp., 8 mar. 1919 (*AAS* 11 [1919] 145); SCCouncil Resol., 14 feb. 1920 (*AAS* 12 [1920] 117–119); SCCouncil Resol., 10 iun. 1922 (*AAS* 15 [1923] 224–227)

CROSS REFERENCES: cc. 834–839

COMMENTARY

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The *CIC* states that it does not attempt to affect what we could call the liturgical-ritual legislation of the Church, which is, therefore, retained as effective, provided that it is not in contradiction with the Code. This liturgical-ritual legislation possesses a measure of autonomy, independent of disciplinary laws, and displays a clear internal cohesion. It would have been inappropriate and unnecessary for such legislation to be affected by the regimen of the Code. The old Code reached this same conclusion.

It must be noted that c. 2 refers to *leges liturgicae*. In previous drafts it read *normae liturgicae*. This change apparently was not made to exclude liturgical customs from the scope of this canon. Since the *CIC*, at least in principle, removes all liturgical-ritual matter from its purview, it would be reasonable to think that such customs would have their own regimen, and not the one granted to them later by c. 5. Presumably, the change in terminology was made to give a more immediate indication of the legislative character of pontifical law, which such norms should have. This means that not all minor liturgical norms, which were quite common in the postconciliar period, are corroborated by this canon. Those norms presaged later liturgical books, or had an experimental or occasional function, or were conditional interpretations or explanations depending on other regulatory documents. These were later restated in their entirety, and therefore repealed under the definitive liturgical books. Thus, perhaps with only a few exceptions,[1] the documents originating in the *Consilium*

1. For example, the *Directorium de Missis cum pueris* (November 1, 1973).

ad exsequendam constitutionem de sacra liturgia are not covered by the concept of liturgical law presented in c. 2. On the other hand, the SCSDW itself made the concept of *leges liturgicae* equivalent to that of *libri liturgici* in its interpretation of c. 2.[2]

1. *Liturgical books*[3]

As we have seen, although c. 2 does not refer to liturgical books but rather to liturgical laws, it would be difficult to characterize correctly the concept of liturgical law without first understanding the historical use and function of liturgical books. At least from the high Middle Ages in the Western world (and something similar could be said of the Eastern Churches), the texts used in sacramental rites and the norms that guided the development of their celebration were incorporated into special books with a distinct canonical status. The compilation of these sacramental *ordines* gave rise in the Western world to the Roman Pontifical and the Roman Ritual which comprise, respectively, the liturgical norms for the celebrations of the bishops and of the presbyters. Both the Pontifical and the Ritual were complex arrangements of documents rather than jointly published compendia; even today, a combined edition of the Pontifical and the Ritual does not exist, although it is being considered. In addition to the Pontifical and the Ritual, the Roman Missal, the Ceremonial of bishops, the Liturgy of the Hours, the Roman Calendar and the Roman Martyrology[4] are also considered to be liturgical books, i.e., *liturgical laws*, according to the language of c. 2.

Following Vatican II, the liturgical books were completely reorganized. At present, the liturgical books are the following (I have used their date of issue, rather than their date of publication in the *AAS*):

a) *Missale romanum ex decreto sacrosancti oecumenici Concilii Vaticani II instauratum auctoritate Pauli pp. VI [et Ioannis Pauli pp. II] promulgatum: Ordo Missae*, with the *Institutio generalis Missalis Romani* (typical 3rd ed, April 20, 2000), *Ordo lectionum Missae* (ed. alt., January 21, 1981), *Missale parvum e Missale Romano et Lectionario excerptum* (October 18, 1970), *Ordo cantus Missae* (June 24, 1972), *Collectio Missarum de Beata Maria Virgine* (August 15, 1986).

2. SCSDW, September 12, 1983, in *Notitiae* 20 (1983), p. 540: *...libri liturgici vim suam retinent, ut ait can. 2 ipsius Codicis.*

3. A compendium of the norms dealing with liturgical reform can be found in R. KACZYNSKI (Ed.), *Enchiridion documentorum instaurationis liturgicae*, I (1963–1973) (Turin 1976), II (1973–1983) (Rome 1988).

4. A useful work regarding the preceding, with a listing and systematization of the content of these books up to the year 1984, is A. CUVA, "I nuovi libri liturgici. Rassegna documentaria," in *Salesianum* 46 (1984), pp. 787–799, and also in *Notitiae* 21 (1985), pp. 394–408.

b) *Pontificale romanum ex decreto sacrosancti oecumenici Concilii Vaticani II instauratum auctoritate Pauli pp. VI [et Ioannis Pauli pp. II] promulgatum: De ordinatione episcopi, presbyterorum et diaconorum* (ed. alt., June 29, 1989), *Ordo consecrationis virginum* (May 31, 1970), *Ordo benedictionis abbatis et abbatissae* (November 9, 1970), *Ordo benedicendi oleum catechumenorum et infirmorum et conficiendi chrisma* (November 3, 1970), *Ordo confirmationis* (August 22, 1971), *De institutione lectorum et acolythorum, de admissione inter candidatos ad diaconatum et presbyteratum, de sacro coelibato amplectendo* (December 3, 1972), *Ordo dedicationis ecclesiae et altaris* (May 29, 1977), *Ordo coronandi imaginem Beatae Mariae Virginis* (March 25, 1981).

c) *Rituale romanum ex decreto sacrosancti oecumenici Concilii Vaticani II instauratum auctoritate Pauli pp. VI [et Ioannis Pauli pp. II] promulgatum: Ordo celebrandi matrimonium* (March 19, 1969), *Ordo baptismi parvulorum* (May 15, 1969), *Ordo exsequiarum* (August 15, 1969), *Ordo professionis religiosae* (February 2, 1970), *Ordo initiationis christianae adultorum* (January 6, 1972), *Ordo unctionis infirmorum eorumque pastoralis curae* (December 7, 1972), *De sacra communione et de cultu mysterii eucharistici extra Missam* (June 21, 1973), *Ordo paenitentiae* (February 2, 1973), *De benedictionibus* (June 31, 1984).

d) *Caeremoniale episcoporum ex decreto sacrosancti oecumenici Concilii Vaticani II instauratum auctoritate Ioannis Pauli pp. II promulgatum* (September 14, 1984).

e) *Officium divinum ex decreto sacrosancti oecumenici Concilii Vaticani II instauratum, auctoritate Pauli pp. VI [et Ioannis Pauli pp. II] promulgatum, Liturgia horarum iuxta ritum romanum*, with the *Institutio generalis Liturgiae Horarum* (ed. alt., April 7, 1985), *Ordo cantus Officii* (March 25, 1983).

f) *Calendarium romanum* (ed. emm, April 20, 2000).

g) *De exorcismis et supplicationibus quibusdam* (November 22, 1998).

h) *Martyrologium romanum* (2001).

An updated edition of the *Martirologium romanum* is not yet available.

2. *Liturgical Laws*

When c. 2 refers to liturgical law, it is basically referring to "the rites to be observed in the celebration of liturgical actions." These rites, with their dual components (textual and ceremonial) are those included in the liturgical books that we have listed. This bold affirmation, however, requires two clarifications. The liturgical books, in their present version, cannot be considered *ius stricte liturgicum*, because, in addition to the rites and the ceremonial guide for celebration, they also contain numerous disciplinary norms and regulatory pastoral orientations, especially in their

Praenotanda and *General Institutions*. This tendency, noted even in the old liturgical legislation, has now increased considerably. Therefore, the range of potential conflict between the liturgical *Ordines* and the *CIC* has been expanded by this chapter.

The second clarification, which highlights the same problem, is the perspective of the *CIC* regarding the contents of liturgical subjects.[5] Indeed, although c. 2 of the *CIC* excludes the rites of celebration from its legislative regimen, the truth is that, especially in book IV, the *CIC* has a strong influence on liturgical content, with much greater scope and thoroughness than the former Code. It is not a question of regulatory instructions for ritual (*ius stricte liturgicum*, as the commentators of *CIC*/1917 put it), but of the fundamental juridical essence of the sacraments and of the sacramental rites. Notwithstanding, no matter how it is termed, this has marked effects on the liturgical dimension. Book IV, although often referring to the liturgical books and particular liturgical norms, regulates and governs matters relating to the nature of the liturgy (c. 837) and the juridical competence for its regulation (c. 838) and, in greater detail, everything pertaining to matter and form, the minister, the subject, and even the general outline of the celebration of each sacrament.

Therefore, it is easy to note that both the present content of the *CIC* and that of the liturgical books cover a wide range of common themes, making the possibility of conflict between them much more likely. Consequently, those regulatory provisions of the *Ordines* that antedate the *CIC*, which "vim suam retinent, nisi earum aliqua Codicis canonibus sit contraria" (c. 2), may lose their effect.

3. *Variations in liturgical books*

In view of the above, a decree from SCSDW (November 12, 1983)[6] was required to direct the changes that had to be introduced in the liturgical books. In fact, both the Code Commission and the Congregation had anticipated the need for such changes. Book IV of the *CIC* had been prepared with the *Ordines* in mind, but without forgetting that *in Ordinibus liturgicis multae sunt normae disciplinares vel quae mixtae sunt*,[7] and without completely abandoning the willingness to make correction. The Congregation, on the other hand, was aware that "les *Praenotanda* concernent non seulement l'accomplissement cérémoniel des rites, mais tous les aspects pastoraux de la célébration et de la préparation à celle-ci."[8]

5. We discuss this topic in "Funciones del Código en la recepción de la legislación postconciliar," in *Ius Canonicum* 50 (1985), pp. 479–516, especially pp. 487–488.

6. *Notitiae* 20 (1983), pp. 540–541 *(Decretum)*, pp. 541–555 *(Textus variationum)*, pp. 556–561 *(Commentarium)*.

7. *Comm.* 23 (1991), p. 143.

8. P.M. Gy, "Les changements dans les praenotanda des livres liturgiques à la suite du Code de droit canonique," in *Notitiae* 20 (1983), p. 556.

The variations affect 76 points of the liturgical books, especially the *Praenotanda* and the *General Institutions*, concerning matters in which it is difficult to distinguish adequately between the domain of liturgical law and that of disciplinary law. Through an ordering of these changes, the following categories are established:[9] *a*) A small number of cases where the provisions in liturgical books have been corrected, with a return to the former discipline (for example, making it obligatory, not merely optional, to administer the sacrament of anointing of the sick to those who have lost their vital signs and whose status, whether dead or alive, cannot be precisely determined). *b)* A relatively large number of directives in which the *CIC* has simplified the requirements of the liturgical books or has elaborated on the reforms introduced in these books (for example, removal of certain limitations on eucharistic concelebration or celebration outside a sacred place). *c*) The new, stricter regimen to which general absolution without prior individual confession is subject, along with additional conditions and an emphasis on its exceptional nature. *d*) The inclusion in the liturgical books of some canonical prescriptions which did not appear previously in the *Ordines* but which have been detailed in the *CIC* (for example, the authority to hear confessions or the conditions for the lawful baptism of children).

9. Cf. Ibid., pp. 558–560.

3 Codicis canones initas ab Apostolica Sede cum nationibus aliisve societatibus politicis conventiones non abrogant neque iis derogant; eaedem idcirco perinde ac in praesens vigere pergent, contrariis huius Codicis praescriptis minime obstantibus.

The canons of the Code do not abrogate, nor do they derogate from, agreements entered into by the Apostolic See with nations or other civil entities. For this reason, these agreements continue in force as hitherto, notwithstanding any contrary provisions of this Code.

SOURCES: c. 3; BENEDICTUS pp. XV, Alloc., 21 nov. 1921 (*AAS* 13 [1921] 521–524); CodCom Resp. ad c. 404, 26 nov. 1922 (*AAS* 15 [1923] 128); *CD* 20; *ES* I, 18 §2

CROSS REFERENCES: cc. 113 § 1, 232, 362, 377 § 5, 747, 793–800, 804–805, 812, 1055 § 2, 1059, 1259, 1311, 1401

COMMENTARY

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The norm affirming the international agreements which the Holy See ("the Apostolic See") enters into with political entities is particularly clear; indeed, it was even considered redundant by some.[1] The first part, which states that the canon does not abrogate or derogate these treaties (i.e., does not abolish or amend them) would seem to be sufficient by itself; and the second part of the canon, which reiterates that these treaties are to remain intact even if they should conflict with the *CIC*, would seem to be superfluous. All of these precautions have been motivated, naturally, by the international and contractual nature of such agreements, which are in no way subject to emendation by the internal law of one of the contracting parties. The regulation of these agreements adheres to international law. Treaty law is fundamentally governed by the principle of *pacta sunt servanda*. This principle protects the contents of the pact against unilateral denunciation by one of the parties. As a precaution against unreasonable rigidity, the clause, or better, the complementary principle, *rebus sic stantibus*, invalidates the agreement if the situation of one of the parties changes substantially.

1. Cf. *Comm.* 23 (1991), p. 144.

1. *The international character of the Holy See*

The juridical status of the Holy See is universally recognized to be international—with slight nuances in reasons and arguments, both in the realm of law and, above all, in the actual practice (ancient, typical, and prominent) of diplomacy as it is carried on by the Holy See.[2] Of course, this international character has its own peculiarities. The Holy See, although it has Vatican City as a token of its independence and international status, is not a state, nor does it enjoy the same kind of national and international sovereignty that states have. In its international activity it represents, defends and implements the interests of a much larger religious community, which is the Catholic Church. Moreover, it is not subject to the decisions of courts or international tribunals of arbitration for the resolution of disputes or for the interpretation of decisions resulting from mediation. Yet these peculiarities, and others which might be cited as evidence, do not obscure the fundamental principle. In addition, there are certainly other international organizations that are not States or sovereign bodies (UN, FAO, UNESCO, European Community) which, nevertheless, have an international character and are fully qualified members of the international community.

2. *The nature of the agreements made with states*

The pacts ("agreements") referred to in c. 3 may differ widely in nature. There is no reason to exclude those agreements to which the Holy See is party that are not strictly the result of a bilateral agreement, nor diplomatic agreements of representation, from which no code of regulations arises but only the constitution of mutual relations.[3] Nevertheless, it is the bilaterally negotiated *norms* (often termed concordats) that are of primary importance and that are contemplated in c. 3. Included among such agreements are those between the Holy See and political entities (States or otherwise) which govern matters affecting in some ways the interests of both parties. Their particular form and content do not matter much, provided they are entered into between the Holy See and the duly authorized representatives of that political entity. Nor is the name given to the agreement particularly important for these purposes: *convention, protocol, modus vivendi, agreement,* etc.[4]

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2. Cf. S. FERLITO, *L'attività internazionale della Santa Sede* (Milan 1988).
3. Cf. *Annuario Pontificio* (2003), pp. 1216–1240 (pontifical representatives to countries: nuncios, and apostolic delegates); pp. 1245–1270 (accredited diplomatic corps to the Holy See); pp. 1241–1244 (representatives of the Holy See to international governing bodies).
4. For a concise and complete study on the characteristics of these concordats, their nature, juridical effects and interpretation, cf. J. GIMÉNEZ Y MARTÍNEZ DE CARVAJAL, "Los concordatos en la actualidad," in *Derecho canónico* (Pamplona 1975), pp. 715–767.

For the reasons alleged above (i.e., because the Holy See is not a State and because of the specificity of the subject matter of concordats), some authors doubt whether concordats are, strictly speaking, international treaties. However, it is, in fact, quite difficult to deny that they are, especially when one takes into account the juridical formalities of these pacts and the fact that the Holy See has signed the Vienna Convention of 1969 on the law of treaties.[5] Nevertheless, these authors do not question the bilateral and "external" nature of the Code governing concordats. They do not, in other words, claim that it cannot be understood as law stemming from or subordinate to the petition of a state, but rather they maintain that it is parallel and somewhat analogous to international law.

3. *Current juridical accords*

At present, the current concordats are:[6] Germany (Baden, Bavaria, Brandenburg, Saxony, Saxony-Anhalt, Thuringia, Hamburg, Mecklenburg-Western Pomerania, Schleswig-Holstein, Prussia, Rhineland-Palatinate, North Rhineland-Westphalia, Lower Saxony, Saarland), Argentina, Austria, Bolivia, Brazil, Colombia, the Ivory Coast, Ecuador, El Salvador, Spain, France, the Philippines, Haiti, Hungary, Italy, Malta, Monaco, Morocco, Paraguay, Peru, Poland, Portugal, Dominican Republic, Switzerland (Argonia, Berne, Freiberg, San Gall, Lucerne, Ticino, Turgovia), Tunisia, Venezuela. In the last decade, in addition to numerous partial changes and the broadening of current juridical resolutions, the Holy See has completed new international agreements with the Ivory Coast (1992), San Marino (1992), Israel (1993), Croatia (1996), Kazakhstan (1998), Estonia (1999), Lithuania (2000), Latvia (2000), the Slovak Republic, and Gabon (2001).

Treaty activity between the Holy See and states has been extensive of late (more than forty agreements in the last thirty years). Especially noteworthy is the new willingness of the Church to enter into particular agreements without trying to achieve the comprehensiveness of the old concordats. This is even true in the case of new general agreements. No longer do they pretend to resolve every potential conflict once and for all through a rigid distribution of jurisdiction,[7] but rather they often leave open the possibility of subsequent revisions that may be more apt, without thereby destroying the juridical value of the original accord.

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5. Cf. S. Ferlito, *L'attività...*, cit., pp. 104–124.

6. For the text of current agreements signed before 1980, cf. c. Corral Salvador-J. Giménez and Martínez de Carvajal, *Concordatos vigentes*, I and II (Madrid 1980). From 1980 to 1995, cf. c. Corral Salvador-S. Petschen, *Concordatos vigentes*, III (Madrid 1996). For concordats for the year 2000, cf. J.T. Martín de Agar, *I concordati del 2000* (Vatican City 2001).

7. Cf. P. Lillo, *Concordato, 'accordi' e 'intese' tra lo Stato e la Chiesa Cattolica* (Milan 1990), pp. 12–19, 147–156.

The words of c. 3 are very clear: they refer only to the agreements signed by the Holy See. Still, in any case we can ask whether accords between the Catholic hierarchy (diocesan and national) and political entities also fall under c. 3. When these conventions are an immediate consequence of the mandate granted by the original international pact, as we have just said, there is no doubt that they can be considered as part of the pact and follow the same rules. If, however, they are implementations of an international pact not immediately covered by the pact itself, or if they are mere norms agreed upon outside the international agreement, then they cannot be considered to be norms governed by the law of treaties or norms of international standing.[8] It would be the obligation of the ecclesiastical authority that concluded these minor agreements prior to the promulgation of the *CIC* to initiate the bilateral revision of any agreement containing provisions contrary to those of the *CIC*.

4. *The presentation of church-state relations in the CIC*

It follows logically from c. 3 that the canons of the Code constitute the internal law of the Church. We should say, however, that this need not prevent the existence in the Code of certain features which must govern such relations, as has rightly been stressed by one author.[9] In fact, the Code lays claim ("by divine ordination") to the moral personality of the Catholic Church and the Apostolic See (c. 113 § 1) as the foundation for the autonomy of their jurisdictional authority, and for their character and independence in the human community. The Church (or those who have authority within it) also claim the freedom and the right to preach the Gospel and to render its moral judgment on any matter of human affairs (c. 747); to establish and direct schools (c. 800); to promote formation and education in the Catholic religion at all levels of education (cc. 794, 804, 805, and 812); to train its own ministers (c. 232); to appoint and send papal legates (c. 362); to establish the matrimonial regimen for its faithful (cc. 1055 § 2 and 1059); to acquire, retain or sell temporal goods for the attainment of its own goals (c.1259); to punish with penal sanctions those of the faithful who commit delicts (c. 1311); and to judge its own cases (c. 1401). It is clear that each of these stipulations has the fundamental purpose of affirming the Church's autonomy before temporal powers, and, with this in view, they are formulated in the terminology of the Code as "inherent," "exclusive," "native," "original" freedoms and rights "independent of civil power." Rather than an actual presentation of the relations

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8. For a dissenting opinion, cf. T.I. Jiménez Urresti, commentary on c. 3, in *Salamanca Com.*

9. Cf. J. Listl, *Die Aussagen des Kodex Iuris Canonici von 25. Januar 1983 zum Verhältnis von Kirche und Staat*, in *Essener Gespräche zum Thema Staat und Kirche* 19 (1985), pp. 9–32

between Church and State, they provide the foundation for the establishment of such relations together with the Church's conviction that it has supreme authority over its juridical code. Notwithstanding, it does contain certain canons that offer interesting nuances to guide such relations, for example, those canons that discuss the rights and duties of parents in the education of their children (cc. 793, 796–799), or the new norm that warns against the future concession to civil authorities of any right or privilege whatsoever of election, appointment, presentation or designation of bishops (c. 377 § 5).

4 **Iura quaesita, itemque privilegia quae, ab Apostolica *Sede ad haec usque tempora* personis sive physicis sive iuridicis concessa, in usu sunt nec revocata, integra manent, nisi huius Codicis canonibus expresse revocentur.**

Acquired rights, and likewise privileges hitherto granted by the Apostolic See to either physical or juridical persons, which are still in use and have not been revoked, remain intact, unless they are expressly revoked by the canons of this Code.

SOURCES: c. 4; CodCom Resp., 29 maii 1918; CodCom Resp. IV: 6, 2–3 iun. 1918 (*AAS* 10 [1918] 346); CodCom Resp. 2, 16 oct. 1919 (*AAS* 11 [1919] 476); SCHO Resp., 26 nov. 1919; CodCom Resp. IV, 14 iul. 1922 (*AAS* 14 [1922] 527); CodCom Resp. IV, 12 nov. 1922 (*AAS* 14 [1922] 662); CodCom Resp., 26 nov. 1922 (*AAS* 15 [1923] 128); CodCom Resp. I, 30 dec. 1937 (*AAS* 30 [1938] 73); PIUS pp. XII, Litt. Ap. *Litteris suis*, 11 nov. 1939 (*AAS* 32 [1940] 41); PAULUS pp. VI, Alloc., 14 ian. 1964 (*AAS* 56 [1964] 193–197), PAULUS pp. VI, mp *Romanae dioecesis*, 30 iun. 1968, 10 (*AAS* 60 [1968] 379)

CROSS REFERENCES: cc. 9, 36 § 1, 38, 76, 121–123, 192, 362 § 2, 396 § 2, 509 § 1, 510 § 1, 526 § 2, 562, 616 § 1, 858 § 1, 1019 § 2, 1196

COMMENTARY

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Canon 4 provides a textual formula different from that of c. 9, although the purpose of both is substantially the same: to affirm the general principle of non-retroactivity of the law and the exceptional principle of retroactivity when the law expressly establishes it. The perspective of the two canons is, however, slightly different. Canon 4 is concerned with the individual holder of an acquired right or privilege who may be affected by the new law, whereas c. 9 addresses the law itself in stating its desire to respect juridical precedents. There are also differences in the applicability of the two norms. Canon 4 concerns itself with the non-retroactivity rule that governs acts executed under the legal regimen previous to the *CIC*, whereas c. 9 is applicable, within its schema and simplicity, to any law.

1. *Acquired rights*

For ideas relating to the non-retroactivity of the law which are obviously also applicable to all that is stated here, see commentary on c. 9, as that is their natural place.

Canon 4 takes the more classical doctrinal position as regards the non-retroactivity of the law: the possible retroactivity of a new law is limited by the requirement to respect rights acquired in accordance with a previous law. An acquired right is one that results from a lawful act duly carried out under the authority of the previous law. Therefore, one cannot speak of expectations (abilities, faculties, powers or rights) anticipated or contained in the aforementioned law without there also being an act of acquisition. The acquired right (*ius quaesitum firmum*) is thereby linked to the juridical aspect of the person by an act arising from the activity of the subject or by any other cause suitable for producing that act. The name by which such an act may be known can vary considerably: a law or a custom, a regulation, the exercise of judicial or administrative authority, or the power of autonomy belonging to the interested party.

The system of acquired rights, as a means of determining the scope of retroactivity of the law, is only one of the possible systems, and for a good number of authors it is not even the most appropriate. In their fine interpretations, the commentators on the former Code[1] already had misgivings, as expressed in their commentaries to c. 4 *CIC*/1917 (a canon strictly parallel to c. 4 *CIC*), and many civil laws have ceased to use this system as a means of measuring the scope of the retroactivity of the law, abandoning it for a more objective evaluation. Rather than using the right acquired by the subject as the criterion, they focus on the act by which such right is alleged to exist. Thus it becomes unnecessary to decide whether the right was acquired at the time of promulgation of the new law; instead, one asks whether the original act was brought to completion.

Among the reasons that support the change of perspective is the difficulty in determining the concept of an acquired right. If we exclude innate or fundamental rights, all rights, it has been said, have been acquired or else they are not rights. This breadth and lack of precise limits on the concept encourages a diffuse and broad application of an acquired right, and thereby jeopardizes a just reform of the juridical order.

It is agreed that all conceptual systems for measuring the retroactivity of the law are relative and the retroactivity of acquired rights must be judged in this light. In fact, no abstract doctrinal theory is completely successful on this subject. All of them do, however, contribute sources of inspiration and knowledge which, if they are judiciously combined, help to illuminate the workings of juridical practice. Even though it is relative and

1. Cf. A. VAN HOVE, *De legibus ecclesiasticis* (Malines-Rome 1930), pp. 35–36.

of limited efficacy, the system of acquired rights has in its favor a strong tradition and a proven value which make it quite applicable and useful in wide areas of the law. It is not entirely true that an acquired right is the same as a plain right. It would be, if its acquisition were considered merely from the passive perspective ("that which is acquired," that which has fallen within a personal juridical patrimony). In analyzing it from a more complete point of view, however, the active aspect of the acquisition must also be considered: someone is acquiring a right which is ascribed to that person as the result of an acquisitive activity in which the individual is in some way a leading participant (although he need not be the direct agent of the act).

Clearly, this criterion cannot serve to define absolutely the nature of an acquired right, but it does offer some assistance in practice. No one doubts, for example, that juridical situations arising from a contract, or more generally from any juridical transaction based on freedom of choice, generate authentic acquired rights. Likewise, no one disputes that juridical situations that strictly *pendent a lege,* (i.e., that are granted directly by the law without the active participation of the subject, that is, without an act being provided to acquire them), do not constitute acquired rights. Thus, for example, legislation on age requirements, rights, and powers inherent to the juridical condition of a cleric or religious person, the juridical situations included within the legal structure of an office or institution, and relationships between positions (such as matters of precedence), etc., cannot be considered to be acquired rights, and may be affected by the new law.[2] Between such obvious examples, however, falls a wide range of situations which will tend more or less toward one conclusion or the other.

Although c. 4 defines the sphere of operation of acquired rights for juridical situations prior to the enactment of the *CIC*, the Code itself also uses, not surprisingly, the notion of an acquired right to define legal situations subject to its own enactment. It may be deduced that the Code's attitude toward rights acquired under its regime is very similar to the provisions of c. 4. Acquired rights are respected, or more precisely, there is a clear intention to respect them (cc. 38, 121, 122, 123, 192, 326 2, 562, 616 § 1 and 1196). In the sphere of administrative authority—not by law—the possibility of lawful detriment (and therefore, of legitimate retroactivity) is recognized, provided there is an express derogatory clause (cc. 36 § 1 and 38). The *CIC* contains no clause which has express power to revoke, and as such, a specific, typical acquired right, though some of its privileges may be expressly revoked, as we discuss below, could be the means by which acquired rights are secured. There is a provision in the Code (c. 192) which establishes very clearly, with respect to removal from

2. One may consult two old replies of the Holy See on these situations: *AAS* 11 (1919), pp. 349–354 and *AAS* 14 (1922), p. 527.

office, that a contract constitutes grounds, which cannot be appealed, for acquired rights, with precedence over other grounds for acquired rights. The *CIC* accepts the creation of acquired rights in the field of public law proper to the ecclesiastical organization, such as the case of the cumulative right acquired by non-parochial churches to have a baptismal font (c. 858 § 1), but it does not always consider other similar situations to be acquired rights, nor does it respect them in their full integrity: "Parishes are no longer to be united with chapters of canons. Those which are united to a chapter are to be separated from it by the diocesan bishop" (c. 510 § 1).

2. *Apostolic privileges*

According to c. 4, the privileges granted until the moment of promulgation of the *CIC* by the Apostolic See fall under the same regime as acquired rights do: they remain intact if they are in use, unless they have been expressly revoked by the canons of the Code. These privileges are subject to the concept set forth in c. 76 § 1: "A privilege is a favor given by a special act for the benefit of certain persons, physical or juridical." We are, of course, within the sphere of singular acts. Situations which are beneficial or voluntarily granted, whose origin is in a law or a custom (although they may be generically termed *privilegia clausa in iure*), are not contemplated in c. 4, but in cc. 5 and 6 respectively as customs and laws, which in fact they are. Nor is stipulation a means of obtaining a privilege, but rather induces a presumption of the concession (c. 76 § 2), although not necessarily an apostolic concession. In any event, the juridical situation obtained by such stipulation is an acquired right and is subject to c. 4.

Privileges that originate from an authority lower than the Apostolic See are not considered or protected as privileges by c. 4. However, nothing prevents their being retained (c. 73), insofar as they may be considered acquired rights.

The Code expressly revokes any privileges which might impede the freedom of a diocesan bishop to confer each and every canonry (c. 509 § 1); any exoneration from giving dimissorials granted to certain superiors of institutes of consecrated or apostolic life (c.1019 § 2); and any privilege that prevents the existence in each parish of only one parish priest or moderator (c. 526 § 2). The Code reprobates any privilege which prevents the bishop from electing the priests he wishes to accompany him on the pastoral visit (c. 396 § 2). Reprobation, in addition to revoking the privilege, renders such conduct *unreasonable* in the legal sense and prevents it from being legitimately revived in the future.

5 **§ 1. Vigentes in praesens contra horum praescripta canonum consuetudines sive universales sive particulares, quae ipsis canonibus huius Codicis reprobantur, prorsus suppressae sunt, nec in posterum reviviscere sinantur; ceterae quoque suppressae habeantur, nisi expresse Codice aliud caveatur, aut centenariae sint vel immemorabiles, quae quidem, si de iudicio Ordinarii pro locorum ac personarum adiunctis submoveri nequeant, tolerari possunt.**

§ 2. Consuetudines praeter ius hucusque vigentes, sive universales sive particulares, servantur.

§ 1. Universal or particular customs which have been in effect up to now but are contrary to the provisions of these canons and are reprobated in the canons of this Code, are completely suppressed, and they may not be allowed to revive in the future. Other contrary customs are also to be considered suppressed, unless the Code expressly provides otherwise, or unless they are centennial or immemorial: these latter may be tolerated if the Ordinary judges that, in the circumstances of place and person, they cannot be removed.

§ 2. Customs apart from the law, whether universal or particular, which have been in effect hitherto, are retained.

SOURCES: §1: c. 5; SCCouncil Resol., 8 feb. 1919 (*AAS* 11 [1919] 280–284); CodCom Resp. 6, 16 oct. 1919 (*AAS* 11 [1919] 477); SC-Council Resol., 14 feb. 1920 (*AAS* 12 [1920] 163–166); SC-Council Resol., 13 nov. 1920 (*AAS* 13 [1921] 43–46); SC-Council Resol., 11 dec. 1920 (*AAS* 13 [1921] 262–268); SCCouncil Resol., 11 dec. 1920 (*AAS* 14 [1922] 42–46); SCR Resp., 18–20 mar. 1922 (*AAS* 14 [1922] 352–353); CodCom Resp., 26 nov. 1922 (*AAS* 15 [1923] 128); SCCouncil Resol., 13 iun. 1925, III (*AAS* 17 [1925] 538–540); SCDS Instr. *Plures petitiones,* 30 iun. 1932 (*AAS* 24 [1932] 271–272) § 2: cc. 106, 5° et 6°, 136 § 1, 171 § 2, 346, 417 § 3, 441, 1°, 462, 6°, 463 § 1, 471 § 4, 476 § 5, 547 § 1, 730, 740, 831 §§ 2 et 3, 1041, 1100, 1234 § 1, 1251 § 1, 1290 § 2, 1410, 1444 § 1, 1455, 3°, 1482, 1502, 1519 § 2, 1535, 1555 § 1, 1805, 2080; SCCouncil Resol., 14 feb. 1920 (*AAS* 12 [1920] 163–165)

CROSS REFERENCES: cc. 23–28, 284, 396 § 2, 423 § 1, 438, 526 § 2, 527 § 2, 952 §§ 2–3, 1076, 1119, 1263, 1276 § 2, 1279 § 1, 1287 § 1, 1425

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The application of c. 5 is confined to customs *vigentes in praesens*, i.e., customs which are already in force or which at least are in the process of consolidation. It does not consider future customs. Moreover, it serves only to evaluate the relationship of such customs with the *CIC*. The legislator is not concerned here with other types of legitimacy or illegitimacy of custom (for example, no reference is made to the necessary adaptation of divine law, because this is not the appropriate place for such reference), but only with the legitimacy or illegitimacy which arises from its relationship with "the prescriptions of these canons." For that same reason, customs concerning liturgical matters, which are governed by their own laws outside the Code are also not directly affected by c. 5, although we should add that custom may be introduced in this area, whose operation in light of the new law will have a regime analogous to that of c. 5.[1]

The requirements that shape a canonical custom (which is not mere *de facto* use) are set forth in cc. 23–28. To be precise, however, we must in this instance refer to the old canons under the title *De consuetudine* of the 1917 Code, which constituted the immediate legal framework for the formation of these customs. It should be noted in regard to c. 28, the canon that addresses the derogation of customs, that c. 5 is clearly restrictive, i.e., it includes as a norm what the old Code presented as an exception: "unless it is expressly cited the law does not revoke centenary or immemorial customs nor does the universal law revoke particular customs." (The 1917 Code, by contrast, retained particular customs unless it specifically provided otherwise.) The revocatory regimen of c. 5 is more severe than that established for private future customs, and it was not accepted without argument within the codifying commission.[2]

Canon 5 lays out four types of customs in relation to the Code and attributes different effects to each of them: *a)* customs *contra legem Codicis* expressly reprobated by the canons of the Code; *b)* centennial and immemorial customs *contra legem Codicis* not expressly reprobated by the canons of the Code and therefore incapable of being suppressed; *c)* other customs *contra legem Codicis* not expressly reprobated; d) customs *praeter legem Codicis*. Let us look more closely at these cases.

1. A good study in relation to the *CIC*/1917 can be found in M. Noirot, "La 'rationabilitas' des usages contraires aux lois liturgiques depuis la promulgation du Code de droit canonique," in *L'Année canonique* I (1952), pp. 129–140.
2. Cf. *Comm.* 23 (1991), pp. 144–145.

1. *Contrary customs reprobated by canon law*

If a pre-*CIC* custom is opposed to a norm of the Code that reprobates that custom, the effects of its reprobation are absolute: such a custom, whether or not it is centennial, is suppressed and must not be permitted to revive. It is an application (or, if one prefers, a parallel provision) of the norm of c. 24 § 2: "a custom which is expressly reprobated in the law is not reasonable." Reasonableness is the sine qua non which law requires of custom in order for custom to acquire the "force of law." Only a substantial change of circumstances could also change the effect of the reprobation and restore to juridical force a previously reprobated custom. According to Michiels, all condemnatory clauses implicitly contain a further prohibitive clause (i.e., one that prohibits the future practice of the custom), which could be formulated as: "so long as the basis for the judgment of unreasonableness persists."[3]

The mode of reprobation must be explicit; it must consist of the textual formulation of the canon. There are six express instances of reprobation of custom in the Code: that reprobating any custom limiting the freedom of the bishop to elect the priests he wishes to accompany him on a pastoral visit (c. 396 § 2); that reprobating any custom which permits more than one diocesan administrator to be appointed for a vacant see (c. 423 § 1); that reprobating any custom which permits more than one parish priest or moderator in each parish (c. 526 § 2); that reprobating any custom which introduces new matrimonial impediments or which is contrary to existing impediments (c. 1076); that reprobating any custom which allows the administrators of diocesan goods to be exempt from rendering accounts annually to the bishop (c. 1287 § 1); and that reprobating any custom which does not provide that certain contentious and criminal cases be judged by a court of at least three judges (c. 1425 § 1). These instances of reprobation, which are clearly few in number and exceptional in nature, are the only ones addressed in c. 5. Still, these do not by any means constitute the only customs which a legislator may reprobate. All of the previously reprobated customs remain reprobated, provided that a substantial change of circumstances has not come about, and of course nothing prevents the legislator from reprobating other customs in the future.

2. *Contrary centennial customs not expressly reprobated*

Customs contrary to the Code are also suppressed, but if they are not the subject of an express clause of reprobation, the effects of their suppression are different. Only reprobation makes their revival impossible

3. Cf. G. MICHIELS, *Normae generales iuris canonici*, II (Paris-Tournai-Rome 1949), p. 155.

("nec in posterum reviviscere sinantur"). Moreover, among those abrogated customs which are *merely contrary* to the canons of the Code, centennial and immemorial customs (those customs which at the time of the promulgation of the Code had existed for one hundred years or for such a long period of time that their origin is impossible to ascertain) have a special status. Although as a general rule the *CIC* considers these classes of customs to be suppressed, it does allow for their toleration in certain circumstances.

For this to occur, the local Ordinary must first determine that the custom cannot be suppressed. This determination must be communicated through a decree of tolerance[4] or at least through some act of jurisdiction which, although it may have a different immediate purpose, sufficiently certifies tolerance of the custom. Juridical decrees or acts of tolerance do not constitute legislative acts, but rather the exercise of executive authority. As c. 5 states, they emanate from the "Ordinary" and not from the "legislator." We are not talking, therefore, about an internal element of the custom as a source of law (it is not the *consensus legislatoris*), but rather about an indispensable requirement for its validity, though it external to the custom itself.

Tolerance of a custom presupposes the acceptance of a usage which is in some way wrong. It need not be understood that the usage is intrinsically wrong (then it would have no juridical meaning whatsoever), but rather that it contains a certain juridical inconsistency, precisely because it is contrary to universal law. It cannot properly be said[5] that tolerated customs are abrogated or suppressed *per se* and maintained only with de facto status. Tolerance is not compatible with abrogation. Such customs are norms included in the juridical order with the force of norms themselves, although they may have a particular status. Centennial customs may be *contra ius Codicis* because the Code has introduced a new prescription by which a custom that had until then been considered *praeter ius* is now considered to be opposed to the Code, or because that custom had already been established to be *contra ius* prior to the promulgation of the Code. Nor should we restrict the scope of tolerance to these instances alone.[6]

The practice of tolerating a non-reprobated centennial custom depends on multiple factors. The prestige and intention of permanence and immutability enjoyed by the *CIC*/1917, especially in the first decades of its existence, for example, caused few decrees of tolerance to be issued.

4. Regarding the norms of the *CIC*/1917 one may consult a decree of tolerance of Card. Suhard (Paris) on the immemorial, non-reprobated, customary manner of performing "l'ondoiement" (Baptism of urgency), in *Semaine religieuse de Paris*, May 31, 1947, p. 705, cited by M. NOIROT, "La 'rationabilitas' des usages...," cit., p. 134, note 16.

5. To the contrary, A. VAN HOVE, *De legibus ecclesiasticis* (Malines-Rome 1930), pp. 60–61.

6. For an undertaking of this type, cf. G. MICHIELS, *Normae generales*..., cit., pp. 105–106.

Often Ordinaries would have recourse to the Holy See when in doubt concerning the possibility of eliminating a custom, and the Congregations usually replied negatively[7] or very cautiously.[8] Indeed, this happened so regularly that a dubious principle became established in practice: if an Ordinary was unsure whether a custom could be maintained, he thereby plainly admitted that the said custom might be suppressed. This practice, in fact, caused fewer *dubia* to be presented to the Congregations. This tendency was also favored by two complementary trends that have made their way progressively into the sphere of canon law: a less strict construction of written law which is no longer conceived as an inviolable space as it was, and reasonably so, following the promulgation of the 1917 Code, and a revived awareness of the authority of diocesan bishops as officials capable of making their own judgments regarding the tolerance of a centennial or immemorial custom.

3. *Other non-reprobated contrary customs*

Canon 5 establishes that these customs may be suppressed or abrogated "nisi expresse Codice aliud caveatur." Only centennial or immemorial customs have the privilege of prevailing over the Code (that is, they may be tolerated). The rest of the contrary customs, in order to preserve their juridical force, must be explicitly accepted by the Code itself. This occurs in several passages in the Code, which present the custom as a norm which universal law respects as an alternative distinct from the law (*nisi ex consuetudine aliud constet, salvis consuetudinibus*: see cc. 438, 1263 and 1279 § 1). The general application of *ius particulare*, under the same circumstances, produces identical effects, because custom is the source of private law. This happens frequently in the *CIC*, although the immediate context must always be examined in order to determine whether the legislator intended to include the custom in the scope of the expression. (He does not do so, for example, in discussing *praescripta iuris particularis.*)

There are also instances in which the *CIC* refers to a custom without explicitly noting that it is contrary or an exception to the Code. Instead, it is characterized as a directly applicable norm no different than other sources of private law ("iuxta legem particularem aut legitimam consuetudinem": see cc. 284, 527 § 2, 1119 and 1276 § 2), or as a suppletory norm of the law (*ubi desit lex*: see c. 952 §§ 2 and 3). These types of customs are not directly governed by c. 5 § 1, since they are not exceptionally admitted contrary customs, but rather customs in accordance with the law, i.e.,

7. Cf. *AAS* (1918), p. 170; (1919), p. 479; (1921), p. 46; pp. 262–268; (1922), pp. 252–253; (1924), pp. 400–403.
8. Cf. *AAS* (1925), pp. 538–540.

specific means of complying with the meaning of the written law, or, if one prefers, customary norms promoted or provided by the law itself. A customary norm in accordance with the law, however, clearly operates throughout the entire range of juridical legislation and is not limited to these instances.

4. *Extralegal customs*

The uniformity of universal discipline brought about by the *CIC*/1917 led a good deal of canonical doctrine to conclude, in spite of its silence on the point, that the old Code abrogated universal custom *praeter legem Codicis*. Paragraph 2 of c. 5, therefore, puts an end to a situation which was a source of doubt under the *CIC*/1917. Now it is expressly stated that extralegal customs which are currently in force continue in effect, be they private or universal. The content of c. 5 § 2 is, moreover, implicitly contained in c. 19, which establishes substitute criteria for the resolution of those cases for which "there is not an express provision of either universal or particular law, nor a custom."

6 **§ 1. Hoc Codice vim obtinente, abrogantur:**

1° "Codex Iuris Canonici" anno 1917 promulgatus;

2° aliae quoque leges, sive universales sive particulares, praescriptis huius Codicis contrariae, nisi de particularibus aliud expresse caveatur;

3° leges poenales quaelibet, sive universales sive particulares a Sede Apostolica latae, nisi in ipso hoc Codice recipiantur;

4° ceterae quoque leges disciplinares universales materiam respicientes, quae hoc Codice ex integro ordinatur.

§ 2. Canones huius Codicis, quatenus ius vetus referunt, aestimandi sunt ratione etiam canonicae traditionis habita.

§ 1. When this Code comes into force, the following are abrogated:

1° the Code of Canon Law promulgated in 1917;

2° other laws, whether universal or particular, which are contrary to the provisions of this Code, unless it is otherwise expressly provided in respect of particular laws;

3° all penal laws enacted by the Apostolic See, whether universal or particular, unless they are resumed in this Code itself;

4° any other universal disciplinary laws concerning matters which are integrally reordered by this Code.

§ 2. To the extent that the canons of this Code reproduce the former law, they are to be assessed in the light also of canonical tradition.

SOURCES: §1: cc. 6, 1°, 5° et 6°, 489; CodCom Resp. II, 3 ian. 1918; CodCom Resp. III, 17 feb. 1918 (*AAS* 10 [1918] 170); SCHO Decr. *Cum in Codice*, 22 mar. 1918 (*AAS* 10 [1918] 136); CodCom Resp., 30 mar. 1918; *SCCong* Decr. *Proxima sacra*, 25 apr. 1918 (*AAS* 10 [1918] 190–192); SCR Decr. *Ad normam canonis*, 26 iun. 1918 (*AAS* 10 [1918] 290); *SCCong* Resp., 22 feb. 1919 (*AAS* 11 [1919] 75–76); SCHO Resp., 26 nov. 1919; CodCom Resp. II, 24 nov. 1920 (*AAS* 12 [1920] 573); SCR Decl., 26 oct. 1921, III (*AAS* 13 [1921] 538); CodCom Resp., 26 nov. 1922 (*AAS* 15 [1923] 128); SCCouncil Resol., 9 iun. 1923 (*AAS* 17 [1925] 508–510); CodCom Resp., 13 dec. 1923 (*AAS* 16 [1924] 609); SCHO Decr. *Supremae Sacrae*, 13 iul. 1930 (*AAS* 22 [1930] 344); Princ. prooemium § 2: c. 6, 2°–4°

CROSS REFERENCES: cc. 19–21, 335, 344, *2°–3°*, *346* §§ *1–2*, *348* § 1, 349, 359, 360, 569, 997, 1403 § 1

COMMENTARY

Javier Otaduy

The intention of this canon is to establish the regulations to be applied to the pre-*CIC* laws. Although c. 6 always refers to *laws*, the intention of the canon and the circumstances under which it was developed allow one reasonably to deduce that it is not referring to law in the strict sense of the word, but to all written norms issued by ecclesiastical authority. Indeed, the *Schemata* of this canon, in 1° and 2°, deliberately[1] made reference to *norms*, including any positive rule found in canon law in a broad sense (with the exception of customs, whose regime had already been regulated in c. 5). Following this interpretation, not only laws predating the Code are abrogated by c. 6, but also other legal documents, even if they are not laws strictly speaking, if the law which they illustrated, developed, urged or interpreted is abrogated. If they are independent, non-executory norms, they will have to be treated, for purposes of c. 6, as if they were laws.

We should also say that the perspective of c. 6 is different in the two Codes. Compared to that of the *CIC*/1917, which attempted a nearly complete revocation of previous norms (one would have thought that all disciplinary laws which were not either explicitly or implicitly included in the Code had utterly lost their force), that of the *CIC*, as we shall see, is less concerned to abrogate en masse the *ius vetus* that predates the *CIc*. We shall consider below the four grounds for abrogation presented in c. 6 as well as the interpretative norm for the old law.

1. *The abrogation of the CIC 1917* (§ 1, 1°)

Although the mandate of the codifiers was to reform or revise the old Code, it is obvious from the formal juridical point of view that the result has been the complete substitution of one Code for the other, with the immediate consequence of the abrogation of the *CIC*/1917, as indicated in 1°. Moreover, the *scopus primaries* is not, as it was then, the *codificatio iuris.*[2] The primary purpose now is to modify the law, since we already have a codification to use as a point of departure. Thus, "in contrast to c. 6 of the *CIC*/1917, c. 6 of the *CIC* does not affirm its intention to conserve, in general, the previous discipline; indeed, one of its principal objectives has been to modify legislation in order to accommodate it to the enactments of the Second Vatican Council."[3]

1. Cf. *Comm.* 23 (1991), p. 120.
2. A. VAN HOVE, *De legibus ecclesiasticis* (Malines—Rome 1930), p. 66.
3. P. LOMBARDÍA, commentary on c. 6, in *Pamplona Com.*

2. *The abrogation of the laws contrary to the CIC* (§ 1, 2°)

The rest of the laws (universal or particular) are also abrogated if they are contrary to the Code. With regard to particular law, a restriction analogous to that governing particular custom has been enacted. Canon 6, 2° makes a general rule which c. 20 established as an exception in matters relating to revocation of particular law—"a universal law, however, does not derogate from a particular or from a special law, unless the law expressly provides otherwise." The exception, according to c. 6, is that the contrary particular law remains in force, which occurs when the Code explicitly provides for it. Clauses that expressly protect a particular law or particular law in general (through the formulation, "nisi lex particularis aliud caveat," or others such as this) are found in several places in the Code (cf., e.g., cc. 288, 482 § 1, 553 § 2, 1470 § 1, 1561, 1653 § 1). There are many other provisions in the *CIC* concerning the efficacy of the law and of particular law even when they are not expressly indicated as exceptions, but as legislative norms in which the Code subordinates its norm to a particular norm, or even promotes the efficacy of particular law.

The universal law, as we discuss below, can be revoked indirectly, without being directly contravened, through a complete reorganization of the subject matter of the law. This is, moreover, the most common means of revoking universal law. It does not happen thus with revocation of particular law, which is abrogated only with respect to what is opposed to or incompatible with the prescriptions of the Code. Logically enough, c. 6 also does not affect particular *praeter Codicem* legislation. Typically, the particular law is only partially revoked in specific and well-defined normative instances.

The application of c. 6, 2° after the promulgation of the *CIC* has been uneven, especially as regards pontifical particular law. It has, on occasion, been abrogated by reason of contradiction with the Code;[4] sometimes, however, the particular contrary discipline has been maintained;[5] and there are even instances of compromise solutions.[6] Regarding the *ius proprium* of the institutes of consecrated life and the societies of apostolic life, there is a Decree of the SCRSI (February 2, 1984)[7] by which supreme

4. Cf. *AAS* 76 (1984), p. 299: The Rescript *ex audientia* of the Secretary of State, January 19, 1984, which abrogates the mp *Romanae dioecesis*, June 30, 1968, on the provision of benefices in Rome.

5. Cf. X. OCHOA, *Leges Ecclesiae* VI, no. 4999, col. 8678: Notification of the S. Congr. for the Eastern Churches to the Bishops' Conference in Greece, from September 23, 1983, by which the application of c. 1292 § 1 should be considered suspended, since there are, for that territory, still in force other specific pontifical provisions which prohibit any alienation without the permission of the Holy See.

6. Cf. X. OCHOA, *Leges Ecclesiae* VI, no. 5010, col. 8718: Notification *ex audientia* of the Cardinal Vicar of Rome, November 23, 1983, in which it is observed that the Roman practice for the admission to the ministeries and to Holy Orders is to be upheld.

7. Cf. *AAS* 76 (1984), pp. 498–499.

moderators together with their councils are required to determine and declare which laws of *ius proprium* have been abrogated by c. 6 § 1. The decree also establishes a procedure for the development and approval of new norms.

We must emphasize that statutes are not laws. It could not even properly be said that they are particular norms; rather, they are norms of internal autonomy (c. 94 §§ 1 and 2). However, if they have been established and promulgated through the use of legislative power (c. 94 § 3), they fall under the norms which govern laws, and consequently, will be directly affected by c. 6. A good example of this is, as we have already explained, in the area of the *ius proprium* of the institutes of consecrated life. We must also classify as particular laws those normative cases to which the *CIC* applies the term *statute* in a broad and improper sense because it does not speak of internal norms (cf. cc. 548 § 1, 788 § 3; and also cc. 295 § 1, 513 § 1). Nevertheless, if the statutes *sensu proprio* (c. 94 § 1) are contrary to the Code, we believe that c. 6 § 1, 2° affects them as well, even if only indirectly,[8] for two reasons. First, the approval of these statutes is controlled in large part by institutions (e.g. bishops' conferences, ecclesiastical universities, conferences of major superiors, seminaries, presbyteral councils, chapters of canons,[9] and even public associations). Second, the statutes, as norms of internal autonomy, *ad normam iuris conduntur* (c. 94 § 1). Accordingly, statutes must absolutely respect the parameters of the laws within which they operate, not just at their time of promulgation, but throughout their entire existence. In other words, they do not have the nature of singular acts which give rise to acquired rights, which in turn are more or less exempt from the operation of the law.

The PCILT, according to *Pastor bonus*, 158, can determine "whether particular laws and general decrees issued by legislators below the level of the supreme authority are in agreement or not with the universal laws of the Church." Presumably, these particular norms can, by analogy, be evaluated in light of c 6 § 1, 2° as well.

3. *The abrogation of penal laws* (§ 1, 3°)

Any penal law which is contrary to the Code, whether universal or particular, is abrogated by § 1, 2°. The intent of § 1, 3° is broader. It abrogates, in addition, the pre-*CIC* penal laws of pontifical character *(a Sede*

8. Cf. in the same sense, W. AYMANS-K. MÖRSDORF, *Kanonisches Recht. Lehrbuch aufgrund des Codex Iuris Canonici*, I (Paderborn-Munich-Vienna-Zürich 1991), p. 121. Also in agreement is G. MICHIELS, *Normae generales iuris canonici*, II (Paris-Tournai-Rome 1949), pp. 121–122, although by different reasoning and in agreement with the old c. 6.

9. The SCCouncil gave a mandate to the bishops, after *CIC*/1917, to amend the statutes of the chapters of canons, which is effectively c. 6 (see *AAS* 17 (1925), pp. 538–540).

Apostolica latae), whether universal or particular. They are abrogated, however, provided only that they are not "resumed in this Code." They need not compose part of an actual canon. It is enough for them to be indirectly mentioned in a canon (e.g., the penal laws[10] contained in *RPE*, indirectly mentioned in c. 335). By contrast, the penal laws enacted by legislators lower than the Holy See are kept in force unless they conflict with the norms of the *CIc*. Such a conflict occurs in the provisions of the Code that grant the power to issue penal law to those who hold legislative power (cc. 1315–1320, especially cc. 1317–1318).

The *juridical situations of those who committed* offences under the previous penal law and were subject to a penalty shall be evaluated according to the principles of c. 1313. This refers to an application of the principle of "*benefit to the offender*" which thus frequently requires "favorable retroactivity" of the penal law. If the offence were committed under the old law but is judged under the new law, the most favorable law is applied. If the offender was judged and punished under the old law, and the offender remains under the penalty, his case is to be re-evaluated in light of the new penal norm. If the offense has been removed or the punishment has been suppressed, the offender's punishment is to cease immediately. Finally, if the laws are inconsistent in their severity of punishment, the offender is to be judged according to the most favorable one[11] (see commentary on c. 1313 for this discussion.)

4. *The abrogation of universal laws re-ordered* "ex integro" *by the CIC* (§ 1, 4°)

The remaining universal disciplinary laws that the *CIC* re-orders *ex integro* are abrogated by 1, 4°. Just as we noted before that the proper reason (and the exclusive one) for abrogating a particular law is because of a conflict with the universal law, we now note that the most characteristic manner (not exclusive, of course) of abrogating the universal norm is the integral reorganization of its subject matter. This is especially true when the new law takes the form of a code, thus giving the new normative design the character of a global, all-encompassing purpose. Although not absolutely and unreservedly true, it is a valid supposition that "ipsa notio codificationis includit ordinationem integram materiae."[12]

The integral reordering results in the complete abrogation of the old norms on any given subject matter. Not only are the conflicting elements abrogated, but indeed the entire contents of the subject matter are

10. Above all in nos. 55–61 of said Ap. Const.
11. In disagreement, J.M. PIÑERO CARRIÓN, *La ley de la Iglesia*, I (Madrid 1985), p. 89. According to the author, in this last case, the penalty "does not have to be applied automatically."
12. A. VAN HOVE, *De legibus*..., cit., p. 357.

superseded, since it is understood that the new law proposes a substantially new regulation of the matter in question.

Thus, the integral re-ordering will only affect universal laws. It refers also to disciplinary laws. The *CIC*, in using this term, wishes to exclude from any derogation the dispositions concerning faith and customs, or, more precisely, those dispositions that present requirements relating to faith and morality which are without immediate effect in the external forum (even when their formulation is positive, specific, and mandatory).

The concept of integral re-ordering is difficult to define precisely (see commentary on c. 20); that is, it is not always easy to define the situations subject to it. There is broad agreement that the re-ordering *ex integro* embraces the general structure of a juridical institution. Yet it is also agreed that this integrity of subject matter is an elusive concept. That which appears to be whole when viewed in one way, can also be seen as merely a part of something else when viewed differently because within the same unitary subject, there are other subunits which in their turn can be considered whole, and in some sense, autonomous. Due to this ambiguity, the drafters preferred not use this concept in c. 6,[13] although in the end it proved impossible to avoid.

There are some pre-*CIC* norms which are clearly subject to the *ordinatio ex integro*.[14] Others are subjected to it more doubtfully because the *CIC* re-orders only certain sectors of the juridical subject matter to which

13. Cf. *Comm.* 23 (1991), pp. 118–119.

14. E.g., in the postconciliar legislation, Instr. *Piam et constantem*, on the cremation of cadavers, July 5, 1963, in *AAS* 56 (1964), pp. 822–823; mp *Pastorale munus*, on the faculties granted to bishops, November 30, 1963, in *AAS* 56 (1964), pp. 5–12;Rescr. Pont. *Cum admotae*, on faculties granted to Supreme Moderators and Abbots, November 6, 1964, in *AAS* 56 (1964), pp. 374–378; Ap. Const. *Paenitemini*, on performing works of penance, February 17, 1966, in *AAS* 58 (1966), pp. 177–198; mp *De Episcoporum muneribus*, on the bishops' faculty of dispensation, June 15, 1966, in *AAS* 58 (1966), pp. 467–472; mp *Ecclesiae Sanctae*, on norms for developing the conciliar decrees, August 6, 1966, in *AAS* 58 (1966), pp. 757–787; Decr. *Crescens matrimoniorum*, on mixed marriages with non-Catholics of Eastern rites, February 22, 1967, in *AAS* 59 (1967), pp. 165–166; Instr. *Renovationis causam*, on the renewal of the formation for the religious life, January 6, 1969, in *AAS* 61 (1969), pp. 103–120; mp *Matrimonia mixta*, on the governance of mixed marriages, March 31, 1970, in *AAS* 62 (1970), pp. 257–263; Litt. circ. *Presbyteri sacra*, on presbyteral councils, April 11, 1970, in *AAS* 62 (1970), pp. 459–465; mp *Causas matrimoniales*, on the new norms for Church marriage court procedures, March 28, 1971, in *AAS* 63 (1971), pp. 441–446; Decr. and norm. *Episcoporum delectum*, on the appointment of bishops, March 25, 1972, in *AAS* 64 (1972), pp. 386–391; mp *Ad pascendum*, on the diaconate, August 15, 1972, in *AAS* 64 (1972), pp. 534–540; Litt. circ. *Omnes christifideles*, on pastoral councils, January 25, 1973 (X. Ochoa, *Leges Ecclesiae* V, no. 4166, col. 6444–6449); Decr. *Ecclesiae pastorum*, on the proper vigilance of books, March 19, 1975, in *AAS* 67 (1975), pp. 281–284.

those norms applied.[15] Still, these bear a strong resemblance to that which we know to be regulated; so the presumption is that these normative pre-*CIC* documents are abrogated, especially when we keep in mind three documents in particular, all clearly within the post-Vatican II legislation, which state in their revised editions that they have been re-ordered *ex integro* by the *CIC*.[16] The Code Commission also clearly expressed its wish that such pre-*CIC* norms, which conflict in many instances with the *CIC*, be "revised," "adapted," "reformulated," or "re-promulgated" so as to reflect their formal dependency on the *CIC*, and thereby acquire a new lease on life.[17] In the meantime, we conclude that they are to be seen as entirely without juridical effect. The same must be said of all those normative documents which urge, illustrate, interpret, enlarge upon, apply, or execute these laws;[18] in other words, their fate is the same as that of their derogated source document.

It is perfectly clear that the following pre-*CIC* juridical norms are not subject to integral re-ordering, and thus remain in force:

a) *Those independent from the CIC,* in other words, those which pertain to matters neither regulated by, nor mentioned in, nor undertaken by, the Code;[19]

b) Those to which the Code expressly refers explicitly, usually in the terms of "special law," "peculiar law," or "peculiar right" (cc. 335, 344, 2°–3°, 346 §§ 1–2, 348 § 1, 349, 359, 360, 569, 997, 1403 § 1). We are speaking, of course, of the laws that discuss the vacancy of the Apostolic See and

15. For example, within the postconciliar legislation, Direct. ecumenical *Ad totam Ecclesiam*, May 14, 1967, in *AAS* 59 (1967), pp. 574–592; *Rationale fundamentalis institutionis sacerdotalis*, January 6, 1970, in *AAS* 62 (1970), pp. 321–384; Instr. *Dispensationis matrimonii*, on the dispensation of a ratified and non-consummated marriage, March 7, 1972, in *AAS* 64 (1972), pp. 244–252; mp *Ministeria quaedam*, on lay mininstries, August 15, 1972, in *AAS* 64 (1972), pp. 529–534; Direct. *Ecclesiae imago*, on the pastoral ministry of bishops, February 22, 1973 (X. OCHOA, *Leges Ecclesiae* V, no. 4174, col. 6462–6539); Not. direct. *Mutuae relationes*, on the relations between bishops and religious, May 14, 1978, in *AAS* 70 (1978), pp. 473–506.

16. Cf. *Rationale fundamentalis institutionis sacerdotalis (editio approbata post Codicem Iuris Canonici promulgatum)* (Typis polyglottis Vaticanis 1985), pp. 3–4; Litt. circ. *De processu super matrimonio rato et non consummato*, December 20, 1986, in *Comm.* 20 (1988), p. 78; *Directorium oecumenicum noviter compositum*: *AAS* 85 (1993), p. 1039.

17. Cf. *Comm.* 14 (1982), p. 131; 23 (1991), p. 119.

18. Cf. for a brief list of this type of norms in the postconciliar legislation, J. OTADUY, "Funciones del Código en la recepción de la legislación postconciliar," in *Ius Canonicum* 50 (1985), pp. 485–486.

19. E.g., within the postconciliar legislation, Direct. *Peregrinans in terra*, on the pastoral care of tourists, April 30, 1969, in *AAS* 61(1969), pp. 361–384; Instr. *Nemo est*, on the pastoral care of emigrants, August 22, 1969, in *AAS* 61 (1969), pp. 614–643; Normae et facultates *Apostolatus maris*, on the pastoral care of sea-farers, September 24, 1977, in *AAS* 69 (1977), pp. 737–746.

the election of the Roman Pontiff,[20] the Synod of Bishops,[21] the Roman Curia,[22] military chaplains,[23] the processes of beatification and canonization,[24] as well as the regulations on indulgences.[25]

c) Those norms which are implicitly contained in the Code, that is, those norms (which are usually procedural in nature) which are not expressly mentioned in the *CIC* but which are undoubtedly required in order to provide an operating procedure for a body or institution for which the *CIC* only outlines their fundamental nature and functions,[26] or, as the case may be, which are needed as regulatory (or merely executory) enlargements upon non-abrogated, pre-*CIC* laws.[27] The Roman dicasteries have made one claim for their validity since the promulgation of the *CIC*.[28]

Although these three categories of normative documents retain their force, they will clearly not be applicable insofar as they are incompatible with the Code.[29] This will happen repeatedly until these legislative docu-

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20. Ap. Const. *Universe Dominici gregis*, February 22, 1996, in AAS 88 (1996), pp. 305–343.
21. MP *Apostolica solicitudo*, September 15, 1965, in *AAS* 57 (1965), pp. 775–780; and *Ordo Synodi*, June 24, 1969, in *AAS* 61 (1969), pp. 525–539, and *AAS* 63 (1971), pp. 702–704.
22. Ap. Const. *Regimini Ecclesiae Universae*, of August 15, 1967, in *AAS* 59 (1967), pp. 885–928, restructured and later replaced by the Ap. Const. *Pastor Bonus*, June 28, 1988, in *AAS* 80 (1988), pp. 841–912.
23. Instr. *Sollemne semper*, April 23, 1951, in *AAS* 43 (1951), pp. 562–565, restructured and later replaced by the Ap. Const. *Spirituali militum curae*, April 21, 1986, in *AAS* 78 (1986), pp. 481–486.
24. Ap. Const. *Divinus perfectionis magister*, January 25, 1983, in *AAS* 75 (1983), pp. 349–355.
25. *Enchiridion indulgentiarum*, published by Decr., June 29, 1968, in *AAS* 60 (1968), pp. 413–414; and *Normae de indulgentiis*, June 29, 1968, in *AAS* 60 (1968), pp. 414–419.
26. For example, within the postconsciliar legislation, *Regolamento generale della Curia Romana*, from February 22, 1968, in *AAS* 60 (1968), pp. 129–176, afterwards restructured and replaced by the new version from February 4, 1992, in *AAS* 84 (1992), pp. 201–267, and again by the last version from April 30, 1999, in *AAS* 91 (1999), pp. 629ff; *Normae Sacrae Romanae Rotae*, of January 16, 1982, in *AAS* 74 (1982), pp. 490–517; *Ordo Synodi*, of June 24, 1969, in *AAS* 61 (1969), pp. 525–539, and *AAS* 63 (1971), pp. 702–704; *Normae speciales Signaturae Apostolicae*, of March 23, 1968 (X. OCHOA, *Leges Ecclesiae* III, no. 3636, col. 5321–5332); *Nova agendi rationale in doctrinarum examine*, January 15, 1971, in *AAS* 63 (1971), pp. 234–236; Ap. Const. *Sapientia christiana*, of April 15, 1979, in *AAS* 71 (1979), pp. 469–499, and complementary norms, April 29, 1979, in *AAS* 71 (1979), pp. 500–521. See also, for example, the norms in *AAS* 61 (1969), pp. 281–287, and *AAS* 63 (1971), pp. 486–492: cf. X. OCHOA, *Leges Ecclesiae* V, no. 4244, col. 6702–6705.
27. Thus one can classify the norms produced before the *CIC*, but which have recourse to the entitlements that are indicated, for example, in *PB* 72 §1, 94 and 115.
28. Cf. Notification of the S. c. for the Doctrine of the Faith, September 6, 1983, advising that the norms of the dicastery (of a procedural nature) on the dissolution of marriage in favor of the faith retain their full force, in spite of the fact that the *CIC* directly addresses that matter (X. OCHOA, *Leges Ecclesiae* IV, no. 4995, col. 8668).
29. Cf., for a detailed study of this point, J. OTADUY, "El derecho canónico postconciliar como '*ius vetus*,'" in *Le nouveau Code de droit canonique. Actes du Ve Congrès international de droit canonique. Ottawa 19–25.VIII.1984*, vol. I (Ottawa 1986), pp. 115–129, especially pp. 124–128.

ments, whose importance is beyond question, are formally adapted to the Code (as has already happened with *SMC* and *PB*, for example).

5. *Recourse to canonical tradition* (§ 2)

An interpretative norm for the *ius vetus* is presented in § 2. This provision stipulates that canons of the *CIC* which contain old law are to be interpreted in light of canonical tradition. However, two nuances in the wording of the canon, which were deliberately included, should not be overlooked. The obligation to heed the canonical tradition extends only insofar (*quatenus*) as the old law is embedded in the canons. This qualification saves the trouble of giving various norms on this subject depending on how much of the *ius vetus* was contained in the *CIC* (all, part, or indeterminate), as occurred in the old Code and in the first *schemata* of the current one. Likewise, the canons are to be interpreted taking into account *etiam* the canonical tradition, from which one deduces that canonical tradition, even when it must be used, is not the *only* interpretative source to be used in those cases where the old law is reproduced. This idea is further reinforced by the softer view now taken by c. 6 in considering the pre-*CIC* discipline, given that the norm of the *CIC*/1917 no longer exists, "Codex vigentem huc usque disciplinam plerumque retinet," a norm which carried a strong presumption of its own prevalence, as well as a much deeper wish for compatibility (cf. also c. 6, 2°–4° *CIC*/1917).

By "old law" we mean previous law in general, not just ancient or medieval law. It seems to us that the scope of the concept of canonical tradition changes substantially in speaking of the parallel norm of the *CIC*/1917, not only because it did not expressly refer to the canonical tradition (it referred to *probati auctores* instead), but also because then there was not a series of doctrinal commentaries to a code of law, as we have today. Thus, we think that the views of the commentators and authors of the *CIC*/1917 now represent an unavoidable element in the interpretation of large parts of the Code whose primary source, or at least one of them, is the *CIC*/1917 itself. We also think that interpretations which rely excessively on tradition are unsuitable. Precisely because we are now talking about canonical tradition and not about the doctrines of approved authors,[30] it is inappropriate to reduce such a broad concept to those authors *qui bene audiunt in Curia romana* or who are in some way *recepti*

30. Cf., for a detailed study of this question, J. OTADUY, "El derecho canónico postconciliar como '*ius vetus*,'" in *Le nouveau Code de droit canonique. Actes du Ve Congrès international de droit canonique. Ottawa 19–25.VIII.1984*, vol. I (Ottawa 1986), pp. 115–129, especially pp. 124–128.

in Curia.[31] While this injunction certainly cannot be dismissed, it does not need to be construed as absolute or exclusive.

The norm of c. 6 § 2 operates as a norm of interpretation for those canons that contain *ius vetus*, not as a norm to fill gaps in the canons of the Code. This function is to be performed by c. 19, as is well-known. Only a certain analogy can be extracted from a comparison of the two canons, because c. 19 provides, as one of the means whereby lacunae in the law may be filled, for recourse to the general and accepted consensus of previous scholars.

31. Cf., for a list of these authors, N.J. NEUBERGER, *Canon 6 or the relation of the Codex iuris canonici to preceding legislation* (Washington 1927), p. 76.

TITULUS I
De legibus ecclesiasticis

TITLE I
Ecclesiastical Laws

INTRODUCTION

Javier Otaduy

The law constitutes, for many reasons, the first of the sources of law, which largely justifies its placement at the top of the first titles of book I of the Code. Revealing a marked parallelism with the civil codes of continental law, title I will discuss the following topics pertaining to canonical law: promulgation (cc. 7–8), non-retroactivity (c. 9), the conditions of invalidating and incapacitating laws (c. 10), the conditions of the addressee of merely ecclesiastical law (c. 11), the rules for attributing effects to territoriality (cc. 12–13), the influence of doubt (c. 14), the influence of ignorance and of error (c. 15), the subject, rules and conditions of interpretation (cc. 16–18), suppletion (c. 19), revocation (cc. 20–21), and remission to civil law (c. 22).

1. *Aspects of Continuity*

Without going so far as to call it an exact replica of the regulation of the *CIC*/1917, it is clear that the treatment of the topics mentioned above makes use of the parallel title of the *CIC*/1917 as a paradigm and a backdrop.[1] This similarity can be understood as a response to the first of the principles directing the revision of the Code, which vigorously vindicated the juridical nature of the Code.[2] One of the requirements for that was precisely that the laws retain the indubitable characteristics with which they had been endowed by the canonical tradition, for example, their obliging

1. The Code Commission affirmed it in this way, cf. *Comm.* 9 (1977), p. 232.
2. Cf. *Comm.* 1 (1969), pp. 78–79.

nature.[3] The law *tenet* (cc. 11 and 12 § 1), *adstringit* (c. 12 § 2), *subicit* (c. 12 § 3), *obligat* (c. 12 § 3), *urget* (c. 14). To give law that obliges those subject to it is the most classic manifestation of the power of jurisdiction.[4]

Together with its nature as imperative and obliging, the intersubjectivity and the properly juridical effects of the law must also be emphasized. Canonical law requires external conditions of establishment and public knowledge (c. 8); it attributes efficacious effects (sanctions) to personal behavior (cc. 10, 15, and 18); and it grants a characteristic juridical importance to certain external circumstances of persons (cc. 11–13). At any rate, it would be false to say that all the effects of canonical law are strictly juridical. The whole of the title *De legibus* is imbued with one basic *a priori* conviction: the first effect of the law is conscientious obligation.[5] Many of the terms mentioned above concerning the obligation of the law must first of all be understood as expressions which denote the obliging of the conscience, although that obligation does not impede or supplant other, properly juridical effects (such as concession, qualification, acknowledgment, permission, invalidity, and penalty). In canon law there are also numerous laws which are merely preceptive and prohibitive, that is, laws which lack immediate juridical effects.

Further, the very scheme of presentation of the normative material on the law is almost identical in the two Codes, with a sequence of topics that is unchanged. The most innovative proposals concerning the promulgation of the law,[6] its definition,[7] its author,[8] the inclusion of a formal notion of the law,[9] and the placement of the title[10] were not considered pertinent. There is no doubt that there has been a clear intent to retain the substantive values of the tradition.

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3. Quite apart from the textual formulation of some canonical laws, which sometimes do not contain an external expression of obligation, but are presented as recommendations, advice, and cautions. For the vocabulary of the canons concerning the expression of imperativeness, cf. L. WÄCHTER, *Gesetz im kanonischen Recht. Eine rechtssprachliche und systematisch-normative Untersuchung zu Grundproblemen der Erfassung des Gesetzes im Katholischen Kirchenrecht,* (St. Ottilien 1989), pp. 286–297. Also P. ERDÖ, "Expressiones obligationis et exhortationis in Codice Iuris canonici," in *Periodica de re morali canonica liturgica* 76 (1987), pp. 3–27.

4. Cf. P. LOMBARDÍA, "Norma y ordenamiento jurídico en el momento actual de la vida de la Iglesia," in *Escritos de Derecho canónico y Derecho eclesiástico del Estado,* IV (Pamplona 1991), pp. 195–200.

5. Though in fact, the *coetus* on codification affirmed from the beginning that in the tit. "De legibus," those effects which were merely of conscience were not to be heeded: cf. *Comm.* 16 (1984), p. 144.

6. Cf., *Comm.* 14 (1982), pp. 130 and 132; 16 (1984), pp. 145–146; 23 (1991), pp. 149–150.

7. The definition of law was introduced in the session of May 11, 1979 (*Comm.* 23, 1991, pp. 148–149), and passed to the *Schema* of 1980 and 1982, but disappeared in the end. On the reasons for the unnecessariness of the definition, cf. *Comm.* 16 (1984), p. 144.

8. On the rejection of a proposal to indicate in the canons "de legibus" who are the holders of legislative power, cf. *Comm.* 16 (1984), p. 144.

9. Cf. *Comm.* 23 (1991), pp. 148–149.

10. Cf. *Comm.* 14 (1982), p. 128.

2. *Aspects of reform*

At the same time it must be said that it is not purely continuous.[11] There have been numerous technical changes in details, which are without a doubt important and improve the canons of the title. It is true that the most important changes in this topic are "induced" or "reflections," that is, changes of perspective generated by the effect of the rest of the laws of the Code which focus on this material. We will briefly examine this below. There are also express changes, however, in the textual formulation of the canons. Reserving a detailed analysis of them for the appropriate place in the commentary, let us now consider some of those changes and the general sense which they embody. Nearly all of them are changes of nuance, or improvements in terminological rigor. The term "general law" has been changed to "universal law" (cc. 8 § 1 and 12 §§ 1–2), which is better suited to the exact distinction between particular and special laws; the presumption of territoriality has been limited to particular laws (c. 13 § 1), in accordance with the rest of the most creditable doctrine; the need for promulgation and *vacatio* of a particular law has been established (c. 8 § 2); certain poorly defined and ambiguous expressions from the former Code have been omitted (*aequivalenter* in c. 10 for the means of indicating invalidating character, *generatim* in c. 15 § 2 for the non-presumption of ignorance of the law, of penalty, or of facts concerning oneself); the promulgation of authentic replies is now required, even if they are declarative (c. 16 § 2); only that is called authentic interpretation which is manifested in the form of a law (c. 16 § 2), not what is exhibited by judicial judgment or administrative act; the *stylus curiae* (not the practice) has disappeared as a means of supplying the silence of the law (c. 19); the complex term, "statuta locorum specialium vel personarum singularium," has been changed to *ius speciale* (c. 20), a simpler expression though still one of doubtful meaning in the doctrine; error has been added to ignorance as a subjective situation that is irrelevant for the efficacy of invalidating and incapacitating laws (c. 15 § 1); c. 15 has been drafted with a less subjective flavor: it has passed from the personal inexcusability of fulfillment ("does not excuse from them") to the production of juridical effects ("does not prevent the effect of those laws").

Other changes are of greater importance in the doctrine, such as the limitation of the subjects of merely ecclesiastical laws to those who were baptized in the Catholic Church or received into it (c. 11); the suppression of the former c. 21 on the validity of laws given to avert a general danger even if the danger does not impend, a topic which the legislator has deemed unnecessary to emphasize because it is already comprehended in

11. For this point and the previous one, cf. J. OTADUY, "El sentido de la ley canónica a la luz del Libro I del nuevo Código," in *Temas fundamentales en el nuevo Código. XVIII Semana española de Derecho canónico* (Salamanca 1984), especially pp. 64–68.

the general provision of every law, and its reiteration implies compliance with criteria which are moral in nature rather than juridical; the introduction of c. 22, on remission of civil law, which has attracted to the title *De legibus* a topic that formerly was dispersed and not contemplated in a general perspective; and the disappearance of the former c. 24 on precepts and its transfer to the sphere of administrative acts.

3. *The silences of the title*

The canons *De legibus*, as is well known, present only a material or substantive notion of law, which we shall analyze below. Yet not even in this matter has the legislator pretended to a complete description, a presentation of all the elements which shape the doctrine on the law and operate in its material or substantive juridical framework. Some of these silences owe to deliberate decisions of the legislator, who has deemed it more prudent not to make explicit (textual) room for certain themes; for example, the juridical importance of the acceptance of the law by the community, the condition of reasonableness required of the law, and the cessation of canonical law *ab intrinseco*, on account of a nonconformity brought on by one of its essential elements. These silences, of course, do not signal that the legislator does not want to pay attention to them or to attribute juridical effects to them. They are manifestations of an indispensable tradition in canonical doctrine. All the same, he has preferred to remain silent on them and not to formalize them positively, because they may perhaps have occasioned too many risks of misinterpretation. The former Code also remained silent on them, so this does not constitute any innovation.

Other silences owe to the technical difficulty entailed by the definition of these topics. Let us think, for example, of the community capable of receiving law (a concept employed generically elsewhere, e.g., in cc. 25 and 29). But to formulate a typology of capable communities or to offer one defining characteristic of the capacity to be a passive subject of law is a truly difficult problem, one which the legislator has shunned.

Nor has the *CIC* discussed the legislative power in the title *De legibus*.[12] The underlying reason is a systematic one. The legislator has preferred to situate these topics in different places. Strictly speaking, it might perhaps have been more opportune to insert the canons *De legibus* after the treatment of the legislative power, a content undertaken by the *CIC* at a later point, in title VIII. It seems illogical to speak of the effect before speaking of the cause, but the material that the *CIC* presents specifically on the legislative power is very scanty (it reduces in practice to c. 135 § 2), and the change of order would have gone too far in the other direction.

12. As was suggested: cf., e.g., *Comm.* 16 (1984), pp. 143–144.

Moreover, there is also a certain consistency in the unitary, prior treatment of the formal sources of law.[13]

With respect to the active subjects of law who are the typology of the canonical legislators, the title *De legibus* is silent. In speaking of the formal concept of law, we must take note of this point as well. The *CIC* achieves the acknowledgment or attribution of legislative competence to canonical subjects in a dispersed manner, basically by designing the institutions of the ecclesiastical organization; there do not cease to be some doubts about the participation of certain institutions in the legislative power.

There are, we repeat, silences of the title. They cannot be projected to the entire Code, still less to positive canon law, let alone to canonical doctrine. They are silences only with respect to the textual expression of cc. 7–22. Thus, certain material characteristics of the law which are not expressly outlined in the canons of this title nevertheless directly depend on them, such as the generality of addressee and the abstraction of subject matter of the law. In other words, the law affects whomsoever falls within its supposition of fact, and that supposition of fact is itself designed hypothetically and generally, and is not exhausted in the singularity of a specific case. This is a characteristic of the law in the regimen of the Code, which has emphasized the generality of the law in opposition to the singularity of the administrative acts. The Code Commission has underlined the extension of this characteristic on more than one occasion: the law contains "common prescriptions of law, that is, those which must be observed by all who are in the same conditions as the supposition of fact of the norm;"[14] accordingly, "every law possesses generality, including particular law, provided that it is given to a community as a whole."[15] One author has identified the following features as characteristics of the law in the *CIC*:[16] its obliging character; its reasonable character; its provenience from the competent legislator; a community capable of being a passive subject (which implies the generality of addressee); its abstract character in the focus of the case being outlined (which is always indeterminate, potentially multiple, and cannot be exhausted in one application); the condition of a certain measure of stability; and the requirement of promulgation.

4. *The definition of law*

In the last schema, before the last revision carried out by the select commission of Cardinals, c. 7 presented, along with its short present text, a clause defining the law: "norma generalis ad bonum commune alicui

13. The preparatory works of the *CIC* designed law and custom as sources of law, both in the first title of the Code, but this approach was criticized and eventually discarded: cf. *Comm.* 23 (1991), pp. 147–148.
14. *Comm.* 3 (1971), p. 81.
15. *Comm.* 14 (1982), p. 131.
16. Cf. L. WÄCHTER, *Gesetz im kanonischen Recht...*, cit., p. 273.

communitati a competenti auctoritate data."[17] Even knowing that the function of the Code is not to define the juridical institutions, but rather to attribute to them their relevant effects, it was a shame, in our opinion, that this definition of the law disappeared,[18] for at least it contained two programmatic characteristics: its generality and its reasonableness (the latter implicit in its being directed to the common good) while still defining the law as a "norm," which is also not without value from the point of view of a general theory of canonical law.

The consequences of the disappearance are undeniably relative, because a substantial portion of the elements which disappeared from c. 7 are reproduced in c. 29. There we find, in fact, the need for the competent legislator, the community capable of receiving law, and the necessary abstraction of subject matter (*communia praescripta*). It does not seem to us, however, that the purpose of the two canons is the same, because c. 29 means to establish the formal concept of the law; if it establishes the minimum conditions of a substantive definition (that is, the material characteristics; a general prescription given to a capable community), it does so in order to indicate that the competent legislator may not divest his norms of legislative status by calling them general decrees (even though "decree" is a terminological sense more properly used in the administrative sphere).[19]

There is no doubt that the definition of law plays a much more important role from the programmatic or methodological perspective than from the technical one. Strong proof of this is the contemporary doctrinal dispute about the law, which divides authors precisely over the question of its definition, whereas they largely agree on the technical outline that it merits and on the canonical effects that it produces. For some, the application to canonical law of the traditional Thomistic definition of law ("ordinatio rationis ad bonum commune ab eo qui curam habet communitatis promulgata"),[20] if applied to canon law, would suffer from a lack of ecclesiality, a shortchanging of its revealed nature. Thus, canonical law would be, fundamentally, an *ordinatio fidei*, but it would require the condition of *ratione efformata* for its operative efficacy.[21] Further, the common good must be reinterpreted from a perspective that is properly ecclesio-

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17. On the aims which inspired the introduction of this notion of law, and how it fared, cf. P. LOMBARDÍA, "Ley, costumbre y actos administrativos en el nuevo Código de Derecho canónico," in *Escritos de Derecho canónico...*, cit., V (Pamplona 1991), pp. 104–108.

18. This is quite contrary to the definition presented in c. 7 of the *Schema* of 1980, L. WÄCHTER, *Gesetz im kanonischen Recht...*, cit., pp. 153–159.

19. Cf. M.J. CIÁURRIZ, "Las disposiciones generales de la administración eclesiástica," in *Le nouveau Code de droit canonique. Ve Congrès International de Droit canonique. Ottawa, 1984*, I (Ottawa 1986), p. 226.

20. *S. Th.*, I–II, q. 90, art. 4 in c.

21. For a study based more along these lines of definition of canonical law, cf. the suggestive pages of W. AYMANS-K. MÖRSDORF, *Kanonisches Recht. Lehrbuch aufgrund des Codex Iuris Canonici*, I (Paderborn-Munich-Vienna-Zürich 1991), pp. 142–159.

logical:[22] canonical law must be directed *in bonum communionis* rather than *in bonum commune.*

It may be that these "essential internal elements" (the *fides* and the *communio*), which "derive from the question about the intimate nature of ecclesiastical law,"[23] contribute some advantages to the general consideration of the law in the Church. It appears, however, that their description and setting in a correct definition of canonical law are yet to be accomplished; this is because the definition has been decanted, while the mold has been retained, with the result that the law continues to retain the concept of *ordinatio*, yet the active and subjective function of reason in the Thomistic definition (*rationale ordinans*, we might say) has become the objective function of faith (*fides ordinata*). This results in a remarkably unbalanced definition. In our opinion, it is not necessary to emend substantially the Thomistic definition if the natural order is taken without reservations. Rationality ceases to be neutral (and much less inopportune) once a transcendent vision of reason is assumed with complete confidence and it is accepted that reason itself is the intersection of the natural and the supernatural, of the *lex creationis* and the *lex gratiae.* The *recovery* of the natural order, however, is yet to be accomplished in many contemporary canonical and ecclesiological sciences.

5. *The law in a formal sense*

By law in a formal sense, we understand here the norm which proceeds from the legislative power and which is, therefore, a superior category in the collective of canonical norms. In this sense, "the canonical law is an act of the legislative power of the Church, endowed with generality, whose tenor is expressed in a formula, established through the act of promulgation."[24] This level of law implies a certain sovereignty for the regulation of the theme addressed normatively by the law. It also implies prevalence over the juridical phenomena, by virtue of which the law is imposed on the other juridical norms and juridical acts, which are then subordinate to it, at least in so far as they must respect it and not contravene it. This is the first content of the principle of legality. By formal law, therefore, we do not mean a norm which observes an essential *form of presentation* (proper title, strict process of elaboration and public manifestation), but one which offers an essential *form of incidence* in canon law.[25]

22. Cf. F.X. URRUTIA, "Legis ecclesiasticae definitio," in *Periodica de re morali canonica liturgica* 75 (1986), pp. 333–334.
23. W. AYMANS, "Lex canonica. Consideraciones sobre el concepto de ley canónica," in *Ius canonicum* 50 (1985), p. 468.
24. P. LOMBARDÍA, *Lecciones de Derecho canónico* (Madrid 1984), p. 153.
25. A good list of the conditions of the legislative norm can be found in E. LABANDEIRA, *Tratado de Derecho administrativo canónico*, 2nd ed. (Pamplona 1993), pp. 248–249.

The title *De legibus* does not by any means define the concept of formal law.[26] Nearly all of its elements are applicable to any general norm of the administrative power of the Church. "In canonical law, the term 'ecclesiastical or canonical law' (which is the term used by the *Codex*, cc. 1–22) has the special feature of being a generic concept, since it is in principle equivalent to written law, as opposed to custom (regulated in the following title, cc. 23–28), such that any rule or juridical principle can be considered law, independent of the body from which it issues."[27] Fundamentally, these words cannot be denied if we apply them strictly to the title *De legibus*. This does not mean, however, that we are at a loss for means to construct a notion of formal law in canon law.

In order to discern the conception of formal law in the *CIC*, it is necessary to turn to three different sources: the canons on the distinction of powers (or the legislative, judicial, and executive functions), the canons which attribute strict legislative power to a determined officeholder, and the canons which distinguish and hierarchically order the normative acts.

With respect to the distinction of powers or functions, one must refer to c. 135 as the primary passage. In § 1 the power of governance is divided into legislative, executive, and judicial powers, while in § 2, some succinct rules or requisites are established for the exercise of the legislative power (a legality *in legislando*). Only the legislative power of the supreme legislator can be validly delegated, and a lower legislator cannot validly make a law which is contrary to that of a higher legislator. This canon indicates, at least, that the legislative power has a sufficient degree of autonomy.

To know whether this power is attributable to certain determined officeholders and not to whomsoever participates in the *sacra potestas*, it is necessary to trace the declarative or capacitating norms for the making of law which are found dispersed throughout the Code. Thus, those competent to make universal law are those who hold the supreme authority, that is, the Roman Pontiff (c. 333) and the College of Bishops (cc. 336–337); those competent to make particular law are, in addition to the supreme legislator, the diocesan bishops (c. 391 § 2) and those equivalent *in iure* to them (c. 381 § 2), the particular councils (c. 445), and the bishops' conferences pursuant to c. 455. The Ordinaries of the military ordinariates and the prelates of the personal prelatures are also particular legislators; a majority of the doctrine affirms that the supreme moderators of clerical religious institutes of pontifical right possess legislative authority (c. 596 § 2). As for the divestiture of legislative power (that is, the negative definition that can be made of the competent legislator by means of the incapacitations to make law), the provisions of *Pastor bonus*, 18 § 2 must be empha-

26. Although at one time certain consultors of the Code Commission wanted to introduce it: cf. *Comm.* 23 (1991), pp. 148–149.
27. A. BERNÁRDEZ CANTÓN, *Parte general de Derecho canónico* (Madrid 1990), p. 101.

sized: "The dicasteries cannot issue laws or general decrees having the force of law or derogate from the prescriptions of current universal law, unless in individual cases and with the specific approval of the Supreme Pontiff." This same general incapacitation is expressed in art. 109 § 2 of RGCR: "The dicasteries cannot issue laws and general decrees of c. 29 *CIC*, or derogate from the prescriptions of law without their specific approval." In the sphere of particular law, other incapacitations can be found indirectly in: c. 391 § 2, which stipulates that the diocesan bishop himself (*ipse Episcopus*) exercises legislative power in the diocese; in c. 466, which affirms that the diocesan bishop is the sole legislator ("unus legislator est Episcopus") in the diocesan synod; and in c. 455 § 1, which limits to certain cases the competence of the bishops' conference to make general decrees ("decreta generalia ferre tantummodo potest…").

Canons 29–34 ("De decretis generalibus et de instructionibus") establish a regimen of normative hierarchical ordering of canonical norms. This hierarchy proceeds from the law (c. 29) and the norms with force of law by virtue of delegation of legislative power (c. 30), to the general executory decrees (cc. 31–33) and the instructions (c. 34), which fulfill the function of the regulations issued by executive authority for external (via general executory decrees) and internal (via instructions) addressees. It is true that c. 29 speaks of "general decrees," but it does so precisely with the intention of noting that the name is the least important aspect, while the most important is the formal category of the legislator's norms. "It's nothing more than a question of vocabulary,"[28] one might say. We have, therefore, a hierarchy of norms, within which the laws are understood not simply as "general precepts given to a capable community," but rather as norms which issue from the "competent legislator" (c. 29), which enjoy a formal superiority over the other norms (cc. 33 § 1 and 34 § 2), but which are not necessarily distinguished from them by their form of external presentation, since the documents which embody them can have diverse names and forms (cc. 29 and 33 § 1).

Canonical terminology relating to the law is very unstable. On one hand, canonical tradition has used the concept of law with a substantive perspective, as we noted above. Every rational, imperative ordering, from the eternal law to the indication of a superior, merited the name "law." It encompassed all types. On the other hand, in the juridical practice of positive law, the terms used for defining the legislative phenomena are very diverse[29] and not suited to heeding the rank of the juridical act that they embrace. This terminology reflects the criteria of diplomacy (the science

28. J. GAUDEMET, "La hiérarchie des normes dans le nouveau Code de droit canonique," in *Pro Fide et Iustitia. Festschrift für Agostino Kardinal Casaroli zum 70. Geburtstag* (Berlin 1984), p. 212.
29. Cf. L. WÄCHTER, *Gesetz im kanonischen Recht...*, cit., pp. 36–50.

of the preparation of documents) more than it does the juridical science.[30] Therefore, any attempt to make a classification of the rank of the norms based on the form of presentation of the documents which contain them, is doomed to failure. Only a few minor juridical elements bear any relation to the type and title of the document.[31] For example, some documents clearly indicate that the act is pontifical, or that its author is a dicastery and not the Pope, or that its function is accessory and not constitutive. It is but little information, however, that one will be able to gather from the title and manner of external preparation of the documents.

30. Cf. J.M. GONZÁLEZ DEL VALLE, "Los actos pontificios como fuente del derecho canónico," in *Ius canonicum* 32 (1976), pp. 248, 263, *passim*.
31. Cf. J. OTADUY, *Un exponente de legislación postconciliar. Los directorios de la Santa Sede* (Pamplona 1980), pp. 174–177.

7 **Lex instituitur cum promulgatur.**

A law comes into being when it is promulgated.

SOURCES: c. 8 § 1

CROSS REFERENCES: c. 8

COMMENTARY

Javier Otaduy

1. Canon 7 would seem to be the best place to set forth a definition or description of the law (since it is, after all, the first canon in the title), so that its provisions and obligations are not described before the concept itself is given concise definition. Such was the intention of the drafters up to the last *schema* ("a general norm for the common good given to a community by the competent authority"). This language, though very general and much diluted, did not survive the last revision, and in fact the canon was retained largely in its old form. The purpose of the canon, formulated with remarkable restraint yet historic importance, is to demonstrate both the fundamental effect of promulgating a canonical norm and the juridical effect of its acceptance by the community.

2. The true importance of c. 7 will be difficult to understand unless one knows the history that lies behind such a brief formulation. In fact, the principle of c. 7 is based on a *dictum* of Gratian, which, however, originally contained a second part that was not retained in c. 7—nor in its ancient parallel: "leges instituuntur cum promulgantur, firmantur cum moribus utentium approbantur" (D.4, c.3, dict. p.c.). This second element in the *dictum* of Gratian attributes to the community a certain competence in determining the strength and confirmation of the law. Gratian's idea, "still fully valid even today, unfolds in a socio-judicial context in which normative sources, especially secular ones, were predominantly of a customary nature, from which the importance of the *mores* is deduced; nevertheless, obligation continues to be tied to the *institutio*, not to the *confirmatio*."[1] Even so, there was a good deal of controversy in the doctrine regarding the true effect of acceptance. It is clear, in any case, that it is not a question of formal acceptance or actual approval. It is not an essential act or an inescapable condition, nor is it a necessary step in the

1. G. LO CASTRO, *Las prelaturas personales. Perfiles jurídicos*, Spanish trans. (Pamplona 1991), p. 141 (in note 61).

constitution or perfection of the law. The secular authority, the canonical bodies inferior to the one that issued the law, and the community of the faithful cannot be considered competent legislators or partners in the legislative mandate.[2]

3. Therefore, the effect or value of the acceptance, to which undoubtedly *Ecclesia quosdam effectus tribuit,*[3] must be evaluated so as not to compromise the constitutional prerogatives of canonical legislative authority. The theoretical and technical methods that have been developed to explain the canonical relevancy of non-acceptance are varied, taking into account the nature of the non-accepted law in question, the will of the legislator who issued it, and the nature of the community which rejected it:

a) If the legislator uncharacteristically makes clear that his will is conditioned on the acceptance of the law (i.e., if *quasi sub conditione praecipit*[4]—if he issues the norm rather in the sense of an exhortation or with a view to persuasion), obviously the question of acceptance does not present any theoretical difficulties. Of course, the real problem arises not in this instance, but when the legislator acts as such, making use of his full power and unconditional will.

b) In such an instance the historical doctrine has been that the entire effect of non-acceptance can be reduced to a question of fact, although, in reality, this too has juridical consequences. In fact, the non-acceptance, called in this case "merely executive" or "relative observance," would impede the natural development of the law's obligation, an obligation that exists from the moment of the promulgation of the law. The non-acceptance would not so much form part of the internal structure of the norm, but instead would simply paralyze or remove the effectiveness of its obligations. In other words, the acceptance of the law "nullo modo est ad vim intrinsecam legi tribuendam necessaria," but instead it only "indirecte necessaria esse potest ad vim obligatoriam legi conservandam."[5] The basis of this argument is the desire to safeguard the will of the legislator which presumably is not intent on destroying the community, but on improving it. Accordingly, the non-use of the law, if

1) it is backed by the *maior ac sanior* part of the community,

2) the non-use has not previously been reprobated,

3) it does not go against the divine law, and

2. Cf. L. DE LUCA, "L'accetazione popolare della legge canonica nel pensiero di Graziano e dei suoi interpreti," in *Studia Gratiana* 3 (1955), pp. 193–276; G. MICHIELS, *Normae generales iuris canonici*, pp. 192–203.
3. A. VAN HOVE, *De legibus ecclesiasticis* (Malines-Rome 1930), no. 106, p. 116.
4. G. MICHIELS, *Normae generales*..., cit., p. 197.
5. Ibid., p. 201.

4) it does not result from contempt for or rebellion against the legislator, is understood to be to some degree accepted by the legislator. It is difficult not to see in this example a dynamic, very similar, though of course with some differences, to the *consensus legislatoris* needed for the introduction of a custom contrary to law.

c) A very special case is the institution of the *remonstratio*, which has its basis in centuries-old pontifical decretals,[6] and which has the unanimous support of canonical doctrine, classical[7] and modern.[8] The *supplicatio* or *remonstratio* is a petition made to the Roman Pontiff that, because its application is unsuitable for a particular territory, a pontifical law remain unenforced in that territory. This is not an *appelatio* against the pontifical act or law, but a *supplicatio* to the person of the Pontiff for him to exempt a territory from that law or act, exercised by means of a petition setting forth the reasons for the unsuitability of the act or law in that territory. When the petition is presented more formally, that is, when it is presented by the bishops of a territory and it suspends the operation of the act or law, it is usually called *remonstratio episcoporum*. Following submission of the petition, the response which comes from the Pontiff is a binding one. The notable feature of this institution, however, is that, according to the most-accepted doctrine, the mere legitimate presentation of the petition is sufficient to suspend execution of the law. Moreover, the pontiff's silence (the absence of a reply) "is interpreted in a positive sense to be a tacit assent" that the law not be executed in that place:[9] "ex benigna interpretatione voluntatis Pontificis, lex censetur pro tunc non obligare."[10] The question of whether this exemption constitutes an authentic abrogation of the law or only a temporary suspension of its effect while the circumstances outlined in the petition exist, is a rather theoretical and debatable one.

The actual force of the *remonstratio* is undeniably weak in practice, although this does not, of course, present any obstacle to its juridical legitimacy. The open channels of communication within the Church (e.g., the Synod of Bishops, the established papal legations, the quinquennial report, the *ad limina* visits, etc.), and above all the procedure followed in the formulation of universal law, which normally entails the transmission of the text of the proposed law to the bishops' conferences before its

6. Cf. the decretals *Si quando* (*X* I, 3, 5) and *Cum teneamur* (*X* III, 5, 6) of Alexander III.

7. Cf. the standard and oft-cited commentaries of F. SUÁREZ, *De legibus ac Deo legislatore*, 1st ed. (Conimbriae 1612), lib. IV, ch. 16, and BENEDICT XIV (P. LAMBERTINI), *De Synodo dioecesana*, 1st ed. (Rome 1748 and 1755), lib. IX, ch. 8.

8. Cf., among the most modern treatises, L. DE LUCA, "Lo *ius remonstrandi* contro gli atti legislativi del Pontefice," in *Scritti in onore di V. Del Giudice*, vol. I (Milan 1953), pp. 243–273, and E. LABANDEIRA, "La *remonstratio* y la aplicación de las leyes universales en la Iglesia particular," in *Ius Canonicum* 48 (1984), pp. 711–740.

9. E. LABANDEIRA, *La "remonstratio...,"* cit., p. 728.

10. F. SUÁREZ, *De legibus...*, cit., lib. IV, ch. 16, no. 8.

promulgation,[11] as well as the modern ease of communication between center and periphery in the Church,[12] make this institution less necessary nowadays. It does not thereby lose its validity, however, which is unimpeachable from a historical and doctrinal perspective (see, for the concept of "promulgation," commentary on c. 8).

11. The proposed c. 9 § 2 made this same provision, and was rejected in the *Coetus studiorum "De normis generalibus"* because it was not made mandatory, but this was done without impugning its nature as customary procedural practice (cf. *Comm.* 23, 1991, pp. 149–150).

12. Cf., for an account of each of these reasons, E. LABANDEIRA, *La "remonstratio...,"* cit., pp. 731–734.

8 **§ 1. Leges ecclesiasticae universales promulgantur per editionem in *Actorum Apostolicae Sedis commentario officiali*, nisi in casibus particularibus alius promulgandi modus fuerit praescriptus, et vim suam exserunt tantum expletis tribus mensibus a die qui *Actorum* numero appositus est, nisi ex natura rei illico ligent aut in ipsa lege brevior aut longior vacatio specialiter et expresse fuerit statuta.**

§ 2. Leges particulares promulgantur modo a legislatore determinato et obligare incipiunt post mensem a die promulgationis, nisi alius terminus in ipsa lege statuatur.

§ 1. Universal ecclesiastical Laws are promulgated by publication in the 'Acta Apostolicae Sedis,' unless in particular cases another manner of promulgation has been prescribed. They come into force only on the expiry of three months from the date appearing on the particular issue of the 'Acta,' unless because of the nature of the case they bind at once, or unless a shorter or a longer interval has been specifically and expressly prescribed in the law itself.

§ 2. Particular laws are promulgated in the manner determined by the legislator; they begin to oblige one month from the date of promulgation, unless a different period is prescribed in the law itself.

SOURCES: § 1: c. 9; Syn. Bish. Relatio *Pastor aeternus*, 27 oct. 1969, II/5, 2b
§ 2: cc. 291 § 1, 335 § 2, 362

CROSS REFERENCES: cc. 7, 16 § 2, 31 § 2, 94 § 3, 341, 446, 455 § 3

COMMENTARY

Javier Otaduy

Canon 8 is concerned with establishing the methods of promulgating law, both universal law (§ 1) and particular law (§ 2). In discussing these, we will also have the opportunity to address other topics of interest.

1. *Different perspectives on the promulgation of canon law*

In order to offer a definition of promulgation, we must first explain the perspective from which we want to define it. If we are interested in defining promulgation from the point of view of the process of formulating the law (the *nomogenesis*), then promulgation turns out to be an integrative act, and not essential to or constitutive of the nature of law; that is, it functions as an instrumental act in relation to the other, prior acts that

provide the underlying substance of the law. Promulgation, thus understood, is merely a receiving vessel for the finished and completed legislative content which has been designed, approved, and produced from an instance that is legislative properly speaking.

On the other hand, we may consider the law from an external perspective: in its status as a juridical norm, law is capable of exerting its obliging and evaluative effects on the behavior of its designees, which is the perspective that reflects what is assumed by "law" in the juridical system. Then the promulgation is a constitutive element of the law, on which depend the perfection, effect, and characteristic effects of the law within the canonical order. Distinguishing the one perspective from the other is absolutely essential to understanding what is meant by the term "promulgation."

2. *Promulgation as an integrative phase in the process of formation of canon law*

In paragraph 1 the concepts of promulgation and publication are equated in the case of universal legislation. "Universal ecclesiastical Laws are promulgated by publication in the 'Acta Apostolicæ Sedis.'" This equation by no means constitutes a technical error; rather it reflects a characteristic peculiar to canon law. This is not what happens in civil law, in which acts of legislative approval (proper to the legislative power, which acts as an autonomous and sovereign house), sanction, promulgation (proper to the monarch or president of the republic), and publication (which requires the involvement of the executive power) must be clearly distinguished.

These successive and compulsory formal phases do not exist in canon law. Nor does there exist in canon law a uniform procedure for the elaboration, formal signing, and promulgation of laws. For practical purposes, it is nevertheless important to distinguish between the signing of the law and its promulgation—publication. This distinction is generally valid within the same level of authority. In other words, there are not two systematic instances, one when the law is signed and another when it is promulgated; these are, rather, just two successive moments. For this reason, canon laws often carry the date on which they were issued or signed (the date of emanation) as well as the date on which they were promulgated (the date of publication). This second date is the one that perfects, as we shall see, the characteristic effects of the law;[1] the date of emana-

1. The opposite opinion—which in our view results from insufficient differentiation between the internal and external perspectives of the perfection of the law—is, however, evinced by V. DEL GIUDICE, "Promulgazione e obbligatorietà della legge canonica," in *Annuario della Università Catolica del S. Cuore* (Milan 1927), pp. 77–94; and recently by P. PELLEGRINO, "Spunti per uno studio sulla promulgazione e sulla pubblicazione delle leggi in diritto canónico," in *Raccolta di scritti in onore di Pio Fedele* I (Perugia 1984), pp. 235–254.

tion produces only internal effects, if you will. A law "data et nondum promulgat" can be considered perfect only in that it has completed the essential process of formation and lacks only an integrative phase: the publication of the law. Law in such a state, however, does not realize its characteristic effects. It affects only the executive authority in that it directs the publication of the law. It must be remembered that this obligation derives not from the law itself, which as yet lacks juridical existence, but from the administrative practice.[2]

This does not mean that the canonical order does not acknowledge, in certain situations, practice in reference to successive acts in the formation of law. These occur when there are different authorities involved in the nomogenetic process: one authority that produces the law, another that approves or confirms it, another that commands its observance or publication, and another that publishes it. This occurs often enough, especially in conciliar legislation and in legislation involving the Roman dicasteries. Thus, for example, most of the books dealing with the Pontifical and the Roman ritual have been produced at pontifical direction by the CCD. They were approved *auctoritate sua* by the Roman Pontiff, were ordered to be promulgated by him, and were promulgated with a decree of the Congregation. Laws established by the collegiate act of an Ecumenical Council are subsequently confirmed by the Roman Pontiff and promulgated by his direction (c. 341 § 1).[3] These examples enable us to understand that the publication—promulgation, as an integrative phase of the process, *is not particularly important for purposes of determining the authorship of the legislative act.* It cannot be said that the law simply comes from whoever promulgates it. To determine this we would have to know which authority has delegated the constitutive approval of the law. Therefore, the promulgation as an act within the process of formation of law often[4] constitutes an act of executive power.

Although promulgation is without question a required element in the procedure of formal law, this does not of course prevent every norm from needing a fixed procedure for publication. Specifically, the *CIC* likens general executory decrees to laws, for purposes of promulgation and vacation (c. 31 § 2). It also requires expressly and in every case, the promulgation

2. Cf. P. GILLET, "De lege data et nondum promulgata," in *Ius Pontificum* 8 (1928), pp. 217–218.

3. Something similar can be seen in the *CCEO*, concerning the legislation of the patriarchal synod: it is the exclusive responsibility of the Synod of Bishops of the patriarchal Church to issue laws for the whole patriarchal Church and to establish the manner and time of their promulgation (cc. 110 § 1 and 111 § 1 *CCEO*), but the promulgation itself is the responsibility of the Patriarch (c. 112 § 1 *CCEO*).

4. Canon 94 § 3 is the only canon norm that directly attributes the promulgation to the legislative authority, and it appears to do so deliberately, seeing as it distinguishes between *condere* (establishing, emanating from authority) and *promulgare* (publishing): "*Quae statutorum praescripta vi potestatis legislativae condita et promulgata sunt, reguntur praescripta canonum de legibus*".

of interpretative replies manifested in the form of law (c. 16 § 2), modifying the position of the *CIC*/1917, which did not require the promulgation of replies that were merely declarative.

3. *Promulgation as an act that perfects the canonical legislative norm*

Considering the matter from the point of view of the norm's obligation, which is the hold it has on its designees, the promulgation is the act that perfects the law and attributes to it its characteristic effects. Indeed, the most appropriate way to consider the law (and therefore, the promulgation) is in its relation to the community it will affect, not as it relates to the process by which it is formed. Traditionally, canonical doctrine has understood promulgation of the law to mean the solemn introduction of the law, made in such a way that it could be known to the community.[5] Today we would say, perhaps more precisely, that the promulgation of the law is "an official act, generally of limited circulation, but which authentically establishes its text." In other words, to promulgate does not mean to publicize the content of laws, a process which takes place by other means. In any event, however, it is also inappropriate to make light of the need for adequate publicity, so long as it is understood that the essence of promulgation is simply to certify the existence and terms of the law, not necessarily to make them publicly known.[6]

The promulgation of canon law takes place, as we have noted above, with the official publication. It has two fundamental purposes: *a*) to produce the perfection of the law, that is, the root actualization of all its effects—although certain of these can be affected by some extrinsic circumstance, such as *vacatio*; and *b*) to establish authentically both the existence and the exact terms of the law, in such a way that the law is certain, and those who apply it and are affected by it cannot be unaware of it, impede it, or place it in doubt. To say that the law is "instituted" or "established" with promulgation means, moreover, that the designees are bound by it from that moment forward. It also means that the judicial and administrative bodies must carry it out and ensure that others carry it out. This is done without any other special directive, since the existence and reach of the law no longer need to be proved. The promulgation already constitutes the proof of the given norm. Rather, it means that the law can now be received by them (*iura novit curia*).

5. Cf. A. Van Hove, *De legibus ecclesiasticis* (Malines-Rome 1930), p. 112, citing A. Vermeersch, *Theologiae moralis principia, responsa, consilia*, I, *Theologia moralis fundamentalis* (Rome 1926), no. 161.

6. Cf. J.M. González Del Valle, "Los actos pontificios como fuente del Derecho Canónico," in *Ius Canonicum* 32 (1976), especially pp. 273–276.

The concept employed in c. 7 (*legis institutio*, a concept which will not be used again in the *CIC* and which appears here for deep-seated historical reasons) had as its most fundamental purpose to stipulate that promulgation is the moment that perfects the law. The same could perhaps be said in classical law; but it can undoubtedly be said more accurately now, because codified canon law (since 1917) has retained no trace of the *utentium approbatio* of Gratian. This was deliberately removed by the drafters in order to prevent any importance from being attributed to the approving acceptance or any other subsequent moment which would perfect the legislative mandate. The best doctrine after the Code developed regarding a doubt about the perfective moment of the Apostolic Constitution *Ut sit*.[7] This doctrine has made it clear that the instituted (promulgated) law is perfect, and therefore absolutely effective, even though it sometimes requires certain integrative procedures (e.g., the passage of time required by the vacation) in order for it to attain "operative efficacy," that is, actual validity.[8] Thus, technically speaking, it is not the moment of emanation (which is, if we are considering the law in its dimension of juridical norm, an act previous to its perfection) nor the moment of the operative effect of any of the effects of the norm (which is a subsequent act and depends on the promulgation as its cause) nor, of course, the actual observance of the prescriptions of the law (which is subsequent and hinders not at all the perfection of the law) that constitutes the moment of perfection. The "essential efficacy" of laws must be traced back to the moment of promulgation.

4. *Promulgation of universal law* (§ 1)

The regimen of promulgation of universal canonical law was established in 1908 by the Apostolic Constitution *Promulgandi* of Pius X.[9] This document put an end to the famed debate about whether subsequent diocesan promulgation was required for the effective validity of pontifical laws in the territories of the Catholic world. The regimen established by St. Pius X was adopted with slight modifications in both canonical codifications. Its current formulation has three interesting points:

a) "*Leges ecclesiasticae universales promulgantur per editionem.*" All universal laws (and therefore, not just pontifical ones, but also those of an Ecumenical Council) require, as a general rule, written publication of their text in *AAS*. Even though the pontifical promulgation of conciliar documents has been standard practice since the Council of Trent, the current c. 8 § 1 is innovative in requiring *pro regula* the publication of such

7. *AAS* 75 (1983), pp. 423–425.
8. Cf. G. Lo Castro, *Las prelaturas personales, Perfiles jurídicos*, Span. trans. (Pamplona 1991), pp. 88–137, with the bibliography contained therein.
9. *AAS* 1 (1909), pp. 5–6.

conciliar documents in *AAS*, as in fact has already been done with the documents of the Vatican Council II; c. 9 of the *CIC*/1917 required only the promulgation in *AAS* of "leges ab Apostolica Sede latae."

b) "*per editionem in Actorum Apostolicae Sedis commentario officiali.*" The publication of universal laws must generally be carried out in the official Register of the Apostolic See. Since their origin in 1909, however, the *AAS* have been used for other purposes as well. Of course, laws and juridical acts are contained therein, but so are other documents of a doctrinal nature. In the area of juridical phenomena, acts which are purely official and general in nature are found together with decisions whose importance is merely criteriological or illustrative, although in recent times this tendency has become much less pronounced. The intention from the beginning was to distinguish two sections in the *AAS*: one official and juridical, and the other illustrative and supplementary;[10] but that plan has never been put into effect.

c) "*... nisi in casibus particularibus alius promulgandi modus erit praescriptus.*" As we have seen, the u* MERGEFORMAT niversal legislator can establish, and indeed on occasion does, a different manner of promulgation. Not infrequently, some acts and juridical norms are promulgated (for reasons of urgency, caution, sheer typographical volume, or for other reasons) by publication in *L'Osservatore Romano*, or by direct transmission to bishops, bishops' conferences, or affected institutions, or, when dealing with acts of a constitutive nature executed *in forma commissoria*, by public reading. This does not mean, of course, that such acts cannot subsequently be published in *AAS* as well, but if it was agreed that the manner of promulgation-publication would be different, then this second publication would not be for the sake of promulgation, but only for mere publicity. It can also happen that the *AAS* does not publish the full legislative text, but only a decree certifying its publication.[11]

5. *Promulgepation of particular law* (§ 2)

The Code does not establish a general method for the promulgation of particular laws which "promulgantur modo a legislatore determinato." It is reasonable to ask if the determination of that manner obliges the legislator to settle on one manner for all of his laws in advance or whether he is free to decide on a case-by-case basis. A prudent analogy with the promulgation of universal law favors the first option. The particular legislator must establish a regular method for the promulgation of his laws, although exceptions from this course are allowed in individual cases if a different manner of promulgation has been prescribed. Clearly, a strict reading of

10. *AAS* 2 (1910), pp. 37–39.
11. For example, in the case of the typical editions of liturgical books, published by the Vatican Press.

this provision (both for particular and universal law) will entail many problems. *Fuerit praescriptus* would mean that there had to be a previous stipulation in the official method of promulgation that expressly provided for the new manner of promulgation.[12] This does not occur, however, with universal legislation, and it cannot be required for a particular law either, although it certainly does tend to favor juridical certainty and assurance.

Neither is the Code more explicit regarding the manner of promulgation-publication of the laws or general decrees of particular synods (c. 446) and bishops' conferences (c. 455 § 3). It falls to them separately to determine the manner of promulgation. In both cases the need for a *recognitio* previous to the promulgation is established, namely, an act of administrative control exercised by the Holy See with the power to evaluate the legality and even the suitability of the law or decree, a review which nevertheless does not alter the authorship of the norm.

6. *Vacation of the law*

"The purpose of the *vacatio* is to facilitate the reception of laws and the adoption of the new criteria required in the juridical life of the Church when the laws come into force."[13] According to the prescriptions of § 1, universal laws become effective three months after the date appearing on the issue of the '*Acta*' in which they were promulgated, while § 2 stipulates that particular laws become effective one month after their promulgation. In both cases, it is noted that a longer or shorter vacation is possible if expressly prescribed in the law itself, a situation which arises often enough, especially in the area of universal law. The *vacatio* is not necessary for those laws which, by their very nature, bind at once (c. 8 § 1), as is the case with norms which formalize the contents of divine law (laws that affect faith or morals), or which are merely declarative of law (such as the authentic interpretative replies of a declarative character: cf. c. 16 § 2), or those norms whose operation requires their immediate validity in order to accomplish the objective for which they were intended. Those norms that are solely defining or technical, or which are purely beneficial and do not affect the rights of third parties in their implementation, and which do not make changes in matters of organization, can all be understood to obtain immediate force.[14] It should not be forgotten that the vacation is to a certain extent a circumstance external to the completeness of the law itself, which is absolutely complete from the moment of its promulgation, even though some of its effects are pending.

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12. This is the opinion of J.M. GONZÁLEZ DEL VALLE, "Los actos pontificios...," cit., p. 275.
13. P. LOMBARDÍA, commentary on c. 8, in *Pamplona Com.*
14. Cf. G. LO CASTRO, *Las prelaturas personales, cit.*, p. 123. In opposition, A. VAN HOVE, *De legibus...*, cit., pp. 141–142, and most of the doctrine of the commentators: cf. F.X. URRUTIA, "De quibusdam quaestionibus ad librum primum Codicis pertinentibus," in *Periodica de re morali canonica liturgica* 73 (1984), pp. 293–297.

9 Leges respiciunt futura, non praeterita, nisi nominatim in eis de praeteritis caveatur.

Laws concern matters of the future, not those of the past, unless provision is made in them for the latter by name.

SOURCES: c. 10; CodCom Resp. IV: 6-8, 2-3 iun. 1918 (*AAS* 10 [1918] 346); SCCouncil 17 maii 1919 (*AAS* 11 [1919] 349-354); *SC-Cong* Decl., 1 aug. 1919, I (*AAS* 11 [1919] 346); SCR Resp., 6 oct. 1919 (*AAS* 11 [1919] 420); CodCom Resp. 2, 16 oct. 1919 (*AAS* 11 [1919] 476); CodCom Resp., 3 dec. 1919; CodCom Resp. V, 24 nov. 1920 (*AAS* 12 [1920] 575); CodCom Resp. IV, 14 iul. 1922 (*AAS* 14 [1922] 527); SCHO Decr. *Post editam,* 15 nov. 1966 (*AAS* 58 [1966] 1186)

CROSS REFERENCES: cc. 4, 16 § 2, 1095, 3°, 1097 § 2, 1098, 1102 § 1, 1161, 1313, 1399, 1622

COMMENTARY

Javier Otaduy

When promulgation takes place, the law is considered "fully realized" and now has its fundamental juridical efficacy. Some of its effects can, however, remain pending into the future (through the vacation), and rarely, can even affect matters of the past (through retroactivity). This happens when a new law affects an act constituted under the temporal regimen of an older law.

1. *Juridical values contained in c. 9*

Canon 9 states that non-retroactivity is a general principle of the canonical order: laws are designed for future time, they look to future events, and they are intended to evaluate and direct future behavior. This reflects a fundamental belief in justice, order, and juridical certainty. The designee of the law has the right to have his or her actions, legitimately performed in accordance with normative prescriptions or as a result of his autonomy of will, not be arbitrarily stripped of meaning. Valid and efficacious acts demand to be upheld. Those who perform them deserve protection. The law itself requires certainty. Besides this value, there is another which is equally reasonable, though it seems contradictory. A completely static juridical system would also be unjust, because it would not allow

for the modification of situations which over time have become unsuitable and even unreasonable. To deny a place for retroactivity in the law is tantamount to forbidding just reform of the juridical system. Accordingly, c. 9 places the exceptional principle of retroactivity alongside of the general principle of non-retroactivity. Retroactivity is not allowed "unless provision is made in them [the laws] for the latter [past matters] by name." As we can see, the exception is, we might say, doubly rigorous. It is not part of the general rule, and it also requires a further condition, namely the express provision. The solution to the problem of the non-retroactivity of the law lies in the appropriate joining of these two principles.

2. *The temporal projection of juridical acts*

With respect to their projection in time and their dependence on the cause from which they originate, juridical phenomena occur in many forms. Some are intrinsically intertemporal and have continuous intertemporability, such as prescription and custom, while others have an intertemporability that derives from the complexity of the act. This may have several phases or steps, such as the procedure governing appeals or the constitution of a complex administrative act. Other acts, by contrast, are carried out or constituted at a discrete time, such as religious profession or marriage. Even in these cases, however, it is obvious that such acts of temporally specific and limited constitution are naturally constituted so as to have effects that extend into the future. The basic (or stable) juridical situation that has been produced by the constitutive act makes later effects possible, that is, other acts which fit the supposition of that situation (e.g., the dispositive acts in favor of an institute made by one who has taken vows). Conversely, if we situate those acts in relation to the law as it becomes effective, they could already have been carried out by the time the new law begins to operate, or they could have been started but not finished, or they could simply anticipate what will happen in the future.

3. *Systems for evaluating retroactivity*

Reducing everything to a very simple formulation, we could say that there are two different theoretical systems[1] for evaluating the retroactivity of the law: the system of performed acts and the system of acquired rights. Both are useful in their own way. It is dangerous, when dealing with retroactivity of the law, to apply principles mechanically that are

1. In actuality, there are many systems. Cf., e.g., for one possible and well-organized summary of the basic systems for evaluating retroactivity, A. VAN HOVE, *De legibus ecclesiasticis* (Malines-Rome 1930), pp. 26–30.

rigid or merely speculative. In order to know which system will be the more helpful, we must first know what supposition is being evaluated.

The range of retroactivity of the new law is limited by the respect it must have for rights acquired under terms of the older law (see commentary on c. 4). When the basic juridical relationship issues from the autonomy of the will, the element of acquisition is very important in ensuring that the future effects of that situation are linked to the system which existed at the moment of its constitution. In any case, we must be scrupulously exact when identifying those basic situations which arise from an *acquired element*. If we alter that basic or fundamental situation, then every other juridical situation will have become dependent on a changed original situation, until finally we must take on faith that, even though the last situation was acquired under the rule of one law, no effect that depended on that law would be affected: in a word, we would have complete paralysis in the juridical system. Therefore, when we speak of basic acquired situations, we do not refer to juridical capacity, to subjective juridical conditions (canonical *status*), to fundamental rights (which are not *acquired* but *received*), or generally to juridical situations that depend on or are granted by the law.

The system of performed acts, with only a slight change of perspective, states that acts carried out under the rule of a former law are respected *tempus regit actum*: each act follows the system of law that was in force when said act was carried out. Combining both principles, and without ignoring the inspiration of other systems, such as the purpose of the law or the dependence of present and future effects on past acts, allows us to say as follows.

The action of a new law as regards the future effects of situations or basic relationships created under the earlier law is not retroactivity (or at any rate, it is juridically irrelevant retroactivity, which some authors call "low-grade retroactivity"). Those acts which undeniably arise from the basic situation, have yet to be carried out, and their actualization is therefore governed by the provisions of the new law; nor can they be considered acquired rights, but only expected ones. In these cases, that so-called "low-grade retroactivity" need not be mentioned explicitly in the law in order to be operative. A law that modified the regimen of competencies of the office of parish priest would immediately apply to the future, and no parish priest could invoke the former regimen in his favor. Such a law would in no way affect the basic situation (possession of the office of parish priest), nor would it affect the past acts performed in dependence on this situation.

Juridical effects derived from a contract or a bilateral juridical transaction assume an exception to the regimen that normally governs future effects. It is precisely on that point that the juridical importance of the active acquisition of rights can be fully appreciated, together with the role the system of acquired right plays in the scope of the non-retroactivity of

the law, which in certain areas overshadows and prevails over the system of performed acts. The future juridical effects of a contract, provided there is no express mention of retroactivity, must be considered protected from the rule of the new law.

The realization of those effects of a basic juridical situation which were conceived under the rule of an earlier law but have not yet been carried out will be governed by the new law—provided that they are distinguishable and to a certain extent independent of the basic situation that constitutes their *raison d'être*. For example, the regimen for taking up an office can be governed by the new law, even though the provision of the office had been carried out in accordance with the previous law. It could be, however, that their effects are so intrinsic to the basic situation that it is incomprehensible without them. It is impossible that the right of a chapter to assist the choir, the right of a spouse to cohabitation, or the right of a Cardinal to sit in the conclave[2] could ever be removed by the force of a new law without invoking retroactivity, and therefore without the law expressly stating its retroactivity. Meanwhile, the regimen of the intertemporal acts (prescription and custom, for example) is similar to that of complex acts, whose phases are to a certain degree independent of each other. The elapsed time is calculated with reference to the law under which it elapsed, because it refers to a section of the act that has already been completed. The time required for the future will be calculated in accordance with the new law.

The existence of basic juridical situations and the already-completed effects of those situations, that is, past matters, are protected from being affected by the new law, unless it makes express provision for such retroactive effects.[3] The one applying or interpreting the law should be clear that his or her task is not to judge the fairness of the retroactive effect that the legislator included in the law, but rather to verify whether the retroactive effect exists. Notwithstanding, it is clear that the applier and interpreter of the law will often be confronted by temporally transient juridical phenomena, which must differentiate between those effects of the new law which can be applied immediately (because they only give the appearance of ignoring the effects of the law), and those effects which must not be applied, (because they would be truly retroactive).

2. As was done, in our opinion with authentic retroactivity, by the mp *Ingravescentem aetatem*, II, 2, in *AAS* 62 (1970), p. 811.

3. Some classic examples can be found in the Bull *Clericis laicos* of BONIFACE VIII (*VI* III, 23, 3) and in specific points of the Council of Vienna (CLEMENT V) (*Clem.* III, 17, 1; III, 7, 2). In the last case, all customs, privileges, statutes, treaties, and conventions which were contrary to that norm are declared "cassa, vacua et irrita."

4. *Tacit or implicit retroactivity*

It is very important to remember the provision of c. 16 § 2, which states that authentic interpretative replies are retroactive if they are solely declarative (that is, if they clarify words of the law that are certain in and of themselves). In this case, an express indication is not necessary. This is an instance of tacit retroactivity. The law is silent because it is understood to be implicit, that is, logically required by that type of law. In any event, for the general case of authentic replies, it is necessary to determine which ones are declarative, because the PCILT does not label them.

We must include all cases of declarative law in this regimen of tacit or implicit retroactivity, not just the authentic replies. In short, all norms which declare natural or positive divine law would be included herein. Examples include norms that declare juridical acts which were grounded in, or constituted because of, a sinful act (such as prescriptions of bad faith or goods acquired through usury), to be *pro infectis* (i.e., non-acts). Other examples include norms that declare the substantive foundations of the juridical system or the essential elements of capacity and will for the constitution of acts, topics which can be easily integrated with natural law as we understand it.

It is in the scope of matrimonial law that the possible retroactivity of certain canons of the *CIC* has been raised more urgently, particularly in relation to evaluating the validity of marriages contracted under the rule of the previous Code, whose norms did not consider certain factors of capacity, certain formulations regarding error, and specific impairments of free will which have now been redefined or newly established. More specifically, the formulation of c. 1095, 3°, concerning incapacity to assume the essential obligations of marriage for psychological reasons, already existed in a jurisprudential version prior to the *CIc.* In any case, because it deals with a prerequisite of capacity regarding the essential obligations of marriage, it certainly must be understood to be declarative of law and to have retroactive reach. In the case of the error of quality that is directly and principally intended (c. 1097 § 2), it seems obvious enough that we find ourselves before an instance of a declarative norm in which a fundamental principle of natural law is immediately present. That is how the majority of doctrine and jurisprudence has seen it,[4] thereby accepting its retroactive nature. The question of deceit (c. 1098) is more complex. Its connection with natural law is beyond doubt; however, we must take into account that in this case the language of the norm has required the important technical involvement of perpetration and comprehension, which endows this canon with a strong historical flavor. The majority of the doc-

4. Cf. J.C. AGNEW, "Error of quality in recent rotal jurisprudence," in *Cuadernos doctorales. Excerpta e dissertationibus in iure canónico* 10 (1992) (Pamplona 1993), pp. 235–309, especially pp. 297–301.

trine[5] considers, however, the norm of c. 1098 to be declarative of natural law and accordingly accepts its retroactive character. It appears that something similar must be said of c. 1103, concerning the topic of fear as an impairment of consent, if we take note of the authentic reply[6] that declares the norm of this canon to be applicable to the marriage of non-Catholics. As for a condition concerning the future (c. 1102 § 1), there is no retroactivity whatsoever.

5. *Favorable retroactivity*

The final point about the retroactivity of canonical law, an important one for a full understanding of the subject, is the retroactivity *in mitius*. It turns out that canonical laws sometimes establish a benign or favorable retroactivity, which does not involve the problems of general retroactivity, since no acquired right is affected and the effects of juridical acts are not suppressed. On the contrary, the juridical latitude of the interested party is widened, or favorable effects are attributed to his prior behavior. Beneficial retroactivity typically occurs in the penal area. If the law should change after the commission of a delict, the most favorable law is to be applied. If a later law should abrogate a previous one, or at least suppress the punishment, that punishment immediately lapses (c. 1313). Paradoxically, penal canon law also recognizes, in cases of extreme danger to the public welfare, a significant exception to the principle of favorable retroactivity, embodied in the norm of c. 1399. The following should also be considered acts of power with favorable retroactive effects: the retroactive validation of an invalid marriage which involves "a referral back to the past of the canonical effects" (c. 1161 § 1); the legal acts of remediable nullity (c. 1622); and the commutation[7] or convalidation of the effects of acts which have already been performed.

5. Cf. P. MONETA, "Matrimonio *canónico* e problemi di diritto transitorio (con particolare riferimento al dolo)," in *Scritti in memoria di Pietro Gismondi* II, 2 (Milan 1991), pp. 41–56.

6. PCILT, Resp April 23, 1987, in *AAS* 79 (1987), p. 1132.

7. Cf., e.g., SCRSI, Decr. of February 2, 1984, in *AAS* 75 (1984) 499–500, for that which convalidates the passage of time, by means of a different kind of bond for reckoning the period of temporal vows.

10 **Irritantes aut inhabilitantes eae tantum leges habendae sunt, quibus actum esse nullum aut inhabilem esse personam expresse statuitur.**

Only those laws are to be considered invalidating or incapacitating which expressly prescribe that an act is null or that a person is incapable.

SOURCES: c. 11

CROSS REFERENCES: cc. 14, 15 § 1, 39, 124–127, 1156, 1161, 1620–1622

COMMENTARY

Javier Otaduy

One possible effect of laws is to attribute invalidity (nullity)[1] to a juridical act by reason of the non-fulfillment of a formal requirement that the law itself establishes for the constitution of the act itself (an invalidating law) or by reason of the non-fulfillment of a personal requirement that the law sees fit to require of the subject who is performing the act (an incapacitating law). Although they have different names, the two types of law form a single category, since their purpose is the same and the effect they produce is also the same. The incapacity spreads equally to the invalidity of the act, even though it results from a disqualification at the personal level. The invalidating and incapacitating laws protect the public welfare in a special way, objectively and externally. Consequently, they are not affected by subjective conditions of ignorance (c. 15 § 1), although naturally they can be enervated through doubt of law (c. 14).

1. *The canonical meaning of textual nullity*

The canonical order understands that the effects of invalidity and incapacity are odious, and therefore it requires that they be stated expressly and textually in the law in order for them to have effect. Thus not every irregularity, formal inconformity, illegality, illegitimacy, or anomaly results in

1. Some canonists (A. VAN HOVE, *De legibus ecclesiasticis* (Malines-Rome 1930), p. 167; J.M. PIÑERO CARRIÓN, *La ley de la Iglesia*, I (Madrid 1985), p. 104) prefer to distinguish between invalidity and nullity, connecting the former with invalidation and the latter with the absence of an essential element, but this terminology does not seem to have won general acceptance.

the nullity of acts. As for their conformity with positive law, they are valid so long as there is no clause of invalidity. "In canon law, acts in opposition to the law, although in principle illicit, are not necessarily null and void. The nullity of acts *contra legem* is not the rule, but the exception."[2] In the constant juridical dialectic between certainty and truth (between formalism and will, between security and justice), canon law inclines toward the second alternative. Provided that the acts respect the natural state of the human condition, they are also valid in the law. At any rate, in order to situate the doctrine in its true context, it must be said that this rule was developed gradually and with historical references that make it rather relative. Classical canon law, under the influence of Roman law, used extremely rigorous and formal criteria ("ea quae fieri prohibentur, si facta fuerint, non solum inutilia, sed etiam pro infectis habeantur,"[3] "quae contra ius fiunt, debent utique pro infectis haberi").[4] The evolution to the current rule, on the other hand, is undeniably and paradoxically dependent on legalism. It is understood solely as a protection of liberty and transactional discretion in the face of a juridical system whose prescriptions are wide-ranging and all-pervasive, whose sanctions are plentiful, and whose formal requirements are stringent. That is how French doctrine understood it in commenting on the Napoleonic Code: "pas de nullité sans texte."

2. *Invalidity or non-existence of canonical acts*

Nevertheless, or perhaps precisely on that account, the *CIC* does not have a homogeneous notion of the validity of juridical acts. Nullity is sometimes understood as the non-existence of the act owing to the absence of its essential elements, and at other times as nullity by the prescription of positive law. In this second case, moreover, it is possible to understand nullity as either irremediable or remediable. Both categories are contained within the one term. This lack of systematization has a strong effect on the interpretation of c. 10.

Canon 124 § 1 says: "For the validity of a juridical act, it is required that it be performed by a person who is legally capable, and it must contain those elements which constitute the essence of the act, as well as the formalities and requirements which the law prescribes for the validity of the act." There appears to be a considerable discrepancy between the provisions of c. 124 § 1 and c. 10. In the former, the validity is intertwined with the essential elements and *also* with the requirements of positive law. In c. 10, no mention is made of what nature the material norms must have

2. P. LOMBARDÍA, commentary on c. 10, in *Pamplona Com.*

3. c. 25, q. 2, c. 13. The words taken up by the Decree relate to a decretal of Gregory I, which is the literal application of an imperial constitution.

4. *VI, Reg. iuris* 64.

to incur the sanction of invalidity; but it seems clear that if the express character of the clause is established as an essential requirement, then there are sufficient grounds for concluding that it concerns only the requirements of positive law. In reality, it would be incomprehensible to disregard (as the absolute cause of the inefficacy of the juridical act) the absence of essential elements, irrespective of whether the law expressly stipulates it.

With respect to the efficacy of juridical acts, we must distinguish between nullity and non—existence.[5] The latter, as we have observed above, affects those acts that lack essential elements. "The Code labels all such acts null, because they lack effects; nevertheless, the structural idea of the vitiation of the act is not thereby signified."[6] Rather than vitiation, which presupposes the existence of the act, we should technically speak of non-existence. The result is that when this kind of act is present, the violated law does not possess any possibility of remedy, convalidation, or corroboration. It is not *infirmum* (without effect), but *infectum* (without existence), and the law can only declare it to be such. Acts should not just be declared non-existent because they are unreasonable (that is, absolutely inconceivable or contradictory, such as the "marriage" of homosexuals or a unilateral "contract"), but rather because they fail to meet assumptions of capacity that are absolute (e.g., the marriage of someone who lacks sufficient use of reason, c. 1095, 1°), because of lack of an object (e.g., the provision of an office that is not vacant, c. 153 § 1), because of lack of free will (e.g., the act performed as a result of external violence that could not be resisted, c. 125 § 1), because of lack of cause (e.g., an administrative act performed with a personal or private motivation, or a dispensation without cause, c. 90), or because of lack substantive constitutive form (e.g., a religious profession without public vows, c. 654). Despite the inconsistencies mentioned above, the *CIC* gives cause for understanding the non-existence as an autonomous juridical category in c. 125 § 1, where it labels *pro infecto* an act performed with lack of free will, and in c. 1406 § 1, where it labels *pro infectis* the acts of a process carried out against the Primatial See, by reason of absolute incompetence or incapacity of the judges (or perhaps through lack of objectivity).

The intention of c. 10 is to draw attention to invalidity, not to non-existence This does not mean that there are not occasionally specific issues of non-existence in laws containing clauses of invalidity, which are conceived in the style of invalidating and incapacitating laws (e.g., cc. 42, 126, 153 § 1, 171 § 1, 1°, 1084, 1085, 1097 § 1, 1708). Strictly speaking, the clause of invalidity is unnecessary for these cases, although they can be justified owing to the act's appearance of validity. Technically, however, in-

5. Not all authors agree on the usefulness of this distinction. Cf., e.g., E. LABANDEIRA, *Tratado de derecho administrativo canónico*, 2nd ed. (Pamplona 1993), pp. 389–390.

6. O. ROBLEDA, *La nulidad del acto jurídico*, 2nd ed. (Rome 1964), p. 211.

validating laws must be understood as those which establish, with threat of nullity, requirements of positive law that are non—essential. Such requirements are only invalidating when they are expressly stated. The express character of the invalidity must be manifested unequivocally. Therefore, expressions such as *non potest, non competit, sine licentia non agat, arceatur*" etc. would not be sufficient. This is the only modification that has been made to the parallel canon of the *CIC*/1917. The following (among others) are considered express clauses of invalidation or incapacitation: *inhabilis est* (c. 171 § 1, 2°–4°), *irritus est* (cc. 149 § 3, 188, 423 § 1, 1091 § 2, 1105 § 3, 1292 § 3, 1360, 1433), *invalidus est* (cc. 65 § 3, 127 § 2, 1°–2°, 170, 172 § 1, 1°, 174 § 2, 649 § 1, 1086 § 1), *nullus est* (cc. 166 § 3, 171 § 2, 179 § 4, 425 § 3, 1488 § 1, 1511, 1656 § 2), *ad validitatem requiritur, ut validus sit, vim non habet, effectum non sortitur*, etc. There are also clauses of invalidation in administrative acts (c. 39).

3. *The juridical extension of the clauses of invalidity*

Non-existent acts do not and cannot have juridical effects. They can, however, certainly have *de facto* effects for as long as their status goes undeclared; but they do not exist before the law, and they are, therefore, irremediable. Depending on the case, they must be performed anew. When acts of this type contain a clause of invalidity, they are not to be judged like laws that are merely invalidating or incapacitating.

Acts that are null because they contravene a law that is properly invalidating or incapacitating are in principle remediable by the very nature of the things in question. In effect, this would amount to a requirement or warning of positive law, which just as it has been prescribed by the law, so also can be remedied or convalidated by it. Notwithstanding, the law can also understand that certain anomalies or defects are present in the acts which, without bringing about the absence of essential elements, still produce irremediable nullity. Such is the case, for example, with the instances of absolute procedural nullity (c. 1620), although most of these constitute examples of non-existent acts, as well as with certain matrimonial impediments (cc. 1083, 1086 § 1, 1089, 1090, 1092, 1093), and with certain defects of matrimonial consent that do not in and of themselves presume the absence of free will (cc. 1098, 1102 § 1). It should be noted in the last case, that the invalidating law does not deal with strict requirements of form (which are ancillary to the act), but rather, in order to protect as strongly as possible the genuineness of the voluntary consent, attributes the absolute and irremediable nullity to a *defect* of the essential element, not to the absence of that element.

Most of the acts invalidated by invalidating law are, nonetheless, remediable, because they maintain their essence intact. This is especially

significant in procedural matters,[7] where the remedy of null acts subject to procedural treatment (or of null judgments, c. 1622) is a singularly efficacious device, whether it takes place through renunciation of the contestation of the nullity (cc. 1524 and 1525), through lapse of the time—limit for contestation (c. 1626 § 2), through fulfillment of the objective purpose of the act (c. 1510), or through the remediable effect of the judgment itself (c. 1619).

Remedy by convalidation can also occur in the area of administrative acts. It takes place if the legislator specifically confirms an act that is null[8] (but not non-existent), thereby making good all of its defects or issues of positive invalidation. Likewise, it occurs when the law itself attributes an express convalidating power to remedy a null act completely and retroactively, as in the case of the radical sanation of an invalid marriage (c. 1161). In other cases, which are improperly called convalidating (c. 1156), what the law does is facilitate the ratification or repetition of the act.

4. *Rescindability*

No express clause of rescission is needed for the rescindability (or annullability) of canonical acts. It is enough that the act have a defect or juridically significant anomaly that occasions rescission or permits an authority to intervene and annul it. Canon 125 § 2 notes that the judge can rescind with a judgment, at the instance of a party or even *ex officio*, an act performed as a result of fear which is grave and unjustly inflicted, or as a result of deceit. Canon 126 adds that an act performed as a result of ignorance or of error (when it does not affect the substance of the act or a condition *sine qua non*, in which case, it would be non-existent) is valid, but can give rise to rescission. There are, however, many other situations of rescindability in which the defect of an act of free will is not the primary issue, but rather irregularities concerning the subject, object, or form of an act. The *CIC* cites, for example, the provision of an office to a person who lacks the requisite qualities (c. 149 § 2), and the overlooking of electors in an election (c. 166 § 2). We should not forget, however, that the rescindability (that is, the so-called nullity through non-declarative judgment or through decree) does not have to be expressed. In fact, c. 1739 and c. 1445 § 2 allow us to know with certainty that administrative acts can be rescinded through hierarchical recourse and, subject to much more stringent conditions, through the judgment of the tribunal of the Second Section of the Apostolic Signatura.

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7. Cf. M.A TORRES-DULCE, "La subsanación de la nulidad procesal canónica," in *Excerpta e dissertationibus in iure canónico* 6 (1988), pp. 519–577.

8. Cf. V. GÓMEZ-IGLESIAS, "Naturaleza y origen de la confirmación 'ex certa scientia'," in *Ius Canonicum* 49 (1985), pp. 95–97.

11 **Legibus mere ecclesiasticis tenentur baptizati in Ecclesia catholica vel in eandem recepti, quique sufficienti rationis usu gaudent et, nisi aliud iure expresse caveatur, septimum aetatis annum expleverunt.**

Merely ecclesiastical laws bind those who were baptised in the Catholic Church or received into it, and who have a sufficient use of reason and, unless the law expressly provides otherwise, who have completed their seventh year of age.

SOURCES: c. 12; CodCom Resp. I, 3 ian. 1918; SCCouncil Instr. *Saepenumero*, 14 iul. 1941, 2 (*AAS* 33 [1941] 390); *GCD* Addendum *Inter alia*, 11 apr. 1971, 1 (*AAS* 64 [1972] 173); SCSDW et *SCCong* Litt. circ., 31 mar. 1977

CROSS REFERENCES: cc. 96–99, 105 § 1, 204 § 1, 920 § 1, 1086 § 1, 1117, 1124, 1478 § 3

COMMENTARY

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The one for whom the law is destined, if we keep in mind the concept of law as juridical norm, and its characteristic position among the sources of the law, is the community. The community alone is *capax legem recipiendi*. The term denotes a passive subject that is indeterminate at the level of the individual: whosoever by virtue of their behavior is inscribed in the hypothetical and abstract supposition of fact that the norm establishes. It must not be forgotten, however, that every law, if it is legitimate and reasonable, produces as a general effect, before any other actual juridical effect, the obligation to obey it consciously.

Indeed, c. 11 is concerned with describing the subject of canonical laws from that perspective. In effect, the intention of c. 11 is to determine who "is obliged," i.e., what conditions does the law establish for someone subject to the law to be obliged to obey it. Consequently, the laws directly referred to here are those which are merely preceptive and prohibitive. Canon 11 does not regulate anything connected with the norms constitutive of juridical acts. Invalidating and incapacitating laws, like laws constitutive of acts and canonical institutions generally, are exempt, in so far as their operativity is concerned, from considerations of knowledge and subjective obligation. Their efficacy depends on the conditions stipulated in the juridical order. Nor does c. 11 affect norms that attribute rights. Rather it affects those which instruct or prohibit, the ones which can in a strict sense generate obligation (*tenentur*).

It is important to dispel two other misconceptions that can arise from a superficial reading of c. 11. It speaks of "merely" ecclesiastical laws, thereby explicitly signaling that it is establishing a regimen for subjection to the *positive legislation* of canon law and not to divine law. The obligation of the latter obviously transcends the conditions mentioned in c. 11 for the addressee affected by law. Secondly, although it may follow from what we have stated above, it seems clear that c. 11 does not describe the subject *of* law, but rather the person who is subject *to* the law. The subject of law is a much broader concept than that of the person subject to a legislative norm. There will necessarily be some discussion of this point in the course of this commentary.

As for the parallel canon of the previous Code, in addition to the substantive modifications which we discuss below, the form of the expression has also changed. What once was expressed as a negation and an exception (those who did not meet certain conditions were not obliged) is now conceived and expressed in a positive and regular fashion (those who meet certain conditions are obliged).

1. *Baptism or reception into the Catholic Church*

This is the first condition that c. 11 specifies for the person subject to merely ecclesiastical law. It implies a marked departure from the previous regulation, which established merely the condition of validly conferred baptism, whether in the catholic Church or in another Church or ecclesial community.[1] The Church has always acknowledged its lack of competence to subject the unbaptized to its jurisdiction, although at the same time it has also understood that those baptized in a different Church were included in the plan of salvation of the Catholic Church. Thus, they were subject to its authority. In modifying the second point, c. 11 reflects the doctrine developed by the Second Vatican Council (*UR* 3) and resolves previous situations of doubtful juridical efficacy (because the *CIC*/1917 affirmed that those baptized in other religious confessions were generally subject to its canons, but then dispensed from typical canonical obligations).

Certain acts of those baptized in non-Catholic confessions can be undeniably important in the canonical order. By virtue of baptism (c. 849), they have the potential title to be subjects of canon law,[2] although it is clearly limited in its actual exercise by the absence of ecclesiastical com-

1. In the *schemata* previous to the *CIC*, the canon used different language, intermediate between that of the *CIC*/1917 and that of the current c. 11. Cf. *Comm.* 23 (1991), pp. 151–154.

2. They are granted the "simple" condition of being subjects in canon law, without being full members, but with authentic juridical capacity, by A. GÓMEZ DE AYALA, "Osservazioni sull'elemento soggettivo nella nuova codificazione canonica," in *Raccolta di scritti in onore di Pio Fedele* I (Perugia 1984), p. 137.

munion (cc. 96 and 751). Still, they can be involved in certain canonical relationships, such as marriage (cc. 1124–1129, 1671, 1692) or procedures (c. 1476). Moreover, they can be the object of the pastoral attention of the Church (cc. 383 § 3 and 1183 § 3), and can even participate, under certain conditions and to greatly varying extents depending on their relationship with the Catholic Church, in the *communicatio in sacramentis* (c. 844 §§ 3 and 4). All of this does not mean, however, that they are subject to canonical law (except indirectly, through the formal requirements necessary for the valid fulfillment of those acts).

Likewise, the acts of non-Catholics can have meaning in the canonical order. They can administer baptism in a case of necessity (c. 861 § 2), contract canonical marriage (c. 1086), obtain rescripts (c. 60), plead before a court (c. 1476), be witnesses in a process (c. 1549) or leave their goods to the Church (c. 1299 § 1). In addition, canon law recognizes the competence of the Church over the marriage of the unbaptized, if the supposition of fact arises for the concession of the Pauline privilege (cc. 1143–1144), which presumes the dissolution of a matrimonial bond. The Church also affirms its obligation and inherent right to preach the Gospel to all peoples (c. 747 § 1). Moreover, we must not forget that all people are destined, and to a certain extent have the right, to be part of the people of God (cf. *LG* 13), and have the obligation to seek truth, to embrace it, and to practice it (cf. *DH* 1). Catechumens are more closely linked to the Church and its system of law, and a special juridical status is assigned to them (cc. 206, 788, 851, 1°, 1170, 1183).

Although no one doubts that unbaptized individuals lack title to the rights and obligations proper to Christians, the doctrine is divided on the question of the canonical subjectivity of unbelievers. Some maintain that they lack any juridical capacity whatsoever in the canonical order, even though their acts, when recognized as such by the law, prove to have meaning. Even so, they are not subjects with personality.[3] Others argue that canon law recognizes the natural juridical dimension to the human condition, thereby indirectly attributing personality to the unbaptized. This would explain their capacity to act with canonical meaning.[4] This interpretation would explain the double, symmetrical, and somewhat equivalent formulations of cc. 96 (persons in the Church) and 204 § 1 (the faithful).[5] If the personality of the unbaptized is conceded, then the first formulation would not be superfluous or "completely interchangeable"[6] with the second. Yet even though this second alternative is supported by sound arguments, it is clear that all manifestations of will by the unbaptized to which

3. An up-to-date, well-documented, and strong restatement of this position can be found in A. GÓMEZ DE AYALA, "Osservazioni...," cit., pp. 113–157, especially pp. 154–157.

4. Cf., for all of these opinions, P. LOMBARDÍA, *Lecciones de Derecho canónico* (Madrid 1984), pp. 135–138.

5. Cf. G. LO CASTRO, *Il soggetto e i suoi diritti nell'ordinamento canónico* (Milan 1985), pp. 52–63 and 91–99.

6. Ibid., p. 94.

juridically relevant effects in canon law are attributed protect the interests of the faithful.[7] They are inscribed, when they are not seen as something that is merely objective, with no requirements of juridical capacity, in relationships that are typically canonical and intra-ecclesial in purpose.

Canons 96 and 204 § 1 affect c. 11 only tangentially. Whether or not unbelievers are considered subjects with canonical capacity, it is clear that they are not subject to the law. It is equally evident, however, that one cannot reduce the whole phenomenology of juridicity to "bonds of submission."

Even assuming defection from the Catholic faith and abandonment of the Church, c. 11 does not exclude subjects from submission to canonical laws, except in those cases where some effect in this sense is explicitly attributed to the formal act of abandonment (cc. 1086 § 1, 1117, 1124). As the canon was being developed, a formulation was considered which affirmed that those who abandoned the Catholic Church continued to be obliged by canonical laws unless it was expressly provided otherwise in the law.[8] This language did not prevail, but its underlying sense is identical to that of the actual c. 11. It is also clear that the legislator wanted to distinguish clearly the Catholic Church from an associative or conventional church model, "from which each individual can depart at his own discretion."[9] "It should be borne in mind that the 'coercive' aspect of canon law is based on factors of a spiritual nature (not on recourse to physical violence), the effectiveness of which depends largely on personal faith and disposition. Consequently, it is reasonable to establish in principle an objective obligation to adhere to laws. This obligation does not disappear by reason of the mere fact that one has abandoned the faith or broken hierarchical communion."[10]

2. *Sufficient use of reason*

The sufficient use of reason in order to be bound by ecclesiastical law is drawn from natural law (especially if we observe that in c. 11 direct reference is made to conscious obligation). In order for there to be an authentic moral obligation in the fulfillment of the law, the conscience must be able to perceive such an obligation through a judgment of the reasoning faculty. The only interpretative problem posed is that of juridically defining the concept of "sufficiency." The *habitualiter amentes*, even though they may have intervals of lucidity, are not obliged by merely ecclesiastical laws. This seems to be the most appropriate conclusion for understanding the sufficiency of reason, since c. 99 considers them, with the

7. Cf. A. Gómez De Ayala, "Osservazioni...," p. 156.
8. Cf. *Comm.* 23 (1991), p. 154.
9. *Comm.* 14 (1982), p. 133.
10. P. Lombardía, commentary on c. 11, in *Pamplona Com.*

presumption *iuris et de iure*, as incapable of personal responsibility, and likens them to infants for juridical purposes (along these lines, cf. c. 1322, which considers them as incapable of committing an offence). Another question is the moral estimation that should attach to the behavior of an *habitualiter amens* during a period of lucidity. It is clear that people with mental dysfunction, whether original, acquired, or by reason of age, also possess juridical capacity and canonical subjectivity. They hold rights, even though they lack the capacity to act. The exercise of those rights falls to their parents, guardians, or caretakers (c. 98 § 2).

Those who suffer from an occasionally flawed use of reason, weakness of judgment, or temporary mental confusion, do not thereby lose the permanent juridical situation of submission to merely ecclesiastical laws. The imperfect use of reason does, however, diminish (c. 1324 § 1, 1°), exempt (c. 1324 § 3), or favor (c. 1345) the non-application of a canonical penalty. Furthermore, it obviously prevents the performance of numerous juridical acts that require a higher and specific level of capacity or aptitude (cc. 689 § 3, 1041, 1°, 1044 § 2, 2°, 1095, 2°, 1478 § 4, 1550 § 1).

3. *The septennium*

As a further, though not alternative, condition for the sufficient use of reason, it is established that one must have completed the seventh year of age. Although majority and capacity for the full exercise of rights is obtained upon completion of the eighteenth year of age (cc. 97 § 1 and 98 § 1), the *CIC* grants a certain limited capacity to minors *infantia egressi* (cc. 98 § 2, 105 § 1, 1478 § 3). In addition to that limited capacity, c. 11 establishes that those who have reached seven years of age, if they have the use of reason, are obliged by preceptive and prohibitive canonical laws. The further clause concerning the septennium is not an empty one: "nisi aliud iure expresse caveatur." The *CIC* does expressly mention that the fulfillment of certain merely preceptive laws carries additional age requirements (cf., e.g., c. 1252). It also cautions that in certain express cases, the use of reason prevails over the age requirement for the fulfillment of certain preceptive canonical laws that are strongly linked with requirements of divine law (cf. c. 989 and, where applicable, c. 920 § 1).

12 **§ 1. Legibus universalibus tenentur ubique terrarum omnes pro quibus latae sunt.**

§ 2. A legibus autem universalibus, quae in certo territorio non vigent, eximuntur omnes qui in eo territorio actu versantur.

§ 3. Legibus conditis pro peculiari territorio ii subiciuntur pro quibus latae sunt, quique ibidem domicilium vel quasi-domicilium habent et simul actu commorantur, firmo praescripto can. 13.

§ 1. Universal laws are binding everywhere on all those for whom they were enacted.

§ 2. All those actually present in a particular territory in which certain universal laws are not in force, are exempt from those laws.

§ 3. Without prejudice to the provisions of c. 13, laws enacted for a particular territory bind those for whom they were enacted and who have a domicile or quasi-domicile in that territory and are actually residing in it.

SOURCES: § 1: c. 13 § 1; *EM* V
§ 2: c. 14 § 1,3°
§ 3: c. 13 § 2

CROSS REFERENCES: cc. 1, 13, 87 § 1, 94, 102–107, 295 § 1, 391, 445, 455 § 1, 586, 587

COMMENTARY

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Canons 12 and 13, which form a natural pair, are concerned with setting some practical rules for establishing the regimen of subjection to ecclesiastical laws, by regulating the scope of those laws. Secondarily, they give us a conceptual starting point for considering the nature of universal vs. particular law and personal vs. territorial law. The combination of these two canons presents a complex picture, one which is, however, reflective of the complexity of the canonical legislative instances. Even leaving aside the principal juridical systems which comprise the canonical system (those of the Latin Church and the Eastern Churches), canon law recognizes an unusually large number of legislators. In addition to the supreme legislative instance (the Roman Pontiff and the Ecumenical Council, which are both universal and particular legislators), each particular church, generally limited to a small territorial area, has its own legislator. Besides these, there are other instances of territorial particular norms,

such as the Synods and bishops' conferences. Finally, there are structures with personality which also have legislative competence. The multiplicity of legislators and the numerous divisions and subdivisions allow the designee of particular law to be very mobile, easily passing from one territorial demarcation to another. Such multiplicity also gives rise to frequent conflicts between legislative dictates which may be different or even incompatible. All these considerations make it clear that rules of coordination are necessary for establishing who is subject to canonical law in each case. This is done by regulating the scope or extension of that law.

1. *The notion and scope of universal law* (§ 1)

Although § 1 does not define the nature of universal law, since its sole intent is to declare who is subject to such law, it does provide a criterion that is useful for working out a definition: universal laws are binding everywhere on all those for whom they were enacted. In other words, the characteristic of universal laws is that they affect, not the totality of the faithful (the *universitas fidelium*), but the entire globe (*ubique terrarum*). Within that unlimited territorial scope, universal laws affect "all those for whom they were enacted." In fact, universal laws typically are *special*. They affect a *species fidelium* (clerics, members of institutes of consecrated life, laity, judges, officeholders, etc.) throughout the entire world. Of course, there can also be general universal laws that affect all the faithful (e.g., those canons that express fundamental rights). It should also be remembered that the concept of universal law in the *CIC* applies to the Latin Church (c. 1). Nevertheless, nothing thereby prevents such laws, although given for the faithful of the Latin Church, from in fact being universal and having effect *ubique terrarum*, wherever the faithful of that Church are found. Latin law and Eastern Church law are not dependent on each other in such a way as to make it impossible to speak of universal law in each one of the two systems of law.[1] They each affect the faithful by means of personal, not territorial, criteria. Thus, they are also valid in the territories of other rites (see the commentary on c. 1). Indeed, the concept of universal law does not harmonize well with territorial criteria except indirectly, as in the case of the specific exemption from universal law (as we shall see in § 2). Consequently, the presumption of territoriality for every law, which was contained in c. 13 § 2 *CIC*/1917, is absent from the *CIC*,[2] which presumes only the territoriality of particular law (cf. c. 13 § 1).

1. In any case, however, the *CCEO* is wary of the concept of "universal law" and uses the term "ius commune" to refer both to laws that affect the whole Church and to laws that affect all of the Eastern Churches (cf. c. 1493 *CCEO*).

2. W. ONCLIN has explained the causes of this disappearance on more than one occasion. Cf. *Comm.* 16 (1984), p. 145; *Acta et documenta CODE COMMISSION. Congregatio plenaria diebus 20–29 octobris habita* (Typis polyglottis Vaticanis 1991), pp. 585–587.

2. *The territorial exemption from universal law* (§ 2)

It can happen that universal law is invalid in a particular territory, owing to *desuetudo*, contrary custom, contrary pontifical particular law, apostolic territorial privilege or indulgence, or episcopal dispensation *per modum actus* for a specific, temporally distinct matter (c. 87 § 1). We should not understand as exemptions from universal law either the competence which the *CIC* gives (for example, to the bishops' conferences) for issuing norms determinative of universal law,[3] or the preceptive or facultative provisions of the *CIC* which enable diocesan bishops to issue particular norms.[4]

If a universal law is not in effect in a particular territory because the aforementioned conditions are met, then c. 12 § 2 exempts from that universal law all those who *actu versantur* in the territory. That is, it operates with a criterion of absolute territoriality: all those who are within that territory, whether or not they are domiciled there, are released from the obligation. If the cause of invalidation (e.g., *desuetudo* or dispensation) simply suspends the force of the norm without adding any alternative juridical material, no problem of interpretation is posed. If, on the other hand, the invalidation simultaneously introduces new normative material (e.g., particular custom or pontifical particular law), it will have to abide by the provisions of § 3 as well as those of c. 13 § 2, 2°. The particular norm will then oblige those who have a domicile in that territory and are actually residing in it (with the exceptions contained in c. 13 § 2, 1°). It will not oblige *peregrini* (except as listed in c. 13 § 2, 2°).

3. *The notion and extension of territorial particular law* (§ 3)

Not every particular law is territorial.[5] Section 3 refers only to territorial particular law, that is, to pontifical constitutions for a territory, episcopal and synodal decrees, and the decrees of bishops' conferences. It does not refer to the statutes of c. 94, the *ius proprium* of institutes of consecrated life (cc. 586–587), or any other particular norm of a personal nature (c. 295 § 1). The *CIC* provides that the law established *pro peculiari territorio* affects all those who *actu* are present in that place, if they are also domiciled or quasi—domiciled there (cc. 102–107). Thus it affects

3. E.g., cc. 230 § 1, 242, 502 § 3, 788 § 3, 804 § 1, 1277, 1421 § 2, 1714, etc. Cf. the 43 normative competencies that are cited and urged in the *Letter* of the Secr. St. contained in X. OCHOA, *Leges Ecclesiae*, VI, no. 5008, cols. 8713–15.

4. E.g., cc. 277 § 3, 510 § 3, 513, 531 § 1, 533, 536, 537, 772, 838, 844, 860 § 2, 944, 1002, 1281 § 2, 1292 § 1, 1649.

5. For a dissent, cf. M. PESENDORFER, *Partikulares Gesetz und partikularer Gesentzgeber im System des Geltenden latinischen Kirchenrechts* (Vienna 1975), p. 132. Even still, it is not inappropriate to understand that particular law tends to be territorial.

neither *peregrini* nor those who are absent from the territory. The criterion of territoriality functions in a manner that is fully efficacious for those who are domiciled there (with the exceptions contained in c. 13 § 2, 1°), yet proves to be without effect for *peregrini* (with the exceptions listed in c. 13 § 2, 2°). As a result, the criterion of territoriality outlined in c. 12 § 3 is sometimes called the criterion of relative territoriality.

In this regimen of territorial particular law are inscribed not only the norms produced *praeter legem universalem*, by virtue of the legislative power of bishops (c. 391), particular councils (c. 445), or bishops' conferences that have the special mandate of the Apostolic See (c. 455 § 1), but also the norms produced in the development *secundum legem* of universal law itself.[6] By virtue of their preceptive and prohibitive content, certain matters for which bishops' conferences have the capacity to make law constitute typical examples of this latter type with far-reaching consequences for behavior. Examples include c. 284 on ecclesiastical dress, c. 1246 § 2 on the suppression or transfer of certain holy days of obligation, and cc. 1251 and 1253 on the laws of fast and abstinence.

6. See notes 3 and 4 above.

13 **§ 1. Leges particulares non praesumuntur personales, sed territoriales nisi aliud constet.**

§ 2. Peregrini non adstringuntur:

1° legibus particularibus sui territorii quamdiu ab eo absunt, nisi aut earum transgressio in proprio territorio noceat, aut leges sint personales;

2° neque legibus territorii in quo versantur, iis exceptis quae ordini publico consulunt, aut actuum sollemnia determinant, aut res immobiles in territorio sitas respiciunt.

§ 3. Vagi obligantur legibus tam universalibus quam particularibus quae vigent in loco in quo versantur.

§ 1. Particular laws are not presumed to be personal, but rather territorial, unless it is established otherwise.

§ 2. *Peregrini* are not bound:

1° by the particular laws of their own territory while they are absent from it, unless the transgression of those laws causes harm in their own territory, or unless the laws are personal;

2° by the laws of the territory in which they are present, except for those laws which take care of public order, or determine the formalities of legal acts, or concern immovable property located in the territory.

§ 3. *Vagi* are bound by both the universal and the particular laws which are in force in the place in which they are present.

SOURCES: § 1: c. 8 § 2
§ 2: c. 14 § 1,1° et 2°; CodCom Resp. 4, 17 aug. 1919; CodCom Resp., 24 nov. 1920 (*AAS* 12 [1920] 575); SCCouncil Resol., 9 feb. 1924 (*AAS* 16 [1922] 94–95); SCCouncil Resol., 15 nov. 1924; SCCouncil Litt. circ., 1 iul. 1926 (*AAS* 18 [1926] 312-313); SCR Litt. circ., 15 iul. 1926; SCCouncil Decr. *Prudentissimo*, 28 iul. 1931 (*AAS* 23 [1931] 336-337)
§ 3: c. 142

CROSS REFERENCES: cc. 12, 52, 91, 95, 107, 124 § 1, 136, 285 § 1, 508 § 1, 838 §§ 3–4, 944 § 2, 974, 1078 § 1, 1079 § 1, 1109, 1290–1298, 1315 § 1, 1355, 1356, 1409 § 1, 1714

COMMENTARY

Javier Otaduy

It is difficult to separate the content of c. 13 from that of c. 12, given the extent to which the rules contained in each canon intersect (see commentary on c. 12). Nevertheless, within the composite scheme presented by cc. 12–13, we might say that c. 12 contemplates the matter from the perspective of the law (universal and particular) and c. 13 from the perspective of the passive subject of the law. It follows that c. 13 establishes categories of persons with respect to the territorial mobility of the passive subject of the law (residents, *peregrini*, and *vagi*). In addition, c. 13 contains two other juridical provisions of considerable importance: it establishes the presumption of territoriality for particular law, and formalizes some categories of laws whose effects in this area represent exceptions to the ordinary regimen.

From the beginning, it is important to distinguish between the passive subject or designee of the law and the passive subject or designee of other acts of authority in which territorial and personal dimensions also play an important role. Territorial residence normally provides the point of reference for the determination of the passive subject of ordinary administrative authority, judicial authority, and the parochial care of souls (cc. 107 and 1408). For the performance of certain acts of administrative authority (cc. 91, 136, 1078 § 1, 1079 § 1), the exercise of judicial power (cc. 1408–1413, 1469), the remission of penalties (cc. 1355, 1356), and the exercise of certain habitual faculties connected with sacramental matters (cc. 508 § 1, 974, 1109), the solutions that have been adopted are not identical to those which the *CIC* establishes for determining the designee of particular law.

1. *The territoriality and personality of canonical law* (§ 1)

The *CIC* has modified the presumption of territoriality for every law. This presumption is now to be applied only to particular law (see commentary on c. 12). Thus was consummated an historical process, whose first stage affirmed territoriality as an essential attribute of law.

It is appropriate to make some prefatory remarks here in seeking to organize the complex problem of the dimensions of personality and territoriality present in the canonical norm. Territoriality of the law can denote many things: that it issues from or originates in a legislative authority belonging to an ecclesiastical institution that is territorially based (e.g., a diocese or an ecclesiastical province); or the territorial *modus operandi* of the law, that is, the manner by which it captures its subjects (through their actual presence in the territory); or the manner of fulfillment or

observance of that law (because it must be observed in a juridically determined location). Technically speaking, territorial law has the second of these meanings, but that is not to say that the other two are devoid of juridical relevance.

In the case of personal law, we also need to define things more precisely. Personal law can be understood as law that issues from the legislative authority of a personal structure, or as universal law that proceeds from the supreme legislator. But it can refer to a law that originates with a legislative authority that is territorially based (e.g., the authority of a diocesan bishop), but which nonetheless affects a community that is personally structured (e.g., an institute of consecrated life of diocesan right). It can also apply to a particular law given by the legislator of an ecclesial structure that is territorially limited (e.g., a diocese), for those who are domiciled therein, but with personal effects that affect the individual subject to the law even outside that territory (c. 13 § 2, 1°). Obviously, the laws of the third type, by virtue of the nature of the authority that produced them as well as the original basis of their obligation (the domicile or juridical residence) are heavily dependent on territory. Likewise, personal laws in their fullest and most proper sense are those which "directe et immediate afficit personas, independenter a quocumque territorio."[1] Notwithstanding, it is not wrong to speak of personal law in any of these senses. Furthermore, if we adhere to positive law in light of what appears to be deducible from c. 13 § 1, the personal extension of particular law (which is not presumed) is directly linked with the personal effects of the law as they are understood in this last sense. In other words, c. 13 § 1 fundamentally is concerned with the personal effects of laws *conditae pro peculiari territorio*. In actuality, although it might appear otherwise, the categories referring to juridical residence or domicile, in as much as they refer to submission to the law, are not territorial, but personal. The notion of *incola*, though it springs from a territorial circumstance, is a personal category that belongs to the subject wherever he may be: an *incola* continues to be an *incola* even when outside of his territory. Accordingly, it involves no contradiction to speak of personal laws (or of personal effects of laws) even though domicile is used to determine the designee of the law.

All of these elements of territoriality and personality, which moreover can be blended with each other, produce a very wide range of suppositions of canonical law. Here, however, we are concerned only to define the criteria used in cc. 12–13 in connection with this matter, which have as their proper reference the particular law *condita pro peculiari territorio*:

a) *Criterion of absolute territoriality.* This follows from the regimen established in cc. 12 § 2, 13 § 2, 2°, and 13 § 3. According to this criterion, particular laws have effect only to the extent that the subject is present

1. A. VAN HOVE, *De legibus ecclesiasticis* (Malines-Rome 1930), p. 128.

(*actu versatur*) in the territory, irrespective of his personal category (resident, *peregrinus*, or *vagus*). Thus it is necessary to take note of the exemption from universal laws that are not in force in a particular territory (c. 12 § 2) as well as the obligation of laws that take care of public order, determine the formalities of legal acts, and concern immovable property located in the territory (c. 13 § 2, 2°). Finally, *vagi* are bound everywhere by this regimen (c. 13 § 3).

b) *Criterion of relative territoriality.* This is the usual way of gauging the extension of laws *conditae pro peculiari territorio*, as is indicated in c. 12 § 3 and later confirmed as the ordinary rule by the exceptions of c. 13 § 2, 1°–2°. According to this criterion, such particular laws affect those domiciled at the time (*actu commorantes*: it is therefore a completely territorial criterion), but they do not affect *peregrini* (and that criterion is thereby rendered relative).

c) *Criterion of mixed territoriality.* This follows from the regimen established by c. 13 § 2, 1° for the first of the exceptions: the individual who is absent from his own territory continues to be bound by the laws of his territory if the transgression of those laws causes harm in his own territory. In other words, an effect of personal obligation, which will thus transcend the territorial boundaries, has been added to a law that obliges in the territory of the domicile, whose observance must almost always be carried out in the territory itself and is always necessary for the good of the territory itself. The mixture of the two scopes (territorial and personal) is clear in this category of laws. Historically, the operation of this criterion was especially important in the application of the Decree *Tametsi* of the Council of Trent concerning the form of the marriage, which obliged the faithful of the territory with personal criteria (wherever they were) if that norm had been promulgated in their own territory, and obliged *peregrini* if they found themselves in a territory where the decree was in force.

d) *Criterion of personality.* This is the other exceptional case mentioned in c. 13 § 2, 1°. The legislator of an ecclesiastical structure that is territorially limited can give personal laws, i.e., laws which, within the territory itself, affect communities that are personally structured (e.g., an institute of consecrated life of diocesan right, c. 579; or even a public association of the faithful, c. 312 §§ 2–3). The particular legislator can also enact a law that obliges those subject to him with personal criteria, provided that he advises that the law has such a character, or that it is obvious from the very type of obligation that is being imposed, since the personal nature of particular law is not presumed. With respect to the personal effects of obligation, however, the exercise of legislative power must be distinguished from the exercise of administrative authority. Personal criteria are a regular feature of singular administrative decrees (c. 52).

2. *Laws that oblige absent individuals* (§ 2, 1°)

The *CIC* indicates two generic suppositions in which particular law has personal effects and its obligation follows the subject outside his territory: when personal laws are involved, and when its transgression causes harm in the territory itself. As we have seen, the legislator can establish personal laws by expressly declaring their character as such, or when the *scopus legis* itself requires the personal nature of the obligation, e.g., those laws whose purpose is to forewarn of dangers to morals or the faith.[2] Laws whose transgression causes harm in the territory itself likewise have personal effects, as has long been observed by tradition: the obligation will attach to the person "si id quod absens facit in patria noceat."[3]

So long as it was believed that territoriality was an essential element of law, two expedients were employed to prove that absentees were bound by those laws *quae in patria nocent*. The first consisted of defining these laws as general precepts to which a personal dimension, but not the perpetuity characteristic of law, was attributed. The second argument reckoned that the absentee remained morally in the territory. In both cases, the solution was forced. Such arguments became unnecessary once the personal effects of the laws were admitted.

Examples of laws whose transgression causes harm in the territory itself include those particular laws that regulate the obligations of office, or of residence, or of assistance to the diocesan synod, particular council, or bishops' conference. To be absent in these cases would amount to a deceitful evasion of observance. If, however, there is no harm to the territory, in other legal suppositions, absence, even if intentional, does not constitute deceit of the law and the behavior of the absentee would be lawful.

3. *Laws that oblige* peregrini. There are three categories (including both concrete and abstract) of particular laws that oblige *peregrini* as well. They thereby violate the principle of relative territoriality on this point and instead exceptionally adopt that of absolute territoriality. The result is that "omnes qui et quamdiu de facto seu actu commorantur in territorio" are affected by these laws.[4]

a) *Laws which concern public order.* The canonical notion of public order (a borrowing from civil law first adopted in the *CIC*/1917) is rather difficult to discern. It cannot, of course, be directly compared with the public order of states, because canon law takes into account above all

2. As is rightly noted by E. PACELLI, *La personalità e la territorialità delle leggi, specialmente nel diritto canónico* (Rome 1912), pp. 18–19.
3. I. D'ANNIBALE, *Summula theologia moralis* (Rome 1908), no. 205, cited by A. VAN HOVE, *De legibus...*, cit., p. 215, note 1.
4. G. MICHIELS, *Normae generales iuris canonici*, I (Paris-Tournai-Rome 1949), p. 389. For the laws of absolute territoriality, cf. pp. 389–403.

considerations of the spiritual health of the faithful. Many canonical laws impose behavior or evaluate acts of a strictly personal dimension, which only indirectly affect the public good, rather than public order. Within the laws which refer directly to the public good, we are concerned here with those whose purpose is to protect, order, or safeguard it,[5] i.e., those norms which endeavor to establish a uniform external behavior that makes possible the exercise of authority and the proper development of ecclesial life. The doctrine which holds that public order can be different depending on circumstances of time and place, and is thus relative in nature, is apt; but in any case, the question concerns the laws *necessary* for the protection of that order, such that their violation by any individual (not just by a *peregrinus* in his condition as such) supposes true social harm. The laws that protect the public order "are so necessary to the good of the community that, if they should be violated by anyone, that good would be harmed."[6] In any event, this theoretical description is of little use if it does not lead to the practical identification of these laws as such and as they have been identified by the doctrine.

The following are examples of laws which, by their very nature, protect public order: particular laws that order the exercise of authority and of public offices (e.g., judicial authority, administrative offices, and parochial competencies); norms that regulate the good external order of celebrations and assemblies of people (cc. 95, 944 § 2); the ordinance of particular liturgy (c. 838 §§ 3 and 4) as it concerns the celebration or development of public cult, not the personal observance of preceptive feasts; and the particular laws given to avoid that which is harmful or unbecoming to the faithful (e.g., c. 285 § 1) in the face of behavior that could occasion scandal redounding precisely to the harm of public order, provided that we remember that not every scandal affects public order, and that the obligation not to promote scandal is a fully moral one that transcends any consideration of public order. The possibility exists (we would do well to remember the prescriptions of cc. 1315 § 1 and 1399) that some particular penal laws, to the extent that they harm public order, affect *peregrini*.

b) *Laws that determine the formalities of legal acts*. In the case of these laws, the governing principle is *locus regit actum*; that is, *peregrini* are obliged by those particular laws that determine the external form of the formulation of juridical acts (c. 124 § 1, *in fine*). Thus, this does not refer to the requirements of capacity or to the essential elements of the juridical act, but rather to the process of its formation. Examples include the laws of process in judgments and the form of concluding contracts (c. 1290) and arbitral settlements, mutual promises, and judgments (c. 1714). In these cases, as it generally does when dealing with private juridical transactions, the *CIC* yields to the civil law of the territory. In

5. Cf. W. ONCLIN, *De territoriali vel personali legis indole* (Gembloci 1938), pp. 332–336.
6. *Comm.* 16 (1984), p. 148.

actuality, owing to the broad norms of private international law, which permit the use of territorial civil law or that of the subject who initiates the transaction, "haec regula quoad actus privatos rarius applicatur in Ecclesia."[7]

c) *Laws that concern immovable property located in the territory.* This category of laws represents an addition to the *CIC,* in as much as it was not expressly provided in the previous Code. Regardless, authors used to consider that this supposition could be included in the wide range of laws that protect public order. Nowadays, it is preferred to separate this specific class from the general type. Included in this normative category are the particular laws or statutes that govern those immovable goods, much like the particular norms that refer to the domain of *res immobiles in territorio sitae* (e.g., the dispositions of particular law with respect to their valid alienation: cc. 1291–1298).

4. *Laws that oblige* vagi (§ 3). *Vagi* are governed alike by the law, by administrative authority (c. 107 § 2), by judicial authority (c. 1409 § 1), and by the care of souls (c. 107 § 2), through the criterion of absolute territoriality, such that they are subject to the universal or particular law which is in effect in the territory in which they are present. "It should be noted that a person can be an *incola* or *peregrinus* in the diocese yet remain a *vagus* with respect to the parish."[8] In this case, the condition of *vagus* would be irrelevant for purposes of subjection to the law, and would matter only for purposes of parochial competence.

7. Ibid., p. 352.
8. A. DE FUENMAYOR, commentary on cc. 100–107, in *Pamplona Com.*

14 **Leges, etiam irritantes et inhabilitantes, in dubio iuris non urgent; in dubio autem facti Ordinarii ab eis dispensare possunt, dummodo, si agatur de dispensatione reservata, concedi soleat ab auctoritate cui reservatur.**

Laws, even invalidating and incapacitating ones, do not oblige when there is a doubt of law. When there is a doubt of fact, however, Ordinaries can dispense from them provided, if there is question of a reserved dispensation, it is one which the authority to whom it is reserved is accustomed to grant.

SOURCES: c. 15; *CAd* I, 13

CROSS REFERENCES: cc. 16 § 2, 17, 21, 87 § 2, 90 § 2, 134 § 1, 144, 291, 686 § 2, 845 § 1, 869 § 1, 1031 § 4, 1047, 1060, 1078 § 2, 1080, 1084 § 2, 1086 § 3, 1091 § 4, 1150, 1165 § 1, 1203, 1308 § 1, 1698 § 2

COMMENTARY

Javier Otaduy

Canon 14 offers two different rules for resolving doubts that can arise regarding the application of the law: one for a doubt of law and another for a doubt of fact. It must be remembered that the formulae used in canon law for evaluating the effects of doubt originate in the moral sphere. They were meant to establish some principles for endowing the conscience with certainty so that it could act in freedom without danger of sin. This moral dimension (the value of the rules of c. 14 for resolving the *anxietas fidelis dubitantis* regarding a merely preceptive or prohibitive obligation to fulfill the law) cannot be underestimated. To do so would be to forget the origin of the formula and even the original intention of the legislator. Clearly, however, c. 14 goes further, constructing a juridical norm whose value is not a moral one. This is demonstrated by the mention of invalidating and incapacitating laws (which have external effects that transcend the subject in doubt), and by the reference to the need for *dispensation in the case* of doubt of fact.

1. *The nature of doubt*

Doubt supposes a state of mind in which there is wavering or uncertainty between two alternative choices. In its usual juridical sense, doubt need not imply a perfect balance or equality of probabilities between the two. In reality, one alternative may be more likely, "ita ut dubium positivum

in praxi aequivaleat opinioni vere et solide probabili."[1] Three additional conditions define the level of juridical doubt more closely: first, it is *positive*, (i.e., it adduces reasons in support of each alternative); secondly, it is *probable*, (i.e., those reasons are legally sound and effectively prove the alternative of choice); and thirdly, it is *objective*, (i.e., the doubt is not based in a cause that should be imputed to the subject, such as the lack of the proper knowledge of fact or of law, but rather is based in the fact or law itself). Objective doubt (of law) requires that the interpretative recourses of c. 17 have already been used. If such aids efficaciously resolve the doubt, then there is no reason to apply the rule of c. 14.

2. *Doubt of law*

"A doubt of law is one which concerns the scope of a norm. That is, there is some doubt as to whether a certain situation, the circumstances of which are well known, is or is not included in the terms used by the legislator to determine the cases to which the law is applicable."[2] Doubt of law occurs when it is unclear whether a particular law embraces a particular behavior; a particular topic is included in the law's regulation; or a particular category of designees is affected in the unfolding of the law. As we shall see, there is also doubt of law (but for different reasons) when there is uncertainty about the legitimate promulgation or effective revocation of a law. Canon 14 indicates that, in the case of a doubt of law, the doubtful law does not oblige (*non urget*), even though it be invalidating or incapacitating.

The problem c. 14 is directly interested in addressing is that of the "particular case of doubtful application or validity ... without prejudging the law as it applies to other cases."[3] Canon 14 does not directly set forth the traditional principle *lex dubia, lex nulla*, but rather a slightly different principle which might be formulated as *lex dubia non urget in casu*. One doubtful case with doubt of law does not weaken the general meaning of the law; indeed, legal suppositions, abstract and hypothetical as they are, will inevitably be affected, in individual but objective cases, by doubt of law. Obviously, if doubt falls on the actual formulation of the law (*dubium iuris et de iure*),[4] thereby making it deceptive or obscure, and allowing uncertainty to extend to the general class of cases to be evaluated by it, then the principle *lex dubia, lex nulla* must be applied. In such a situation, and with greater reason, the law will not oblige. But this need not be the

1. G. MICHIELS, *Normae generales iuris canonici*, I (Paris-Tournai-Rome 1949), p. 416.
2. P. LOMBARDÍA, commentary on c. 14, in *Pamplona Com.*
3. T.I. JIMÉNEZ URRESTI, commentary on c. 14, in *Salamanca Com.*
4. Canonical doctrine, however, does not generally use this expression.

habitual type of doubt of law.[5] Therefore, while c. 14 includes the principle *lex dubia, lex nulla*, it is not limited to that principle. Yet precisely because it includes that principle, c. 14 embraces, for example, doubt concerning promulgation or revocation of law[6] (by law or contrary custom, by privilege or *indult*).

In order to gauge the objectivity and the positive and probable character of the doubt of law, it is necessary, as we noted above, to rely on sound reasons. The psychological state of doubt is not what weakens the law, but rather the legal contradiction or irreconcilability that leads to that state. Therefore, it is necessary to have a good understanding of the law (or laws) about which there is doubt. When the doubt is general, or potentially extends to the actual formulation of the law (*dubium iuris et de iure*), the verification that there is a doubtful law falls basically to the scientific doctrine. This is so whether it declares that there are sound reasons for believing the law doubtful, or whether it is divided on the interpretation of that law, granting equally weighty reasons in favor of each alternative of interpretation.[7] It is important to emphasize the requirement of keeping to sound reasons, because the legislator himself may determine that certain *dubia iuris* are not efficacious and do not enervate the law. In fact, the authentic reply to a *dubium* may be simply declarative, that is, "simply declaring the sense of the words which are certain in themselves" (c. 16 § 2). It can be retroactive. This indicates that, in such a case, the doubt lacked legal foundation. It is a well-known fact that canon law recognizes and uses the system of authentic replies to resolve doubts of law (*dubia iuris et de iure*), although an authentic interpretation expressed in the form of a law cannot resolve (logically enough) all doubt of law. When the reply is truly explicative of doubtful law, the law acquires the force of obligation (*urget*) anew.

3. *Deprivation of effects of doubtful laws*

The words *lex non urget* have habitually been understood by commentators of the Code to mean *lex nihil efficit*,[8] such that "it is considered to be objectively non—existent"[9] and "objective destituitur efficacia seu vi sua nullum producit effectum (praescriptivum, prohibitivum, poenalem aut

5. According to Bender, "lex vocatur dubia, quia *ex se sola* causat dubium" (L. BENDER, *Dubium in Codice Iuris Canonici* (Rome-Paris-New York-Tournai 1962), p. 5. On this point, as on many others in his provocative work, the author is completely at odds with both tradition and positive law.

6. For a dissenting view, cf. L. RODRIGO, *Tractatus de legibus* (Santander 1944), pp. 323, 326–327. For Rodrigo, doubt of revocation would be a "dubium facti."

7. On the objective nature of doubt and the need for sound reasons, cf. L. BENDER, *Dubium in Codice...*, cit., pp. 23–26.

8. Ibid., p. 9.

9. M. CABREROS DE ANTA, *Derecho canónico fundamental* (Madrid 1960), p. 252.

irritativum) legi ex se proprium."[10] It is possible to ask, however, if the deprivation of effects is truly absolute, or if it extends only to the effects of urgency or *immediate obligation* (preceptive, prohibitive, penal, and invalidating effects). In our opinion, concessive and permissive effects are not enervated by doubt of law. In other words, those effects that entail obligatory requirements, but not those which suppose concession or permission, are bereft of effect in the case of doubt of law. Moreover, the effects of immediate obligation will be annulled or will not oblige to the extent that doubt falls on them. They will retain their effect insofar as they transcend the doubt or are not affected by it. In case of doubt about the concessive or permissive effects of a law, we should not conclude that such a law concedes or permits nothing. It would be inconsistent to think that a principle which arose and evolved for the benefit of liberty should be applied against it.

In light of all this, the principle *lex dubia, lex nulla* must be explained. The term *lex* is being used here in the abstract and material sense of obligation (*lex a ligando dicitur*), not in the formal sense of a specific legislative norm. Therefore, the maxim could also be formulated as *obligatio dubia, obligatio nulla*: any element of obligation or juridical or moral requirement to fulfill such a doubtful norm, is without effect.

Canon 684 § 3, for example, indicates that a religious may transfer from one autonomous monastery to another. The *dubium iuris*[11] was formulated as to whether the term "religious" included temporarily professed religious or only perpetually professed religious. It should be obvious, insofar as this concerns an objective doubt, that, in the time before the authentic reply was given, the possibility of transfer from one monastery to another was not nullified, nor did the legal concession vanish. Only the greatest or most stringent requirement, that of perpetual profession, was nullified by the doubt of law. Another example can be found in c. 455 § 1, which limits to certain general cases the power of bishops' conferences to issue general decrees. The *dubium iuris*[12] was formulated as to whether the term "general decree" included executory general decrees. Obviously, the power of the bishops' conferences to issue general decrees was not nullified in the time before the authentic reply was given. Only the most stringent requirement, to subject executory general decrees to the strict process of general legislative decrees, passed into abeyance and did not oblige.

This position is supported especially well by certain provisions of positive law: "... in positive and probable doubt, whether of law or of fact, the Church supplies executive power of governance for both the external and the internal forum" (c. 144 § 1). The supplying of jurisdiction is a rem-

10. G. MICHIELS, *Normae generales...*, cit., p. 420.
11. June 20, 1987, in *AAS* 79 (1987), p. 1249 and Volume V, Appendix II.
12. July 5, 1985, in *AAS* 77 (1985), p. 771 and Volume V, Appendix II.

edy of canon law, designed precisely to protect and guarantee the constitution of acts and acquired spiritual goods. In case of doubt, it safeguards the beneficial (and concessive) effects of the law, and enervates the odious ones (and those that contain requirements). Insofar as it makes concessions or grants the capacity to act, the law is upheld; but insofar as it imposes obligations, the law lapses (*non urget*). The same principle can be seen at work in c. 90 § 2: "A dispensation given in doubt about the sufficiency of its reason is valid and lawful." The *dubium iuris* concerning the sufficiency of its reason does not enervate the concessive aspects of the law (in which case it could not make use of the power of dispensation granted by the law), but rather the limiting aspects of the law. Likewise, cc. 1084 § 2 (*dubium iuris* concerning the impediment of impotence) and 1150 (concerning the privilege of the faith) can be interpreted along the same lines.

There are, however, certain exceptional and express cases in which the canonical order reacts against the principle set forth in c. 14, such that the *dubium iuris* does not enervate the obligation of the law, but on the contrary favors the juridical situation that has been subjected to doubt. The law considers that such a situation is especially needful of certainty or stability, and therefore presumes its maintenance (*favor iuris*). The same is true of these matters in case of doubt of fact (that is, they cannot be dispensed in case of doubt). The following comprises a complete list of such situations: doubtful marriage (c. 1060); doubt about the nullity or dissolution of the previous marriage for purposes of incurring the impediment of prior bond (c. 1085 § 2); doubt about the baptism of one of the parties for purposes of incurring the impediment of disparity of cult (c. 1086 § 3); doubt about the obligation to repeat some sacraments (cc. 845 § 1, 869 § 1); and doubt about the revocation of law (c. 21). It should be remembered, however, that in the first two cases of *favor iuris* in matrimonial law (cc. 1060 and 1085 § 2), the *favor fidei* of c. 1150 prevails: "in a doubtful matter the privilege of the faith enjoys the favor of the law." Thus, in a case of doubt about the validity of a marriage contracted before baptism, we should not think that it enjoys the favor of the law, but on the contrary, that the force of c. 1060 yields, and that the law itself considers with a presumption *iuris tantum* that the first marriage is invalid, in order to protect the juridical situation of the baptized party who wishes to contract a new marriage.

4. *Doubt of fact*

"Doubt of fact, on the other hand, arises when one is ignorant of the circumstances of the case and it is not known either if the case is included in the scope of a norm that is clear in itself."[13] For example, the doubt

13. P. LOMBARDÍA, commentary on c. 14, in *Pamplona Com.*

whether the defect of violence or grave fear described in c. 1103 nullifies the marriage of non-Catholics[14] is a doubt of law. The doubt whether John and Jane Doe (assuming they are not Catholic) have married as a result of violence or grave fear, is a doubt of fact. It concerns a circumstance that is in theory very different, though in practice it is not easy to distinguish a doubt of law from a doubt of fact.

A doubt of fact can arise only after an inquiry that produces positive results of uncertainty. In case of a doubt of fact, c. 14 establishes that the Ordinary has the power of dispensation provided that, if there is question of a reserved dispensation, it is one which the authority to whom it is reserved is accustomed to grant (c. 134 § 1 establishes those whom the law considers to be Ordinaries or holders of ordinary executive authority).

As we can see, this rule is quite different from that which applies in case of doubt of law. Canon 14 is now implicitly stating that *lex urget* regardless of the presence of doubt (it is for precisely that reason that it must be dispensed). The law "will oblige or not depending on whether the fact exists, independent of any knowledge that it has of the fact itself."[15] This must be affirmed in the case of invalidating and incapacitating laws, which accordingly always require dispensation *ad cautelam* in order that the person not be incapacitated, or the act invalidated. It should be noted, however, that merely preceptive and prohibitive laws (which reduce to a moral obligation for which true knowledge of the precept is required), and penal laws (whose application requires an offence "gravely imputable by reason of malice or of culpability": c. 1321 § 1) do not oblige in cases of doubt of fact.

Thus, invalidating and incapacitating laws are those whose effects are not impeded by doubt of fact, provided that a dispensation is not given nor jurisdiction supplied, which operates "in positive and probable doubt, whether of law or *of fact*" (c. 144 § 1). The supplying of power extends also to the cases of habitual faculties granted for administering the sacraments of confirmation and penance, and for assisting at marriages (c. 144 § 2).

5. *Dispensation in case of doubt of fact*

The regimen of dispensation in case of doubt is analogous, although the reasons for its application are not identical, to that of dispensation in case of urgency, which the *CIC* establishes both as a general rule (c. 87 § 2), and more specifically in the so—called *casus perplexus* for the dispensation from matrimonial impediments and the convalidation of marriage (c. 1080). Although c. 14 establishes the general rule that the

14. April 23, 1987, in *AAS* 79 (1987), p. 1132 and Volume V, Appendix II.
15. M. CABREROS DE ANTA, *Derecho canónico...*, cit., pp. 254–255.

Ordinary can dispense from doubtful law in case of doubt of fact, this faculty obviously has its natural limits, and does not extend to the following cases:

a) Laws that formalize the content of divine law or that determine the constitutive elements of acts (c. 86). To this end, it is important to remember the authentic replies[16] concerning cc. 87 § 1 and 767 § 1, from which we can infer some idea of the law constitutive of the essential elements of acts and institutions.

b) Laws which enjoy the *favor iuris*, as we observed above. In case of doubt (of law or of fact), these laws do not cease to oblige, nor can they be dispensed. In addition to those already mentioned (cc. 21, 845 § 1, 869 § 1, 1060, 1085 § 2, 1086 § 3), we must add c. 1091 § 4, which is subject only to doubt of fact: the impediment of consanguinity cannot be dispensed if there is doubt as to whether the parties are blood relatives in the direct line or in the second degree of the collateral line.

c) Finally, according to the provisions of c. 14 itself, those laws reserved to another authority, if that same authority is not accustomed to grant dispensations from them. It is well known that the regimen of dispensation has been changed (in the postconciliar legislation) from the system of specific concession for each case to the system of reservation; and further, that the dispensations reserved to the Roman Pontiff and the Apostolic See have been reduced to a minimum (cc. 291, 1031 § 4, 1047 §§ 1–2, 1078 § 2, 1203, 1698 § 2; cf. also cc. 686 § 2, 1165 § 1, 1308 § 1). In these cases, when the practice followed in the exercise of authority by the Roman Pontiff or the Apostolic See tends toward dispensation, the Ordinary can also grant dispensations in case of doubt of fact. The Ordinary cannot, however, grant dispensations when the norm indicates that no exceptions are possible; that is, when the norm itself states that the dispensation can be granted only *ab uno Romano Pontifice* (c. 291, concerning dispensation from the obligation of celibacy; c. 1698 § 2, concerning the dispensation *super rato*) or *ab una Apostolica Sede* (c. 686 § 2, concerning the indult of exclaustration for nuns; c. 1047 § 1, concerning dispensation from irregularities, if the fact has been brought to the judicial forum; c. 1203, concerning dispensation from an oath, if the dispensation would tend to harm others and they refuse to remit the obligation).

16. Cf. *AAS* 77 (1985), p. 771 and *AAS* 79 (1987), p. 1249 and Volume V, Appendix II.

15 **§ 1. Ignorantia vel error circa leges irritantes vel inhabilitantes earundem effectum non impediunt, nisi aliud expresse statuatur.**

§ 2. Ignorantia vel error circa legem aut poenam aut circa factum proprium aut circa factum alienum notorium non praesumitur; circa factum alienum non notorium praesumitur, donec contrarium probetur.

§ 1. Ignorance or error concerning invalidating or incapacitating laws does not prevent the effect of those laws, unless it is expressly provided otherwise.

§ 2. Ignorance or error is not presumed about a law, a penalty, a fact concerning oneself, or a notorious fact concerning another. It is presumed about a fact concerning another which is not notorious, until the contrary is proved.

SOURCES: § 1: c. 16 § 1
§ 2: c. 16 § 2

CROSS REFERENCES: c. 10, 20, 25, 126, 142 § 2, 144, 198, 201 § 2, 1045, 1049 § 1, 1061 § 3, 1096–1100, 1321 § 1, 1323, 2°, 1324 § 1, 9° et § 3, 1325, 1331 § 2, 2°, 1333 §§ 2 et 4, 1336 § 1, 3°, 1585

COMMENTARY

Javier Otaduy

Canon 15 establishes the place of ignorance with respect to invalidating and incapacitating laws (§ 1), and the rules that concern the presumption of ignorance (§ 2).

1. *Ignorance of the law*

The *ignorantia legis* consists of the lack of proper knowledge concerning the existence, juridical nature, content, or scope of application of the law.[1] Ignorance is considered to be on the same level as the inadvertent

1. Cf. P. G. CARON, "L''ignorantia' en droit canonique. III. 'Ignorantia iuris' et 'ignorantia facti', in *Ephemerides iuris canonici* 2 (1946), pp. 203–209.

circumstantial or temporal forgetfulness of the law. The *ignorantia iuris*, in contradistinction to the *dubium iuris*, is always subjective: the cause resides in the subject and is not attributable to causes external to the subject. It is important to append two reservations to this conclusion, regarding the introduction of juridical norms, a subject matter which by its very nature has a completely different regimen. In the case of ignorance of the law on the part of a community introducing custom, it seems obvious that it is not an individual subject, but rather a community, which is ignorant, and in such a case the existence of ignorance must be attributed to an objective cause. Nor is the *ignorantia iuris*, as it is designed in c. 15, comparable to the ignorance of particular law on the part of the universal legislator, presumed by the law itself (c. 20 *in fine*) for purposes of revocation. Canon 20 is concerned with the giving of the law, c. 15 with the fulfillment of the law.

Canon 15 establishes a parallel between error (*approbatio falsi pro vero*)[2] and ignorance, broadening the formula of the previous version. The *error iuris* is also subjective in nature, although once again we must take note of a reservation (common error) which we will discuss below.

We must remember that the effects of ignorance in the juridical sphere are considerably broader than those of the *ignorantia iuris*. The purpose of c. 15 is limited to determining the influence of ignorance of the law, or, to be more precise, of one type of law (invalidating and incapacitating laws). Thus, it does not look to establish criteria for evaluating the influence of ignorance and error concerning the essential object or requisite conditions of juridical acts (cc. 126, 142 § 2, 1096–1100), or concerning the conditions for obtaining and losing subjective rights or freeing oneself of obligations through prescription (c. 198), or concerning the circumstances necessary for the juridical efficacy of the passage of time (c. 201 § 2), or concerning the introduction of custom (c. 25).

2. *Ignorance and error concerning invalidating and incapacitating laws* (§ 1)

In the case of invalidating and incapacitating laws (c. 10), regardless of the conditions of knowledge or ignorance of the law on the part of the subject who performs the act, the act will be valid (or the person capable) if the established conditions are fulfilled, and null (or the person incapable) if they are not fulfilled. That is, the ignorance or error of the subject is irrelevant to the juridical efficacy of those laws. They are generally given for the public good and are independent of any subjective consideration or condition of will or knowledge. Accordingly, "agenti nec afficit nec proficit

2. A. VAN HOVE, *De legibus ecclesiasticis* (Malines—Rome 1930), p. 239.

ignorantia vel error."[3] To this end, irregularities are put on the same level with incapacitating laws (c. 1045).

"Nisi aliud expresse statuatur," declares c. 15 § 1. Typically cited as an exceptional express indication is the supplying of jurisdiction or of the habitual faculty contained in c. 144. (See commentary on c. 14, in which c. 144 is mentioned in connection with doubt). If there is common error of fact or of law, the Church supplies executive power of governance (or other habitual faculties, c. 144 § 2) for both the external and the internal forum; that is, "a temporary supplying of power concomitant with the act,"[4] so that the subject, even though transgressing an incapacitating law, is competent to perform the act by virtue of the power of the law itself (of c. 144).

"Common error of fact exists when a false opinion about power has already taken possession of the minds of many, in greater or lesser number depending on the place in question; common error of law exists when there arises a cause which by itself can lead to misunderstanding for those who consider it, even if few are actually deceived."[5] Common error of fact is generally rooted in a common error of law; that is, the false opinion (error of fact) is based on an objective cause that is capable of leading to it (error of law). Thus the common error of fact, notwithstanding that the terminology might lead one to think otherwise, is more conditioned than the common error of law. Nevertheless, it is clear that the cases termed "common error of law" do not suppose an error concerning the law, but rather concerning a fact, although this fact is particularly well-defined, has juridical standing, is based on a claim, and has a public dimension. The previous c. 209 did not explicitly provide for the common error of law as a cause for the supplying of power. The *CIC* has opted for the most flexible and integrative solution.[6]

The following are traditionally cited as examples of common error: a priest who hears confession without having the faculty to do so; an individual who pretends to be a parish priest without having received the office; an individual who assists at a marriage without having the faculty to do so (c. 1108);[7] and an individual who assists at a marriage in the mistaken belief that the place lies within his parochial territory. A majority of the Rotal jurisprudence and the doctrine, however, believes that the supplying of power would be operative only (i.e., that the common error would be relevant only) "in the case of general delegation or of delegation to a person

3. Ibid., p. 240, citing A. VERMEERSCH.
4. A. ALONSO LOBO, commentary on c. 209, in *Comentarios al Código de Derecho canónico*, I (Madrid 1963), p. 518.
5. Ibid., p. 519.
6. Begun by I. BUCCERONI, *Casus conscientiae* (Rome 1895), p. 464. Cf. P. MONETA, *Il matrimonio nel nuovo diritto canónico*, 2nd ed. (Genova 1991), p. 196.
7. Cf. R. NAVARRO VALLS, "La forma jurídica del matrimonio en el nuevo Código de Derecho canónico," in *Revista española de Derecho canónico* 114 (1983), pp. 498–501.

who usually receives delegation ..., but only with great difficulty in the case of special delegation for a specific marriage."[8] In this case, it is said, true common error would not exist, because it would affect only those participating in the act and not the community as a whole, and so would not truly be protective of the public good. Notwithstanding, this does not appear to agree with the general nature of common error, which does not inherently require a designee organically structured as a community, but simply a non-specific or abstract one (anyone who takes part in the act). "It does not appear that it can be maintained today, in light of the general logic of the system, that the notion of common error is necessarily linked to that of the public or general interest: private good is sufficient—even a single marriage—for power to be supplied."[9] Furthermore, all marriages (each one of them individually) affect the ecclesial public good.

Canons 1049 § 1 and 1061 § 3 also grant some juridical effects to ignorance in good faith.

3. *Ignorance of penal laws and of merely preceptive laws*

Canon 15 § 1 affects only invalidating and incapacitating laws. "In all other cases (of laws), the relevance of ignorance cannot be excluded."[10] In other words, this disposition of the Code is not meant to affirm categorically the inexcusability from fulfillment of the law by reason of ignorance, but merely the inexcusability, under a sanction of nullity or incapacity, from fulfillment of those laws that have clauses of invalidity or incapacity. Clearly, this regimen constitutes a peculiar characteristic of the canonical order which has been gradually mitigating the harshness of the historical rule, *ignorantia facti, non iuris excusat.* This rule already had one exception, which in turn was embodied in the formula, *nemo locuples fieri debet cum aliena iactura,* that is, no one can profit from the ignorance of another; an act produced *ex ignorantia legis,* if it proved to be harmful to the individual who performed it, and that ignorance could be proven, paralyzed the effects of the law, or gave cause for the annulment of the act. The same did not hold if the result constituted a benefit or a gain for the subject.

The norms that clearly lie at the margin of the application of the principle of inexcusability ("ignorance of the law does not excuse its nonfulfillment") are those which are merely preceptive (or prohibitive). Indeed, the mere effects of legality can hardly be thought to be removed from the influence of ignorance. In this case, one must judge by criteria that are

8. Cf. P. MONETA, *Il matrimonio nel nuovo diritto canónico,* 2nd ed. (Genova 1991), p. 196
9. R. NAVARRO VALLS, "La forma jurídica del matrimonio...," cit., p. 501.
10. P. LOMBARDÍA, commentary on c. 15, in *Pamplona Com.*

primarily moral, so that ignorance will or will not burden the conscience, depending on whether it is guilty or not guilty (vincible or invincible).

With respect to penal law, the canonical order does have specific norms and makes explicit mention of the influence of ignorance, seeing as the offence must be "gravely imputable by reason of malice or of culpability" (c. 1321 § 1). Its commission therefore requires that the offender have knowledge of the penal law. Accordingly, no one who infringed a law or precept, "without fault, ignorant of violating the law or precept; inadvertence and error are equivalent to ignorance" (c. 1323, 2°) is subject to any penalty. The penalty must be diminished if the offence was committed "by one who through no personal fault was unaware that a penalty was attached to the law or precept" (c. 1324 § 1, 9°). Furthermore, in this case, "the offender is not bound by a *latae sententiae* penalty" (c. 1324 § 3). "Ignorance which is crass or supine or affected can never be taken into account when applying the provisions of cc. 1323 and 1324" (c. 1325).

The sanctions of invalidity and incapacity that are produced as a consequence of having incurred a penalty (1331 § 2, 2° and 1333 § 2) are not, of course, affected by ignorance, although naturally they would not be efficacious if the penalty was not contracted through ignorance of the law.

4. *Presumption of ignorance of the law or of the penalty* (§ 2)

It is possible to attribute a certain role to the presumption of ignorance or of error of the law only where canon law specifically allows for the efficacy of ignorance or error of the law. For these cases, c. 15 § 2 states that such ignorance (of the law or of the penalty) is not to be presumed. In order to operate it must first be proved, and the burden of proof falls on the one who pleads ignorance (c. 1585). In the case of invalidating and incapacitating laws, whose non—fulfillment is inexcusable, there is no place for proof. Furthermore, the notion of a procedurally verifiable proof of merely preceptive laws makes no sense. There is a role for *iuris tantum* presumptions of knowledge, however, in the case of penal laws (1323, 2° and 1324 § 1, 9°). It can also be applied, in a different sense, to the common error of law (c. 144 § 1).

5. *Presumption of ignorance of the facts* (§ 2)

Intruding upon an area that does not harmonize perfectly well with the methodology of the Code, c. 15 § 2 also establishes the juridical standing of ignorance and error with respect to the facts, not just of the laws. Along these lines, it declares that ignorance about the facts concerning another which are not notorious is presumed with a presumption *iuris tan-*

tum, but that ignorance about facts concerning oneself or notorious facts concerning another is not presumed. We should also note that this last category admits of proof to the contrary, such that the ignorance acquires juridical standing. Facts concerning oneself can be forgotten through reasonable forgetfulness, while notorious facts concerning another are notorious to a relative degree, depending on the place and the person, and the judge must take the notoriety into account.[11] The notoriety to which 15 § 2 refers is *de facto* notoriety, not *de jure* notoriety, the latter being attributable to "every celebration of marriage, every judicial sentence, and every decree, regardless of whether they have acquired actual notoriety, and notwithstanding that they may even have been performed in secret in accordance with the law."[12] Obviously, unless there is minimal *de facto* notoriety, knowledge cannot be presumed.

11. T.I. JIMÉNEZ URRESTI, commentary on c. 15, in *Salamanca Com.*
12. Ibid., p. 26.

16 **§ 1. Leges authentice interpretatur legislator et is cui potestas authentice interpretandi fuerit ab eodem commissa.**

§ 2. Interpretatio authentica per modum legis exhibita eandem vim habet ac lex ipsa et promulgari debet; si verba legis in se certa declaret tantum, valet retrorsum; si legem coarctet vel extendataut dubiam explicet, non retrotrahitur.

§ 3. Interpretatio autem per modum sententiae iudicialis aut actus administrativi in re peculiari, vim legis non habet et ligat tantum personas atque afficit res pro quibus data est.

§ 1. Laws are authentically interpreted by the legislator and by that person to whom the legislator entrusts the power of authentic interpretation.

§ 2. An authentic interpretation which is presented by way of a law has the same force as the law itself, and must be promulgated. If it simply declares the sense of words which are certain in themselves, it has retroactive force. If it restricts or extends a law or explains a doubtful one, it is not retroactive.

§ 3. On the other hand, an interpretation by way of a court judgement or of an administrative act in a particular case, does not have the force of law. It binds only those persons and affects only those matters for which it was given.

SOURCES: § 1: c. 17 § 1; BENEDICTUS PP. XV, mp *Cum iuris canonici*, 15 sep. 1917 (*AAS* 9 [1917] 483–484); CodCom Resp., 9 dec. 1917 (*AAS* 10 [1918] 77); CodCom Resp., 9 dec. 1917 (*AAS* 11 [1919] 480); PAULUS PP. VI, m. p. *Finis Concilio*, 3 ian. 1966, 5 (*AAS* 58 [1966] 37–40); Secr. St. *Notif.*, 99766, 11 iul. 1967; Secr. St. Litt. circ., 115121, 25 mar. 1968; Secr. St. Lit., 134634, 14 apr. 1969

§ 2: c. 17 § 2

§ 3: c. 17 § 3

CROSS REFERENCES: cc. 6 § 2, 17, 18, 19, 27, 31–34

COMMENTARY

Javier Otaduy

Canon 16, the first of those devoted to the interpretation of the law, contains the basic canonical typology for the interpretation of the law: the authentic interpretation "*exhibita per modum legis*" and the interpretation "*per modum sententiae aut actus.*" Canons 17 and 18 (see commentaries) contain the means and rules for the interpretation of canon law.

1. *Types of interpretation of canon law*

Canon 16 indicates only two types of interpretation of law, interpretation expressed in the form of a law (authentic), and interpretation contained in the form of an act (administrative or judicial). Both cases are instances of interpretation carried out by authority. Canon 16 is concerned with the subjects of authority who have the power to interpret and the nature and perspective of their interpretations. Traditionally, it has been understood that the official and authoritative[1] way to carry out the interpretation of canon law reflects the nature of the juridical system of the Church, and that it has little in common with the interpretative systems of civil societies.[2] This is not to say that canon law does not recognize the usual mode of interpretation whose most visible manifestation is the interpretation governed by juridical custom according to the law, "*optima legum interpres*" (c. 27). Nor are we saying that canon law does not grant juridical value to the interpretation governed by the "*praxis Curiae*" and by jurisprudence (c. 19), or that it does not accept the doctrinal or private interpretation, whose value, nevertheless, derives from the strength of its argumentation ("*tantum valet quantum probat*").[3] Also included within that which we may term doctrinal interpretation are qualified suppositions, to which the *CIC* grants a special value in certain areas. Such is the case with the "*traditio canonica*" for understanding those canons of the Code that reproduce old law (c. 6 § 2), and with the "*communis constansque doctorum sententia*" (c. 19) with regard to suppletion of the law.

We should note that in speaking here of *types of interpretation* we are using a subjective category (according to the individual who interprets), as distinct from the instrumental typology, which considers the ap-

1. Cf. U. STUTZ, *Der Geist des Codex iuris canonici* (Stuttgart 1918), p. 50.
2. O. GIACCHI, *Formazione e sviluppo della dottrina della interpretazione autentica in diritto canonico* (Milan 1935), pp. 3–4.
3. Cf. W. AYMANS-K. MÖRSDORF, *Kanonisches Recht. Lehrbuch aufgrund des Codex Iuris Canonici*, I (Paderborn-Munich-Vienna-Zürich 1991), p. 179.

proach used in the interpretation (literal, logical, systematic), or the typology developed according to its relation to the law, that is, a typology according to function (declarative, explicative, extensive, or restrictive interpretation). We shall address each of these at the appropriate time.

2. *The subjects of authentic interpretative authority* (§ 1)

From the words of c. 16, it seems possible to deduce that the Code considers authentic only that interpretation which is general and obligatory, precisely the two characteristics that best define the interpretation "*exhibita per modum legis.*"[4] We thereby bypass the doctrinal debate about the authentic character of the interpretation made "*per modum sententiae aut actus.*"[5] Although this issues from public authority, it should not technically be considered authentic; it may be termed, "authoritative"[6] or "official."[7] Apart from that, in looking to history, the current terminology lays claim to the most venerable canonical tradition.

The authentic interpretation of the law corresponds, first of all, to the legislator. Canon 16 uses the term "legislator" to denote an office, not an individual person; hence the disappearance of the phrase, "*eiusve successor,*" found in the parallel canon of the old Code (c. 17 *CIC*/1917). All of the offices that have legislative power in the canonical system are authentic interpreters of their own laws. This institutional configuration of interpretative competence also helps to demonstrate that one who has superior legislative power is also competent to interpret authentically a law emanating from an inferior office (provided that it is in fact subordinate). The interpretative office need not correspond exactly to the legislative office, but the "*mens et sensus*" of the physical person responsible for giving and interpreting law must be the same. It is sufficient that the interpretative office have competence over the reception and custody of the given law, "quod melius facere potest per iurisdictionem superiorem, quam per aequalem."[8] Thus it follows that the Roman Pontiff and the Episcopal College are also authentic interpreters of particular legislation,[9] and

4. Cf. O. Giacchi, *Formazione e sviluppo...*, cit., p. 34; R. Castillo Lara, "De iuris canonici authentica interpretatione in actuositate Pontificiae Commissionis adimplenda," in *Comm.* 20 (1988), p. 272.

5. For an ardent defense of the affirmative position (against authors who already in the regimen of the *CIC*/1917 were opposed to it), cf. G. Michiels, *Normae generales iuris canonici*, I (Paris-Tournai-Rome 1949), pp. 483–489.

6. T.I. Jiménez Urresti, commentary on c. 16, in *Salamanca Com.*

7. Cf. A. Prieto Prieto, "La interpretación de la norma canónica," in *Estudios de derecho canónico y derecho eclesiástico en homenaje al profesor Maldonado* (Madrid 1983), p. 639.

8. F. Suárez, *Tractatus de legibus ac Deo legislatore*, l. VI, c. 1, no. 2 (Coimbra 1612), p. 624.

9. Cf. Leo XIII, Ap. Const. *Romanos Pontifices*, May 8, 1881, in ASS 13 (1880), pp. 481–498).

that particular synods are also authentic interpreters of diocesan legislation. Of course, the interpretative intervention of the superior legislative entity requires true doubt about a law, and normally, a lawful appeal.

When the interpretation of the legislator regarding his own law is not made strictly "*per modum legis*," it does not seem that such an interpretation can be denied the character of authenticity, though the term is used loosely. Such is the case, for example, with the interpretation that the Roman Pontiff has made of certain canons through the exercise of his magisterial functions, or through his power of governance as supreme titular head of the executive power and natural head of the "*ordo iudiciarius*."[10] In these cases, the Roman Pontiff does not issue interpretative replies "*per modum legis*" through a simple and declaratory formula. Although these interventions are for the most part exhortative, declarative, and concerned with the urgency of the law, they sometimes carry an explicit intent to interpret, or as certain authors style it, authentic juridical normativity.[11] On the other hand, c. 16 § 1 does not itself explicitly require that the reply be "*per modum legis*" for it to be authentic. If that had been an express requirement of the Code, the provision of c. 16 § 1 ("Laws are authentically interpreted by the legislator ...") would not have been necessary, since it is obvious that the legislator can always make law, and so he can always interpret the law by means of a new law. Therefore, c. 16 means to say something further: that the legislator can authentically interpret in the exercise of his function of pastoral governance, even though he is not technically exercising his legislative power, provided that his willingness to interpret the law is clearly understood.

In addition to the legislator, laws are authentically interpreted by "that person to whom the legislator entrusts the power of authentic interpretation." This transferal of interpretative power can be made for a specific act, but most commonly through creation of an entity for the interpretation of the law that possesses enduring power (ordinary but vicarious)[12] to interpret, in accordance with what has been the relatively traditional practice in modern canon law (e.g., for the interpretation of the Council of Trent, for the interpretation of the Vatican Council II decrees, for the authentic interpretation of the *CIC*/1917, and for the current Code, through the Pontifical Council for the interpretation of legislative texts).

10. Cf., e.g., the allocutions of the Roman Pontiff to the Roman Rota, which include interpretations of c. 1095 (*AAS* 79 (1987), p. 1457 and *AAS* 80 (1988), pp. 1182–1185), of c. 1432 (*AAS* 74 (1982), p. 449 and *AAS* 80 (1988), pp. 1179–1185), or of cc. 1578–1579 (*AAS* 79 (1987), pp. 1453–1459).

11. Cf. G. COMOTTI, "Le allocuzioni del Papa alla Rota Romana e i rapporti tra magistero e giurisprudenza canonica," in *Studi sulle fonti del diritto e i rapporti tra magistero e giurisprudenza. A cura de S. Gherro* (Padova 1988), pp. 181–184.

12. J. HERRANZ, "Il Pontificio Consiglio della interpretazione dei testi legislativi," in *La Curia Romana nella Cost. Ap. "Pastor Bonus"* (Vatican City 1990), p. 472.

The PCILT was created under the name of the Pontifical Commission for the Authentic Interpretation of the Code by the *Motu proprio Recognito Iuris canonici* of February 2, 1984,[13] and was later reconfigured, with its current name, by *Pastor Bonus*, 154–158. "The Council is competent to publish authentic interpretations of universal laws of the Church which are confirmed by pontifical authority" (*PB* 155). This formulation leads to the conclusion that the authentic interpretation not just of the Code, but of all universal laws of the Church, falls within the purview of the Council. Therefore, the particular laws to which the *CIC* expressly defers, those which have not been reordered "*ex integro*" by it and are still in force, liturgical laws, and all present or future laws promulgated with formal independence from the *CIC*, fall under its interpretative power. As long as nothing is said to the contrary, the legislation of the *CCEO* also falls within the Council's purview.[14] It cannot, however, supplement the universal law, nor can it interpret customary norms, or those concluded with political entities, or administrative or judicial acts. As for particular law, the Council is not competent to issue interpretative replies "*per modum legis*,"[15] although it has the important function of determining "whether particular laws and general decrees issued by legislators below the level of the supreme authority are in agreement or not with the universal laws of the Church" (*PB* 158). The exercise of this competence is also rooted in the power of interpretation that has been granted to the Council, by which it has been possible to say, that those judgments of consistency "are nothing other than authentic interpretations of a particular character."[16] The Council carries out its function in the form of a reply to the "dubia obiectiva iuris" formulated by all those who have a lawful right to do so; the Council does not reply to "dubia" which have been raised purely subjectively, through ignorance of the law or failure to apply basic means of interpretation.[17]

The dicasteries of the Roman Curia do not have legislative power (*PB* 18), nor has the power of interpretation manifested "*per modum legis*" been conferred upon them. Notwithstanding, the exercise of their general administrative power "*necessario includit*"[18] the function of interpreting the law through general executory decrees and instructions (cc. 31–34). Canon 34 itself explicitly recognizes this: "*Instructiones, quae legum praescripta declarant ...*" This was precisely one of the original functions for which the instructions were conceived as administrative

13. *AAS* 76 (1984), pp. 433–434.
14. Reservations about this opinion are expressed by J. HERRANZ, "Il Pontificio Consiglio...," cit., p. 473, note 28.
15. For a reiteration of this point, cf. F.X. URRUTIA, "De Pontificio Consilio de legum textibus interpretandis," in *Periodica de re morali canonica liturgica* 78 (1989), p. 517.
16. J. HERRANZ, "Il Pontificio Consiglio...," cit., p. 480, note 52.
17. Cf. R. CASTILLO LARA, "De iuris canonici authentica interpretatione...," cit., p. 286.
18. G. MICHIELS, *Normae generales...*, cit., p. 501.

norms, to offer "*explanationes canonum*" and "*lucem afferre legibus*."[19] These competencies of interpretation must be, at first, declarative ("*legum praescripta declarant*"), not constitutive (as would be the extensive and restrictive ones, as well as explicative "*iuris vere dubii*"). "We cannot rule out the possibility, however, that these normative acts also sometimes infringe on other spheres of interpretation."[20] The *RGCR*, 115 § 5, establishes that, if the documents of dicasteries are in the nature of a general executory decree or of instructions, they must be sent to the Council to be scrutinized both for their legislative harmony with the law in force and for their juridical correctness.

3. *Form and scope of the authentic interpretive replies* (§ 2)

The authentic interpretative replies manifested in the form of law are general and abstract replies (applicable, as is the law, to any addressee embraced by their conditions). They are also hypothetical and stable, conceived, as is the law, to be efficacious in every future case. For these reasons, they have the same force as the law, and must be promulgated. The requirement of promulgation applies, therefore, to all interpretative replies "*per modum legis*."[21] Under the old Code, by contrast, promulgation of declarative replies was not required. The new system affirms the legislative nature of all replies of the Council, while securing authenticity for the interpretative solutions. A non-promulgated reply in the past became a reply whose authenticity could be doubted. Moreover, it has always been very difficult to distinguish declarative replies from explicative ones. This makes necessary the requirement of promulgation in all cases.

The functional typology established in § 2 for the authentic interpretation "exhibita per modum legis" is as follows: *declarative*, if it merely clarifies words of the law that are certain in their own right; *explicative*, if it explains a doubtful law; *extensive*, if it expands the sense of the law; and *restrictive*, if it limits it. Under the regimen of the previous commission,[22] there were deep doctrinal doubts about the possible extent of the replies. Some argued that truly extensive and restrictive replies resulted in the generation of a new law, a task beyond the capacity of the commission. The practice of the commission itself (which was also accompanied

19. Cf. mp *Cum iuris canonici*, September 15, 1917, in *AAS* 9 (1917), p. 483.
20. J. OTADUY, "Naturaleza y función de la Comisión Pontificia para la interpretación auténtica del CIC," in *Ius canonicum* 48 (1984), p. 758. Cf., e.g., *Instructio* of Jun 1, 1972, in *AAS* 64 (1972), pp. 518–525.
21. Hypothetical replies not promulgated by the Council do not constitute, in our view, authentic replies "per modum legis exhibitae." In dissent, R. CASTILLO LARA, "De iuris canonici authentica interpretatione...," cit., p. 286.
22. For all relating to the regimen of the CPI of the *CIC*/1917, cf. the interesting study of A. BREMS, "De interpretatione authentica Codicis iuris canonici," in *Ius Pontificium* 15 (1935), pp. 182–190; 298–313; 16 (1936), pp. 78–105; 217–256.

by an array of arguments) led, nevertheless, to the adoption of a nearly unanimous doctrinal opinion that all replies, including the extensive and restrictive ones, were possible and lawful. The difficulty in distinguishing clearly the types of reply, the impossibility of denying lawfulness to the practice of the commission, and the words of the Code itself which spoke (as they do here in § 2) of "*extendere legem*" and "*coarctare legem*" (and not just about extending or restricting the proper meaning of its words) all led to this result. The intent of the current Pontifical Council "is not favorable to giving extensive interpretations in the true sense, in other words, those extensive interpretations that generate a new law. Therefore, if the need for such interpretation arises, *specific* approval"[23] is requested of the Roman Pontiff. Heretofore, this petition has never been used, and the approval of the Pope has been ordinary or generic. It is the Council itself which decides if the solutions are declarative or constitutive in nature, and thus whether or not they require specific approval. For this reason, too, it is not easy to deny their lawfulness.

The interpretative solution that "restricts or extends a law or explains a doubtful one, is not retroactive." This provision runs up against the larger problem that the authentic replies do not advertise their character, they do not say whether they are constitutive (explicative, extensive, or restrictive) or simply declarative. Administrative or judicial power, in the work of applying the law, and canonical doctrine, in its task of analyzing it, both have the same power of distinguishing the character of the decision.[24] It can also happen that a truly explicative solution of a doubtful law leads, nevertheless, to a declarative interpretation of natural law with the result that this second function takes precedence over the first.[25] It is also possible, that the interpretative replies themselves are not able to resolve the doubts or that they create "*ius dubium*."[26]

4. *Interpretation of the law made by a judicial sentence or an administrative act* (§ 3)

In addition to the authentic interpretation (produced in the sphere of legislative power), the interpretation made for a singular case by virtue of judicial and administrative power is possible (i.e., in judicial sentences

23. R. CASTILLO LARA, "De iuris canonici authentica interpretatione...," cit., p. 281. (The translation is ours.)

24. In our opinion, for example, the interpretative decisions regarding c. 87 § 1 (*AAS* 77, 1985, p. 771) and c. 767 § 1 (*AAS* 79, 1987, p. 1249), constitute explicative instructions regarding the power of dispensation and the concept of disciplinary law.

25. Such is the case, in our view, of the interpretative solution of c. 1103 (*AAS* 79, 1987, p. 1132), by which the vitiation of consent outlined in that canon applies to the marriages of non-Catholics.

26. For instance, the reply concerning c. 1737: in *AAS* 80 (1988), p. 1818. Cf. J. MIRAS, "Respuesta auténtica de Jun 20, 1987," in *Ius canonicum* 61 (1991), pp. 211–217.

and in administrative decrees and rescripts). In this case, § 3 warns that such interpretation "does not have the force of law. It binds only those persons and affects only those matters for which it was given." The interpretation made for a singular case can occur in two conceptually distinct ways. It can be a formally interpretive reply given for a particular case, or it can be, as happens much oftener, a juridical act (judicial or administrative) that entails an interpretation of the law itself, as do all acts of application of the law.

The first case presents the problem of the acts "formaliter particulares sed realiter (seu aequivalenter) generales." This occurs, although less and less often in the practice of the dicasteries, in the form of interpretative replies that originally had a specific addressee but which were later promulgated in *AAS*,[27] sometimes with the removal of any connotation of singularity. The value of these replies of the dicasteries is contained in their own power, which is executive. They are, therefore, declarative, exhortative, or executory.

An interpretation made by judgment, decree, or rescript is binding on the parties and has general meaning only incidentally, through the jurisprudence and practice of the Roman Curia (c. 19). The judicial judgment, once it has become an adjudged matter, has the force of law and has the effect of law between the parties (c. 1642). This means that it cannot be affected by an authentic interpretation that is merely declarative, even if it has retroactive force.

27. Cf., e.g., "Responsa SC pro doctrina fidei de interpretatione decr. 'Ecclesiae pastorum'," July 7, 1983, in *AAS* 76 (1984), pp. 45–52.
Editor's Note: for the complete collection of the responses of the PCILT see Volume V, Appendix II.

17 **Leges ecclesiasticae intellegendae sunt secundum propriam verborum significationem in textu et contextu consideratam; quae si dubia et obscura manserit, ad locos parallelos, si qui sint, ad legis finem ac circumstantias et ad mentem legislatoris est recurrendum.**

Ecclesiastical laws are to be understood according to the proper meaning of the words considered in their text and context. If the meaning remains doubtful or obscure, there must be recourse to parallel places, if there be any, to the purpose and circumstances of the law, and to the mind of the legislator.

SOURCES: c. 18

CROSS REFERENCES: cc. 6 § 2, 18, 19, 36

COMMENTARY

Javier Otaduy

After the canon that sets out the typology of interpretation, the *CIC* presents the canon containing the method of interpretation. In discussing the resources of interpretation, the biggest problems of the whole subject arise. With regard to the interpretation of the law, as is well-known, there has been an extensive development of traditional canonical doctrine as well as a lengthy debate in contemporary canonical science. Interest in this is entirely appropriate, since the norms of interpretation affect the whole of the juridical system and confer a most important mission upon the one charged with applying the law.

1. *Juridical rules contained in c. 17*

Canonical laws (juridical norms) are not prescriptions that put into operation a mechanical object which is defined and predictable in its behavior; these are rules to guide and give value to free human behavior. No legislator can conceive a norm capable of completely embracing any given area of human activity. The laws are formulated concisely and abstractly, which means that human behavior will not always turn out to have been perfectly anticipated in the work of legislation. This is not a defect of the laws, but rather implicit in norms that are general in nature. The task of interpretation is frequently necessitated by the impossibility of foreseeing in a general norm the diversity of results of human activity with all of its nuances.

The interpretation of the law is a necessary and not an incidental task. To be absolutely sure of its true meaning, understanding the message of the norm requires not only an understanding of the textual formulation; it is also necessary to use the means of interpretation to confirm the scope of that message. Understanding the law always involves some interpretation. At first glance, however, c. 17 does not appear to support this assertion since it cautions that only in the case of textual obscurity is recourse to the aid of interpretation possible,(namely, to parallel places, to the purpose and circumstances of the law, and the mind of the legislator). As the best canonical doctrine has pointed out,[1] however, this provision must not be understood absolutely. The first rule of c. 17 (which reflects the principle "*in claris non fit interpretatio*") has a two-fold sense. "Its true sense is to prohibit the distortion of norms that are clear; it does not mean to say that, in the case of a grammatically correct norm, all further inquiry is unnecessary."[2] All interpretive aids must, then, be applied "*semper simul*,"[3] if only to confirm the assumption that the words are clear.

In the words of the law ("ecclesiastical laws are to be understood according to the proper meaning of the words"), traditional canonical doctrine has always discovered the manifestation of the legislator's will to be limited, in that the law is made known in the express words of its formulation. The task of interpretation, therefore, has been understood as a search for what the legislator intended to say when he formulated and promulgated the legislative text. Consequently, the means of interpretation do not stem from the juridical system in general, nor from history (seen as the designer of the norm), nor from the ideological and programmatic context that inspired the law. Neither do they stem from the specific circumstances and sociological conditions that affect the application of the law, as though the meaning of a juridical norm could be understood only in its specific instances of application. The result is that the norm would be only an open type, not a closed one, which is absolutely essential for interpretation to exist at all, and would never be clear and unequivocal unless it were applied to a specific situation.[4] The resources of interpretation, on the contrary, stem from the means that make the will of the legislator accessible. They are limited to figuring out what the legislator meant to say when he said what he said. This view of interpretation has been called subjective (that is, shaped and defined by the "*voluntas seu mens legislatoris*"), and has been contrasted with so-called objective interpretation. Such interpretation posits that the law possesses an autonomous life, which is to a

1. Cf., e.g., G. MICHIELS, *Normae generales iuris canonici*, I (Paris-Tournai-Rome 1949), pp. 516–517.

2. A. PRIETO PRIETO, "La interpretación de la norma canónica," in *Estudios de derecho canónico y derecho eclasiástico en homenaje al profesor Maldonado* (Madrid 1983), p. 635.

3. G. MICHIELS, *Normae generales...*, cit., p. 517.

4. Cf. H. PREE, *Die evolutive Interpretation der Rechtsnorm im kanonischen Recht* (Vienna-New York 1980), pp. 252–256 and *passim*.

certain extent independent of the legislator who conceived it. Once it enters the social and juridical world, it acquires meanings distinct from those its author meant to give them.

It is undeniable that c. 17 takes up the tradition of subjectivism. Notwithstanding, it is important to situate this idea in its true place: *a*) the tradition of subjectivism does not support the approach to the will of the legislator as an inquiry of the psychological-personal type. "Legislator" is, in this tradition, expressive of office, and consequently, the will of the legislator is that which is implied in the law. *b*) The subsidiary interpretive resources presented in c. 17 no doubt contain a considerable measure of objectivity, even though they are always presented as simple attempts to obtain the will of the legislator: the parallel places definitely call upon the juridical system, the "*ratio vel finis legis*" frequently points to an objective rationality, and the "*mens legislatoris*" itself cannot be understood without reference to the general principles of the law. On the other hand, the Code (c. 6 § 2) also has recourse to history, to the "canonical tradition," for the interpretation of its canons to the extent that they reproduce old law. *c*) In addition to the rules of c. 17, the canonical system also acknowledges certain objective ways to interpret norms, in which the will of the legislator operates only "*a posteriori*" or "*ab extrinseco*" to guarantee authoritatively the correctness of the interpretation, without diminishing its objectivity. Such are, for example, canonical custom, jurisprudence, and administrative practice, because jurisprudence and practice do not just function to supplement the law (c. 19), but also to constitute circumstances relevant for its interpretation. *d*) It is undeniable that c. 17 intends to act as a restraint on the evolutionary interpretation of the law,[5] which has been fairly widespread in canonical scholarship during recent years,[6] and as a guard against the undue influence of the will of the interpreter or of the one who applies the law.

In the application of the subsidiary means contained in c. 17 (parallel places, purpose and circumstances of the law, mind of the legislator), no strict, formal hierarchy exists, in our opinion. One is not required to consider the purpose of the law after exhausting all references to parallel places. Depending on the case, one or another of the methods can be more useful in working out the true sense of the text of the law. The means of interpretation are applied simultaneously, and they operate conjointly, although the contribution of each may be of different magnitude or probative capacity. The conviction of the interpreter regarding the wisdom of

5. An outline of this interpretive trend was offered and critiqued by R. CASTILLO LARA, "De iuris canonici authentica interpretatione in actuositate Pontificiae Commissionis adimplendae," in *Comm.* 20 (1988), pp. 281–284.

6. Cf., from a historical perspective, H. PREE, *Die evolutive Interpretation...*, cit.; from the perspective of the doctrine's adoption of the principles, L. ORSY, "The interpretation of laws: new variations on an old theme," in *The Art of Interpretation. Selected Studies on the Interpretation of Canon Law* (Washington 1982), pp. 44–79.

the interpretation is the product of all of the tests that confer greater juridical suitability on the interpretation. The conviction does not come about through a process of formal and speculative logic, but through practical reasoning, with a view to obtaining a feasible and suitable result in the realm of human endeavor,[7] precisely the purview within which the law operates.

2. *The proper meaning of the words*

The first rule (rightly considered, it is the only one) contained in c. 17 establishes that the laws must be understood according to the proper meaning of the words, both their text and their context. Only if the text fails through obscurity, the canon says, must one have recourse to the other interpretive aids. One must bear in mind the simultaneity of the application of the rules: ordinarily a law will become clear only after corroborating its apparent textual clarity with the other means of interpretation (and not just with grammatical logic). Nevertheless, it should be clear that the primary purpose of the rule is to ensure that the interpretation depends or is based on the words used by the legislator, carefully and deliberately chosen to manifest his will. One must not suppose that the intention of the legislator is other than the one manifested in his words: otherwise "*frustra ferrentur leges.*"[8] The words, then, are "*quasi legis substantia,*"[9] and one must not look for artificial reasons to discredit their proper sense.

The proper interpretation reflects a reading that is not equivocal or analogous and that does not modify, extend, or restrict unnecessarily the meaning of the words. Accuracy admits of degrees; the legislator may use words more or less accurately. The proper sense derives, as is logical, from the technical-juridical meaning of the terms, which sometimes can have normal equivocal versions ("action," "seizure," "ordinary"), or which may be considerably broader ("benefit," "religious," "college," "profession"), or simply not be designed for the rigor inherent in law ("similar," "infant," "appeal"). We cannot lightly discount the possibility that the legislator may use technical expressions in their familiar or less proper sense, nevertheless, juridical terms generally have precise definitions which one must remember in order to preserve their proper meaning.[10] It would be equally

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7. Cf. A. PRIETO PRIETO, "La interpretación de la norma canónica...," cit., p. 637; also of great interest in this regard is the methodology of juridical topics formulated by T. VIEHWEG, *Tópica y jurisprudencia*, trans. L. Díez Picazo (Madrid 1964).

8. F. SUÁREZ, *Tractatus de legibus ac Deo legislatore* (Coimbra 1612), lib. III, ch. 20, no. 7, p. 283.

9. Ibid., l. VI, ch. 1, no. 19, p. 630.

10. The section, "De verborum significatione," has appeared as often in juridical compilations, both canonical and civil, as in encyclopedic works about the use of terms and expressions. Cf., e.g., A. BARBOSA, *De clausulis usufrequentioribus*, in *Tractatus varii* (Lyons 1678).

destructive to the proper interpretation of terms to use them in a manner contrary to their natural sense: to imply, for instance, that an exhortative expression entails juridical obligation, or that an expression which is merely preceptive carries invalidating or penal sanction. It has often been said that the meaning of the words must be that which they had at the moment of the promulgation of the law (the meaning which the legislator gave them). This view follows from the notion that interpretation is an approach to the "*voluntas legislatoris.*" Nevertheless, the meaning at the time of promulgation can vary across juridical environments established by the system itself, such as authentic custom, administrative practice,[11] and of course, authentic interpretation. We must keep in mind that indeterminate juridical concepts ("grave cause," "just reason," "suitable candidate"), or relative juridical concepts, which depend in large part on societal factors ("public order," "scandal," "damage"), are open to a logical transformation of their meaning, and this need not imply disloyalty to the will of the legislator.

The grammatical interpretation of the law is not the labor of mere verbal semantics—mechanical analysis of definitions of words without consideration of the relationships between them. The words are meaningfully linked in the text and inscribed in the context. The text and the context also help in understanding that the legislator sometimes uses language which is not strictly technical, and that the true meaning therefore has a lesser degree of accuracy. (For instance, the concept of "*lex*" used to designate the constitutive and original basis of a foundation ("*lex fundationis*": cf. cc. 149, 559, and 680), or the concept of "*statuta*" used to designate those norms imposed on or given to an institution which do not issue from their own autonomy, or the reference to special laws (cf. cc. 295 § 1, 513 § 1, and 788 § 3).)

To understand the interpretive effectiveness of the text and context, the tradition provides us with rules that are part of the common hermeneutic sense ("verba generalia generaliter sunt intelligenda," "ubi lex non distinguit neque nos distinguere debemus," "non sermoni res, sed rei est sermo subiectus," etc.). In addition to these rules, let us point out that the context of the norm also includes its internal position within the law in which it is inscribed. Hence the axiom "de rubro ad nigrum valet illatio"—in other words, the rubric that frames the norm can serve as a means of interpretation. The common sense of the juridical interpretation, however, sometimes lends validity to the opposite rule ("de nigro ad rubrum valet illatio") when the words of the norm are so clear that they overrule a defective systematic placement. In this regard, we point out that many of the juridical expressions with traditional authority, many of the "*regulae iuris*" and "*brocarda,*" which are formulated as axioms or proverbial juridical apothegms of the law, are very loose in sense, which can produce

11. Cf. A. van Hove, *De legibus ecclesiasticis* (Malines-Rome 1930), p. 261.

contradictory results if used carelessly. The truth is that many of them are inherently contradictory because they were created to resolve matters that, in practice, required very diverse solutions. They provide the interpreter with some help, in that they encapsulate formulaically one solution from experience, which is valid in some instances. They do not, however, relieve the interpreter of his fundamental task of figuring out the particular cause at issue.

In the function that c. 17 grants to the "context" of the law, we must understand the context to be the legal entity in which the norm is included. Therefore, it is not susceptible to interpretation across disciplines (such as theology, philosophy, sociology, and psychology), which might shed light on the norm.[12] None of these extralegal aids, whose usefulness in many respects is beyond question, are relevant here.

3. *Parallel places*

By "parallel places" we mean those legal passages[13] which treat the same subject, though they contemplate it from a different disciplinary perspective. They need not treat the same subject with total agreement of perspective and argumentation (i.e., they need not present "*idem ius*").[14] However, it must be emphasized that we are speaking of identical, not merely similar, subject matter. The more obscure texts shall be interpreted through the clearer ones, as follows from a natural hermeneutic principle. Parallel places make more sense and have greater juridical efficacy if canonical laws (and canon law proper) are understood as part of a systematic, ordinal scheme (like a unitary juridical system), in which legal passages are seen as pieces that work in an integrated system.

Parallel places frequently confirm the laws in those passages that are not completely clear. For instance, if from some of the extremes of cc. 294–297 a doubt should arise regarding the associative or institutional character of personal prelatures, cc. 265 and 266 § 1 would clarify the uncertainty, by comparing, with regard to incardination, personal prelatures to particular churches. However, it could also happen that antinomies arise between various parallel passages. Very often these antinomies will be no more than illusory and can be resolved by the use of simple rules, as for instance the one that explains that the specific derogates the general, that is, that the

12. For an opposing view, cf. L. ORSY, commentary on c. 17, in *The Code of canon law. A text and commentary* (New York-Mahwah 1985), p. 36.

13. Clearly, the parallel places cannot be applied to extralegal fields, much less extrajuridical ones. Cf., for a dissent, E. KNEAL, "Interpreting the revised Code," in *The Art of Interpretation*..., cit., pp. 29–31.

14. As is desired, without adequate justification, by L. BENDER, *Legum ecclesiaticarum interpretatio et suppletio. Commentarius in canones 17, 18, 19 et 20* (Rome-Paris-New York-Tournai 1961), pp. 140–150.

more specific passage prevails over the more general one.[15] If c. 1 cautions that the canons of the *CIC* are applicable only to the Latin Church, while on the other hand c. 111 stipulates certain provisions regarding incorporation into other Churches, it is clear that c. 1 does not derogate from c. 111, but rather that the latter canon should be understood as a specific exception to the former. If c. 87 § 1 grants diocesan bishops the power of dispensation from all disciplinary laws except the procedural, penal, and specially reserved ones, and c. 905 § 2 grants the local Ordinary restricted power of dispensation from a specific disciplinary law (which is not reserved, and is neither a penal nor a procedural law), clearly the norm of c. 905 § 2 prevails as a specific exception to c. 87 § 1. The principle of the derogation of generality by specificity is an important rule for the interpretation of law. One should, above all, refrain from appealing to all-encompassing principles as if they were generic derogatory expedients opposed to the specific provisions of the law.

The antinomies between parallel passages may be irreconcilable (genuinely contradictory), although this is less likely if all means of interpretation are used. In such a case, "*ius vere dubium*" would arise which would diminish the value of the juridical norm. Before concluding that a contradiction exists, it is important to interpret the terms in their less proper sense to see if the conflicting passages can be reconciled.

When parallel passages did arise, the commentators on the *CIC*/1917 taught that one was to employ the principle of "exclusio unius est inclusio alterius," as well as its converse "inclusio unius est exclusio alterius." These rules, which are to be used very cautiously, are not properly an application of parallel places, but rather fall under what we may term grammatical interpretation or analysis of the proper meaning of the words. Suppose one were asked: does the inclusion of a normative supposition in the law exclude as illegal those laws which have not been included? Or conversely: does the exclusion of a normative supposition in the law include as legal those laws that have not been excluded? Obviously in both cases one would have to answer in the negative. Only when the inclusion or exclusion is understood as clearly exceptional, and this is made perfectly clear in the words of the law, or when they are found in penal norms or norms that carry serious sanctions, will the so-called argument "*a contrario*" be valid and applicable.

As stated above, parallel passages are applications of systematic interpretation: one norm sheds light on another. Consequently, one must also conclude that the complete juridical system sheds light on specific laws. Wherefore, the interpretive assistance provided by parallel places is frequently likened to that provided by the general principles of the law, especially now that the doctrine can rely on a codified canonical system,

15. Michiels understands this principle differently: cf. G. MICHIELS, *Normae generales...*, cit., p. 526.

structured as a single unit (still more if we favor the systematic method of interpretation over the exegetical one). By general principles of the law, we mean those universal juridical principles (those that apply to all canonical laws) or particular ones (that apply within specific individual areas) which inspire and motivate the laws from within, often tacitly, and which constitute their rational foundations. A problem also immediately arises at this point that is concomitant with all interpretation of the law if it is attempted with any assumptions that are not strictly positivistic: the risk of subjective interpretations that subvert the juridical system, i.e., the manipulation of that implicit rational foundation in order to give legal force to the will of the interpreter. This problem explains why canonical doctrine sometimes appears cautious when faced with accepting the unconditional efficacy of recourse to general principles.[16] This risk, however, is preferable to the opposite. The *CIC* defers to the general legal principles of the law in instances of supplementation of the law (c. 19), although it does not exclude their use in the area of interpretation. (See commentary on c. 19 for more on the nature and functioning of the general principles.)

4. *The purpose of the law*

Purpose or "*ratio legis*" is the driving force behind the law. This should not be confused with the rationale implicit in every canonical legislative mandate (to establish a just social and community order capable of pursuing "*salus animarum*"), nor should it be confused, either, with the specific objective reason, which naturally accompanies any norm, by virtue of which it is connected to the general rationale of the juridical system (e.g., the ordinary pastoral care of parishioners is the intrinsic *raison d'être* of parish churches; the procedural protection which marriage deserves explains the figure of the defender of the bond). The "*ratio legis*" reflects the "*finis operantis*," not the "*finis operis*,"[17] the external cause that prompts the legislator to issue a norm. If the legislator expressly indicates the "*ratio legis*," it is called "*ratio scripta*;" if it can be deduced with certainty but is not expressly written, it is called "*ratio non scripta*." Of course, the "*ratio scripta*" has much more value. The "*ratio non scripta*," or inferred purpose, must meet many other requirements in order to be considered certain.

Ch. Lefebvre[18] illustrates the concept of "*ratio*," (which means "rationale for") using the decretal *Saepe* of Clement IV, a text which is frequently cited on this point. The decretal explains that oftentimes

16. Cf. G. MICHIELS, *Normae generales...*, cit., p. 530.
17. The most complete discussion of this point is by A. M. DARMANIN, "De reservatione peccatorum iure Codicis piano-benedictini," in *Angelicum* 5 (1928), pp. 213–241.
18. Cf. CH. LEFEBVRE, *Les pouvoirs du juge en droit canonique* (Paris 1938), p. 30.

unworthy persons, such as excommunicates or apostates, abandon their native land in order to be ordained in other places where their condition is unknown. This fundamental legal passage would constitute the motivation or the driving force behind the law. The text goes on to say that the Roman Pontiff wants to confront the dangers that threaten the souls of those involved in these matters ("*obviare periculis animarum ipsorum*"). This would constitute the "*ratio legis,*" the final cause external to the norm. Finally comes the legislative element, in which Clement IV establishes that no Bishop of Italy may bestow the sacrament of orders upon a foreigner. This is the sequence which the commentators most often follow when they analyze the structure of the decretals: "ponit causam impulsivam, dat rationem, decidit casum."

The purpose or "*ratio legis*" is a well-developed historical subject, and we cannot disregard those doctrinal guidelines if we are to understand the words of c. 17 "*quatenus ius vetus referunt*" (c. 6 § 2).[19] The restriction or extension of the law by virtue of its "*ratio*" was for centuries nearly an unrestricted resource of interpretation that was bluntly invoked. There was not a clear distinction between the "*ratio legis*" and the "*mens legislatoris,*" and it was accepted as a general principle that the "*ratio,*" (as though it were the soul of the law) was endowed with the same force as the law itself, so that the range of application of the law came to be "*quasi indefinita.*"[20] It is easy to see that a broad view of the efficacy of the "*ratio*" may lead one to suppose, as for instance in the aforementioned example of the decretal *Saepe*, first, that this norm is likewise applicable in other cases, if the same motive is present, so that the norm can thus be extended to other designees besides the Italian bishops. Secondly, it may also lead one to think that only if the "*ratio legis*" prevails completely, (i.e., when souls are truly endangered), will the extension take place, and the same is true of restriction of the law.

The doctrinal landscape is radically altered by the Suarezian doctrine.[21] Intending to put an end to the unrestricted interpretation of the "*ratio,*" Suárez distinguishes between the "*mens legislatoris*" (or "*mens legis,*" as stated in medieval doctrine) and the "*ratio.*" The "*ratio*" is not the law, nor does it satisfactorily include the "*mens*" or will of the legislator, that which the legislator truly knows and intends. The "*ratio*" does not amount to the legislative will and is not perfectly synonymous with it; nor is it necessarily the appropriate motive for that will. The motives offered by the legislator can differ somewhat from what the law intends and even from what it actually says. Thus, the "*ratio legis,*" the motivation for the law, (which unquestionably constitutes a means of interpretation), will be

19. For the historical development of the doctrine on this point, cf. CH. LEFEBVRE, *Les pouvoirs du juge...*, cit., pp. 36–66.
20. G. MICHIELS, *Normae generales...*, cit., p. 536.
21. F. SUÁREZ, *Tractatus de legibus...*, cit., lib. VI, ch. 1 and 2, pp. 623–634.

operative only when the same motive obtains in the respective cases (comprehensive interpretation, Suárez would say). And yet it will not be able to extend or restrict the words of the law, i.e., that which the legislator really intended (extensive interpretation). Henceforth, the maxim "*ratio legis non est lex*" will recover its special meaning. The doctrine that follows the lead of Suárez, which now comes to us, will stress the same arguments and will even reinforce them, asserting that the subject matter also, not just the motive, must be the same. Moreover, for the final external cause or "*ratio legis*" to be applied, it will not only be necessary that the motive and subject matter be the same, but further that the "*ratio*" be certain (just as the law must be certain for it to have the capacity to oblige), unique (because a double motive would make the purpose uncertain), adequate (to cover the whole extent of the law completely), and positive (so that it may be proven, not merely supposed to be true).[22]

This drastic reduction in the efficacy of the "*ratio legis*" assumes that identity of motive will be applied only to those cases that are comparable, related, correlative, and exemplary, cases that are, very much like the declarative interpretation. In comparable (or assimilated) suppositions, the law itself usually declares the attribute of identity of effects (e.g., cc. 368, 381 § 2; 620, and 1140), and it thus becomes superfluous, in those cases, to speak of the "*ratio legis.*" Related suppositions are those that manifest a natural dependency, so that one cannot be understood without the other: for example, he who has the power of dispensation if there is a need for urgency and grave harm in delay also has the power to judge concerning the verification of such a supposition of urgency or grave harm in delay (c. 87 § 2). By "correlative suppositions", we mean those which are complementary and identical in scope (for instance, father and mother in their obligations to their children, husband and wife in their marital rights and responsibilities to each other). By way of illustration, correlative motive is exhibited by c. 1148 § 1, which explicitly attributes to the woman also that which applied only to the man in the *CIC*/1917 and in the Constitution *Altitudo* of Paul III. Finally, exemplary suppositions are those in which the legislator does not specifically restrict his will, but rather accepts its extension by way of identity or similarity of "*ratio*" (e.g., cc. 49 or 1741).

The real force of the "*ratio legis*" in formalized law (which is accordingly less likely to declare the motives of the legislative mandate) and codified law (which is thereby better able to find systematic motives that transcend the particular "*ratio*" of each norm) is undoubtedly less today than it was in previous times. Nevertheless, it would be a great error to underrate the "*ratio legis*" as a means of interpretation.

22. Cf. CH. LEFEBVRE, *Les pouvoirs du juge...*, cit., p. 35.

5. *The circumstances of the law*

The circumstances of the law constitute an important resource for its interpretation. Circumstances, or factors that exert their influence on the periphery of the norm without constituting its essence, can be previous to the formation of the law (the historical precedents of the norm), or previous to the promulgation (the preparatory works). They can be contemporary to the promulgation (the moment of the giving of the law), or subsequent to the entering into force of the law (the execution or practice by which it is applied).

It should be noted that c. 17 in its formulation links the purpose and circumstances and considers them a single means of interpretation. This is an important indication that the circumstances, in many cases, can constitute a valuable extrinsic element in demonstrating the "*ratio,*" rationale for, or purpose of the law. The preparatory works in particular can illuminate this problem. The doctrine has warned simultaneously both of the importance of this means and the caution with which it should be used.[23] In fact, the elaboration of the Code affords us access to the previous *schemata* and a digest of the proposals and discussions that occurred, which unequivocally allows us to track the "*ratio legis*" of certain suppositions. Although the committees for the revision and writing of the Code did not possess legislative power strictly speaking, if we can ascertain from the preparatory works that a definite "*ratio*" or "*mens*" underlies a particular norm, that "*ratio*" or "*mens*" can be attributed to the norm because that is how it was adopted by the legislator (i.e., it was adopted with that implicit "*ratio*"). Nevertheless, it is important to distinguish between the "*mens*" of the elaborating committee and individual opinions, so that we do not indiscriminately attribute to the "*coetus*" that which is no more than the opinions of its components.

The moment of the giving of the law is also relevant as a circumstance of interpretation. Here we mean the social or practical circumstances that serve as the pretext for the norm and provide a motive within the immediate historical context. This is easy to see if, for instance, we are examining a corrective law or one necessitated by an abuse,[24] or one which mitigates a requirement that had produced anxiety in the designees of the law, or which interpreted a doubtful law, or which was required by doctrinal declarations of the pastors. In this last sense, we must include the historical circumstance that occasioned the Code, although, of course, it constitutes more than a mere pretext for the law: namely, the Second Vatican Council.

23. Cf. A. VAN HOVE, *De legibus ecclesiasticis*, cit., pp. 272–273.
24. Cf., as a typical example, the Instr. *Memoriale Domini*, of May 29, 1969, in *AAS* 61 (1969), pp. 540–545.

(Regarding the historical precedents, please see c. 6 § 2 and its commentary.)

As for the practice of execution of the norm and the jurisprudence, if we wish to remain faithful to the traditional principles of subjective interpretation, "per se et directe legislatoris voluntatem non aperiunt."[25] Indeed, they are subsequent to the promulgation of the law and the will inscribed in it by the legislator. Yet we should also note here that the canonical system has never ignored the need for a reasonable degree of objective interpretation. That which as been "*similiter iudicatum*" or "*similiter exsecutum,*" in addition to being able to supplement the law (c. 19), also has a morally certain interpretive value. On the other hand, it is not easy to distinguish supplementtory law from extensive interpretation.

6. *The mind of the legislator*

It is true that the mind of the legislator does not comprise a further means of interpretation, but merely an alternative one. It is, rather, the point of reference for all the means of interpretation.[26] The "*mens legislatoris*" is the "*lex,*" although it connotes the full and comprehensive meaning which depends on the mind that conceives the words more than on the words themselves. Notwithstanding, since c. 17 includes the mind of the legislator in the list of helpful means, it appears to grant it a specific role in the realm of interpretation. This special resource has been understood by some to be the administrative or governmental will that the legislator manifests in the exercise of his power,[27] or even "the style or particular *political attitude* of the legislator in each one of his laws: for instance, that of Pius XII or Paul VI, that of the Council of Trent or Vatican II."[28] Nevertheless, without transgressing an interpretive approach which is perfectly compatible with the traditional view, "by *mind of the legislator* we should understand *all the intellectual criteria* which, although they are previous to the formulation of the norm itself and affect that formulation in various ways, even still need not appear in the norm, because it is the function of the law *to regulate behavior, not to justify the sense of the regulation.*"[29] Among those criteria are the constitutional principles and the basic principles of canonical institutions, along with the basic criteria for the methodology of the juridical task (for instance, the fundamental criterion which says that the laws must be interpreted in such a way that they are not absurd or unjust, which would obviously contravene the mind

25. G. MICHIELS, *Normae generales...*, cit., p. 533.
26. Thus, A. VAN HOVE, *De legibus ecclesiasticis*, cit., p. 273.
27. Cf. G. MICHIELS, *Normae generales...*, cit., pp. 555–556.
28. T.I. JIMÉNEZ URRESTI, commentary on c. 17, in *Salamanca Com.*
29. A. PRIETO PRIETO, "La interpretación de la norma canónica...," cit., p. 655.

of the legislator). Other criteria include certain derivative principles of the inherent nature of canon law, which are perforce jointly shared with the task and mind of the legislator (such as the tendency in interpretation toward clemency as opposed to rigor).

The objective purpose of the law must naturally be considered as included in the "*mens legislatoris.*" We are no longer in the scope of a specific "*ratio,*" that is, the external motive that prompts the legislator to issue a particular law, but rather in the area of objective or institutional rationale. The laws (and the legislator inasmuch as he or she is their author), are measured by rationality and must be understood according to the juridical institutions. In other words, the legislator takes for granted (as part of his or her "*mens*") that he or she is acting within a coherent juridical system and in the context of institutions that have established purposes. Naturally, the interpreter is fully justified in accessing the mind of the legislator in light of the institutional purpose of the canonical forms, even though that purpose may not be expressly stated in the norm. Finally, we should remember that the "legislator" described in canon law is an institutional figure, not a physical person. Thus, to appeal to the legislator means to deliberate in light of the system of laws and the motivations of law that support them.

It would be even more doubtful to say that the mind of the legislator includes the criterion of "*aequitas canonica.*" It is undeniable that equity has a place in the application of the law in specific cases, but this is not the function of the legislator, but rather the function of the one who applies the law. It belongs less to the "*mens legislatoris*" than to the "*mens iurisprudenti vel exsecutoris.*" Along the same lines, we must understand that "*aequitas,*" though frequently invoked by the doctrine as a requirement of the mind of the legislator, is not primarily an abstract principle of *interpretation* to be numbered among the other general means, but rather a principle that guides the authoritative *application* of the law in a particular case,[30] an application made by judges or by those who exercise administrative power.

30. In partial agreement with this opinion, H. MÜLLER, "Oikonomia ed aequitas canonica," in *Incontro fra canoni d'Oriente e d'Occidente. Bari 23-29 sept. 1991* (pro manuscripto).

18 **Leges quae poenam statuunt aut liberum iurium exercitum coarctant aut exceptionem a lege continent, strictae subsunt interpretationi.**

Laws which prescribe a penalty, or restrict the free exercise of rights, or contain an exception to the law, are to be interpreted strictly.

SOURCES: c. 19

CROSS REFERENCES: cc. 10, 16 § 2, 17, 36, 138, 1204, 1313, 1354 § 3

COMMENTARY

Javier Otaduy

Canon 18, the last to treat explicitly interpretation of the law, presents a norm about the interpretation of so-called odious laws and takes up, with new categories and a different typology, the traditional canonical principle, "*odiosa restringenda, favorabilia amplianda.*" In effect, it discusses new categories adopted in the Code, new in the sense that traditionally, these three cases (penal laws, laws that restrict rights, and laws that contain an exception to a law) were not expressly delineated. As is well-known, this canon is taken verbatim from art. 4 of the Italian Civil Code of 1865 which provided the canonical legislation (of 1917) with a technical formulation to define the laws that required strict interpretation ("Le leggi penali e quelle che restringono il libero esercizio dei diritti o formano eccezione alle regole generali o ad altre leggi, non si estendono oltre i casi e tempi in esse espressi").

1. *The concept of strict interpretation*

Here it is important to distinguish between that interpretation which is termed restrictive (see commentary on c. 16) and that interpretation which we now denote as strict. To differentiate between them, we must remember that restrictive (or extensive) interpretation goes beyond the words of the laws and the proper meaning of those words, and presupposes an actual restriction or extension, a kind of "*nova lex*" that is formulated by analogy with a previous law. A strict or broad interpretation, on the contrary, does not go beyond the proper meaning of the words, although it applies them to a limited degree, in the case of strict interpretation, or with-

out limits, in the case of broad interpretation.[1] Of course, this distinction is a theoretical one. At any rate, the topic is inherently complex, and it is not easy to delineate the practical boundaries between the two. Most civil law does not distinguish them. However, canonical literature has always considered the distinction important. Also understandable are the criticisms of it (and more generally of the very concept of interpretation understood as the intent to discover the true mind of the legislator) by the supporters of evolutionary interpretation. Indeed, it is precisely on this point that the subjective interpretation (that which seeks to ascertain the will of the legislator) is vulnerable to the most points of attack and affords the weakest argument in response. The task of the interpreter, however much it is considered bound by the will of the legislator, still gives him or her ample power of discretion in choosing, independently, which mode of interpretation to apply.

Admittedly with a didactic and schematic purpose, we have decided to illustrate these types of interpretation by way of an example concerning incorporation into the consecrated life.[2] Strict interpretation (taking the "narrowest proper meaning"[3] of the words) would deem a believer, but not a novice, to be a religious person, and broad interpretation would deem a novice to be a religious person as well. Restrictive interpretation, which already presumes going beyond the proper meaning, would deem only the believer in perpetual vows to be a religious person; extensive interpretation, in turn, would deem the postulant to be a religious person.

In addition to c. 18, strict interpretation is utilized in c. 36 (regarding the strict interpretation of the administrative acts included in categories analogous to those outlined in c. 18), c. 138 (regarding the strict interpretation of executive power delegated for a special or particular case), c. 1204 (regarding the strict interpretation of the oath), and c. 1354 § 3 (regarding the strict interpretation of the reservation of punishments established by the Apostolic See).

2. *The strict interpretation of penal laws*

This category of laws (cc. 1364–1399, along with other earlier instances, e.g., in *UDG* 55–61) should be understood as a paradigm of the laws of strict interpretation, since it is understood that the penal laws always limit rights, and in this sense are "odious." On the other hand, the

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1. Cf. T. García Barberena, "La interpretación extensiva y la restrictiva," in *Investigación y elaboración del Derecho canónico. Trabajos de la V Semana de Derecho canónico* (Barcelona-Madrid-Valencia-Lisbon 1956), pp. 246–248.
2. Cf. X. Urrutia, *De normis generalibus. Adnotationes in Codicem: Liber I* (Rome 1983), pp. 19–20; T.I. Jiménez Urresti, commentary on c. 18 in *CIC Salamanca*.
3. T.I. Jiménez Urresti, ibid.

penal order also utilizes other norms which are unquestionably mitigating or favorable in nature (cc. 1313 §§ 1–2; 1317, 1318, 1321 §§ 1–2; 1323, 1324, 1330).

Nevertheless, the odious character of penal law, difficult to deny in the current state of the doctrine, has not been accepted without controversy in canonical circles. It is obvious that all law, and therefore, penal law as well, exhibits a dual nature that is both favorable and odious: odious insofar as it establishes imperative burdens (which must at least be respected, if it is non-obligatory), and favorable insofar as it sustains the common good and is beneficial to the public or private good. Accordingly, in a sizable element of classical doctrine is the description of penal law, indeed, especially penal law, as established "*pro utilitate publica*," conceived "*ut evitentur animarum pericula*," and therefore, "*inducta in animarum favorem*."[4] This classical view was, however, scaled back considerably by later doctrine (Suárez, Reiffenstuel and, more recently, D'Annibale). The principle of favoritism, which facilitated an extensive interpretation to the benefit of the public good, had to be replaced by the principle of legality, which demanded strict compliance with the dispositions of the law. Without denying the element of public favoritism embedded in penal law, its content proved to be odious and prejudicial to its immediate designee. The "*favor delinquentis*," therefore, has replaced the "*favor animarum*."

One doctrinal camp[5] has concluded that, in spite of the directive of strict interpretation now embodied in c. 18 penal laws can be extended by virtue of identity of motive founded in the purpose of the law, so that unjust or legally absurd situations may be avoided. It does not appear that this solution, which Michiels nonetheless professes "*incunctanter*,"[6] can be sustained without running the risk of stripping c. 18 of all meaning. Indeed, a penal law cannot be applied to a situation that is not in and of itself encompassed by identity of motive, even if the situation is comparable, related, or correlative.

Strict interpretation in the realm of penal law requires that types be reduced to the minimum extent of their meaning. For example, the concept of apostate, heretic, or schismatic, considered with regard to the censure contained in c. 1364, will be applied only to the extent to which the subject or individual carries out a declaration of will, doctrine, or knowledge that is perceived by third parties (c. 1330). The concept of denunciation outlined in c. 1390 should be understood as a formal denunciation, and not merely as a manifestation of doubt or suspicion. The concept of

4. Thus P. FELICI, "Una questione elegante: favorevole o odiosa la norma penale?" in *Comm.* 10 (1978), pp. 276–277, citing Juan de Andrés, Bartolo, and Baldo.

5. Cf. G. MICHIELS, *Normae generales iuris canonici*, I (Paris-Tournai-Rome 1949), pp. 547–552.

6. Ibid., p. 551.

office envisioned in c. 1381 § 1 is not applicable to all ecclesiastical appointments without discrimination, although it does have a certain measure of applicability.

Nevertheless, we should note that the authentic reply of January 19, 1988[7] regarding the interpretation of c. 1398 has assumed an unmistakable extension of the penal concept of abortion,[8] since it cannot be understood solely as the expulsion of an immature fetus, but rather as the deliberate and premeditated killing of the fetus itself. It does not matter in what manner or at what stage the abortion is completed after the moment of conception. Clearly, the authentic reply is not a singular application of the law and it is in no way compromised by c. 18. In its form, however, the identity (or similarity) of "*ratio*" has played an unmistakable role.

3. *The strict interpretation of laws that restrict the exercise of rights*

Canonical doctrine is not well-developed either in this category (restrictive laws) or the following one (exceptional laws). In fact, the commentators of the *CIC* 17 discovered new ideas that needed to be provided with content, since they lacked assured classical precedents. The doctrinal opinions are very diverse and it would not be an exaggeration to say that, "*maxima adhuc viget incertitudo.*"[9]

The limitation on the exercise of rights can be understood as a limitation on juridical liberty in the broadest sense, or as the limitation of liberty in matters that affect active juridical situations recognized by the juridical system itself. In the first case, every norm that is limiting in nature (preceptive, prohibitive, invalidating, or incapacitating) restricts liberty and therefore is subject to strict interpretation. In the second case, only those norms that restrict rights or faculties granted or recognized by the law would be truly limiting, (and therefore, subject to strict interpretation), but not those whose function is to outline obligations or requirements in neutral areas. In such areas, the law, without affecting any previous right, is sovereign in determining its own scope of activity.

It seems to us that the second perspective conforms better to juridical reality, although it should be understood without undue rigor. It is clear that if we accept at the outset that every preceptive and prohibitive norm is restrictive, the majority of the laws (all those which are not concessive or merely definitive) would be subject to strict interpretation,

7. Cf. *AAS* 80 (1988), p. 1818.

8. Cf. A. MARZOA, "Extensión del concepto penal de aborto," in *Ius canonicum* 58 (1989), pp. 577–585.

9. L. BENDER, "Logica et legis interpres," in *Investigación y elaboración...*, cit., p. 265, note 13.

which seems excessive.[10] Admittedly, it is true that in certain instances, it is difficult to distinguish where there is an active juridical situation recognized expressly (such as a right, a capacity, a faculty, or an authenticity), and where there is simply "libertatem nativam in se mere negativam et genericam."[11]

In our view, all of the following should be interpreted strictly: laws limiting the exercise of rights by all the faithful (cc. 208–223), by the lay faithful (cc. 224–231), by clerics (cc. 273–289), and by members of institutes of consecrated life (cc. 662–672). It should be remembered that these canons not only set forth rights but also responsibilities and obligations.

Accordingly, and without pretending to be exhaustive, all of the following should be interpreted strictly: those canons pertaining to incapacity for matrimonial consent (c. 1095), impediments to marriage (cc. 1083–1094), and the form required "*ad validitatem*" of the marriage (c. 1108), which are undeniably restrictive of the "*ius connubii*" (cc. 219 and 1058). We should also interpret strictly those canons that establish restrictive ends or conditions for the constitution of juridical persons or private associations of the faithful (cc. 114 § 3 and 301 § 1), which affect the right of all the faithful to found associations and to direct them freely, and to promote and sustain apostolic action on their own initiative (cc. 215–216); c. 239 § 2, which could seemingly restrict the liberty of a seminarian in his choice of spiritual director, and which should be interpreted without prejudice to cc. 214 and 246 § 4, regarding the free election of the seminarian's own form of spiritual life and of the one who will guide and direct it.[12] We included also c. 630 § 1, to the extent that it could be understood as limiting the right of all the faithful to confess to any confessor who has been lawfully approved (c. 991); and c. 915, which defines certain requirements, (external and juridically strong), for not allowing a faithful to partake of the Sacrament of the Eucharist, thus restricting the right of the faithful to receive the spiritual help of the sacraments from sacred pastors (c. 213).

Although, strictly speaking, there is no right to embrace the priesthood or to exercise the care of souls, or to become part of the consecrated life, the norms relating to irregularities for the reception of orders or exercise of orders received (cc. 1041–1044) are comparable to the limitations on rights, to the grounds for removal from parochial office (c. 1741), or to the conditions of profession in an institute of consecrated life (c. 656).

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10. Cf. A. van Hove, *De legibus ecclesiasticis* (Malines-Rome 1930), p. 312, against Vermeersch. Also in substantial agreement with the latter is L. Bender, *Legum ecclesiasticarum interpretatio et suppletio. Commentarius in canones 17, 18, 19 et 20* (Rome-Paris-New York-Tournai 1961), pp. 196–197.

11. G. Michiels, *Normae generales...*, cit., p. 574.

12. For the application of c. 18 to this subject, cf. T. Rincón, "Libertad del seminarista para elegir el 'moderador' de su vida espiritual," in *Ius canonicum* 56 (1988), pp. 480–482.

All invalidating and incapacitating[13] norms have also been understood to limit the exercise of rights. Invalidity and incapacity, together with all the peculiarities that occur in the canonical system (see commentary on c. 10), are the result of positive norms. They are not a simple declaration or recognition of the non-existence of the act owing to a lack of its substantial elements. It does not seem, therefore, that we should interpret strictly the norms declarative of the non-existence of a juridical act (due to natural incapacity or from lack of object or cause) even when the expression of the norm is invalidating in nature. They certainly do not restrict any law, since it could not have been promulgated if the act was not produced. Notwithstanding, in certain cases (for example, the incapacity to give matrimonial consent (c. 1095), or when the ways of formulation or classification of the norm play an important role), the influence of the juridical techniques that define the case must be understood, and consequently, in our opinion, such norms must be interpreted strictly.

4. *The strict interpretation of laws that contain exceptions to a law*

In a manner of speaking, the expression "laws that contain exceptions to the [a] law" can be called "paradoxical."[14] After all, that which is found in law is law, and it does not deserve the label "exceptional." On the other hand, the laws often admit exceptions or alternatives for evaluating differently the general case that is being established. Examples are: the clauses, "if the law does not (expressly) say otherwise," "if particular law does not establish otherwise," "leaving the norm of [another] canon intact," etc. These types of clauses should not be understood, at least in general, as exceptions subject to strict interpretation.[15] Actually, in certain cases they are subject to broad interpretation when they are formulated as exceptions to mere dispositive law, that is, when universal law lends its norm as a subsidiary support to that established by special or particular law (e.g., cc. 119, 164, and 165). We should not forget that c. 18 applies most naturally to the so-called odious laws, which either imply the exceptional or anomalous failure of a juridical structure fixed by some institution, or assume the exceptional rupture of the principle of equality between individuals (because they affect the right of another or because they could be prejudicial to those who are not excepted). Only in these cases, it seems to us, should exceptions to the law be interpreted strictly.

13. Cf. A. VAN HOVE, *De legibus ecclesiasticis*, cit., p. 313; G. MICHIELS, *Normae generales...*, cit., p. 575.
14. P. LOMBARDÍA, commentary on c. 18, in *CIC Pamplona*.
15. For a dissent, cf. H. SOCHA, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1985ff), 18/3, n. 7; T.I. JIMÉNEZ URRESTI, commentary on c. 18, in *CIC Salamanca*.

For this reason, we also do not believe that that which has traditionally been understood as "*ius singulare*" must be applied strictly. By singular law, one should understand exceptions to the law for the benefit of specific "*species personarum*" (minors, mendicants, judges), if the exceptions are contained in the law itself and if they are consistent with it ("privilegia clausa in corpore iuris"), even though they are distinct from the general law (from the law applied "*pro regula*"). This singular law "does not imply a contradiction (to the law), nor does an exception of the subjective type result, which would be equivalent to a general dispensation, but rather a necessary complement."[16] Thus, even when they turn out to be exceptional, we do not think, for instance, that cc. 1478 § 3 and 1646 § 3 (regarding the privileges of minors at trial), 1265 (regarding the privileges of mendicants to take collections), and 566 § 2 (regarding the faculties of chaplains) should be interpreted strictly. Obviously, there is no reason to subject particular law or special universal law (e.g., the juridical regime of the consecrated life) to strict interpretation.

We should interpret strictly, because of their exceptional character, those legal rules that truly exaggerate the general law and contain a certain change of the law, a singularity that is difficult to reconcile with the harmony of the rest of the law ("*iuris singularitates*"). To identify these singularities, it is necessary to remember the line that the law itself draws in shaping a given juridical institution, as well as to verify at the same time that an exception has been tolerated in this case. Thus, for example, one can speak of "*singularitas iuris*" as seen in c. 591, which discusses, with reference to the institutes of consecrated life, the possible exemption of the regime of Ordinaries, as an exception that breaks the general rule used to define its ordinary activity; in c. 1272, which establishes the possibility that benefices properly so-called still exist, so long as they are not extinguished, although the law has suppressed the benefice system; in cc. 523 *in fine* and 178, from which we have the result that a parish can be filled by constitutive election or by appointment, breaking the rule that envisions the provision of offices entailing care of souls be made by free conferral by the bishop (cc. 157 and 523); in c. 377, which foresees the maintenance (exceptional and contrary to the discipline that regulates the institution) of the right of election, appointment, presentation, and designation of bishops conceded to civil authorities; in c. 312 § 1, 3°, which by way of exception accepts the existence of the apostolic privilege to establish public diocesan associations with a power other than episcopal; and in c. 1021, which by way of exception allows the apostolic indult in order to send dimissorial letters to bishops of a rite other than that of the ordinand.

16. J.M. DÍAZ MORENO, *La regulación jurídica de la cura de almas en los canonistas hispánicos de los siglos XVI–XVII* (Granada 1972), p. 281. Cf. A. VAN HOVE, *De legibus ecclesiasticis*, cit., p. 315.

It is more difficult to determine whether the norms characterized by the law itself as extraordinary, that is, as provisions characterized by their application in case of urgency or need, fall within the category of exceptional norms liable to strict interpretation. It seems clear that in these cases we cannot speak, in general, of odious laws. It is the law itself that provides an established mechanism, even if it is extraordinary rather than exceptional, to reach an end desired by the canonical system. Consider, for example, the extraordinary ministry of the sacraments or the extraordinary form of matrimony (c. 1116). Nevertheless, in our view, in these instances one must pay careful attention to the expression of the law itself, i.e., to the wording used, to establish the extraordinary form or the normative provision, because in spite of everything that has been said, these provisions can also conceal anomalous and exceptional provisions. Examples of this would be: cc. 230 § 3 and 910 § 2, which provide in cases of need for the substitution of the ordinary ministers of the distribution of the Eucharist. An authentic reply confirms the strict interpretation of "*deficientibus ministris*"[17]; c. 844 § 4, which defines the case of "*communicatio in sacramentis*" for Christians who are not in full communion with the Church, provided that they are in danger of death or grave need as determined by the bishop or the bishops' conference and in compliance with a series of strict limitations. C. 961 establishes, also with strong limitations, the extraordinary form of administering the sacrament of penance to several penitents simultaneously without previous individual confession. Lastly, c. 1206 likewise conceives the ordinary priest as an extraordinary minister, and an exceptional one, for purposes of dedication of a place.

17. *AAS* 80 (1988), p. 1373.

19 **Si certa de re desit expressum legis sive universalis sive particularis praescriptum aut consuetudo, causa, nisi sit poenalis, dirimenda est attentis legibus latis in similibus, generalibus iuris principiis cum aequitate canonica servatis, iurisprudentia et praxi Curiae Romanae, communi constantique doctorum sententia.**

If on a particular matter there is not an express provision of either universal or particular law, nor a custom, then, provided it is not a penal matter, the question is to be decided by taking into account laws enacted in similar matters, the general principles of law observed with canonical equity, the jurisprudence and practice of the Roman Curia, and the common and constant opinion of learned authors.

SOURCES: c. 20; BENEDICTUS PP. XV, Ap. Const. *Providentissima Mater Ecclesia*, 27 maii 1917 (*AAS* 9/2 [1917] 5); SCCouncil Resol. 10 ian. 1920 (*AAS* 12 [1920] 43–47); SCR Resp. 20 iul. 1923 (*AAS* 15 [1923] 457–458); *REU* 1 § 1; PAULUS PP. VI, Alloc., 8 feb. 1973 (*AAS* 65 [1973] 95–103)

CROSS REFERENCES: cc. 6 § 2, 14, 16 § 3, 17, 23, 25, 63 § 1, 87 § 2, 180 § 1, 221 §§ 2–3, 1313, 1457 § 1, 1607, 1642 § 2, 1752

COMMENTARY

Javier Otaduy

Canon 19 presents the means for providing for the silence of the law. Substantially similar to the old parallel c. 20 of the *CIC*/1917, it also contains some representative modifications which will be explained in due course.[1] All of the resources presented in c. 19 to make the law whole and complete are of a very abstract nature (general principles of law, analogy, and equity) and so naturally lend themselves to abundant theoretical reflection and to numerous inquiries and scholarly interpretation.

1. *The problem of normative lacunae*

A number of definitions may be used in treating normative lacunae. One may understand by "lacunae of the law" the absence of positive legal regulation to take into account a particular case in juridical experience.

1. For a comprehensive view of the textual modifications of the canon, cf. J.M. PIÑERO CARRIÓN, *La ley de la Iglesia*, I (Madrid 1985), p. 126.

This is an "obvious result of the natural and inevitable lack of completeness in the law,"[2] that is, a necessary result of every juridical system, which in itself cannot, and does not pretend to, embrace all situations possible in juridical experience. This fact has been calmly noted throughout the doctrine, including that part which takes a fundamental or philosophical approach.[3]

Nevertheless, this conclusion is "too obvious"[4] for some, and so they demand a more rigorous definition for a proper lacuna of positive law. If, with the resources afforded by positive law or the canonical statutes themselves the apparent gap can be overcome, then it would not make sense to speak technically of a lacuna. Only if it is necessary to resort to a juridical principle outside the canonical system do we really meet with a true lacuna of the law, and the judge will be free to base his opinion on grounds not contained in positive canon law. Only in those cases where canon law is unable to overcome legislative lacunae by its own resources, can one speak of juridical lacunae.

This opinion, which cannot be discounted hastily, is taken to extremes in the arguments of some authors[5] who think that they have detected in the canonical system a lack of fullness (*incompiutezza*, in the classic Italian formulation), on account of which the canonical system, because of its institutional purpose, would inherently lack the power necessary to encompass all juridical matter (a good of which would then be unsusceptible to canon law). By contrast, the secular system, because of its unlimited political purpose, can be said to possess completeness. These authors nevertheless understand that the canonical system can, and in fact, does, have *completezza*, wholeness, by virtue of which it may be considered to be a system free of lacunae, breaks, and discontinuity in its normative system. It is therefore capable of surmounting every near-silence of the law with its own resources. This notion, although it seemingly provides a solution favorable to the wholeness of canon law and the canonical system, addresses the subject from some mistaken assumptions that easily undermine an understanding of the matter. The canonical system (a system of law) possesses fullness in that no subject related to the purpose of the Church susceptible to juridical evaluation is beyond its competence.[6] It is altogether different to say that the evaluation is carried

2. P.A. D'AVACK, "La normativa delle lacune legislative nell'ordinamento canonico," in *Diritto, persona e vita sociale. Scritti in memoria di Orio Giacchi*, II (Milan 1984), p. 55.

3. Cf. THOMAS AQUINAS, *S. Th.*, I–II, q. 96, a. 6, ad 3.

4. CH. LEFÉBVRE, *Les pouvoirs du juge en droit canonique. Contribution historique et doctrinale á l'étude du canon 20 sur la méthode et les sources en droit positi* (Paris 1938), p. 14.

5. Above all, cf. A. RAVÁ, *Il problema delle lacune dell'ordinamento giuridico e della legislazione canonica* (Milan 1954), pp. 33–39 and *passim*.

6. Cf. J.M. GONZÁLEZ DEL VALLE, *La plenitud del derecho canónico* (Pamplona 1965), pp. 61–95; although the author shows himself to be opposed to the use of the term "plenitude," he criticizes the view discussed above.

out strictly on the basis of juridical guidelines that have been prescribed, deduced, or induced by positive canon law. Similarly, the secular system is characterized by plenitude, but only an unbending positive stasis can allow that this amounts to the power to contemplate any juridical objective that it considers relevant to its interests. Moreover, state competence is limited by the very purpose of the state, which of course is incompetent in certain matters, although in fact it can usurp competence.

It can be said, in general, that the doctrine developed in connection with the commentary on c. 20 of the *CIC*/1917, understood by "juridical lacuna" the phenomenon we mentioned at the outset: the complete absence of law or custom, which, however, can be overcome with the help of the resources of c. 19. We have scarcely touched on the subject of insufficiency of the suppletory resources,[7] because it has been recognized that the rule of c. 19 is formulated in such broad terms that silence in the law can be overcome *in every instance* in a way that is both suitable and sufficient.[8] This does not mean, however, that doubts about the true exhaustive character of the resources for supplementation offered in c. 19 cannot arise, especially if one attempts to define them rigorously and technically (so that they do not have an exaggerated or ill-defined scope). Nevertheless, as we have said, the majority opinion is quite clear: the four elements of supplementation named in the canon "*taxative sunt intelligenda*, ita ut ad adimplendas legislationis canonicae lacunae *ad nullum aliud permittatur recursus*."[9] It is thereby made clear that they are not resources for supplementation either of state law, or of particular law outside the very purview of jurisdiction (including the law of the Eastern Churches), or of the old canon law, or of Roman law. It is also indirectly saying that no recourse to any other means of supplementation is possible, and that the means outlined in c. 19 (c. 20 *CIC*/1917) are capable of integrating every lacuna of the law.

2. *The nature of supplementation of the law*

There are two proofs in the textual formulation of c. 19 that clearly illustrate the nature of supplementation of the law that are significant precisely because they represent a break with the old formulation. The first relates to the clause "*aut consuetudo*." It confirms something that doctrine has accepted without debate: a normative lacuna exists only if a prescription of the law or customary norm is lacking. Law and custom furnish their effect and their normative efficacy as sources of law. The replacement of

7. Which has indeed gained the attention of authors such as CH. LEFÉBVRE, *Les pouvoirs du juge en droit canonique...*, cit., pp. 13–19, and A. RAVÁ, *Il problema delle lacune...*, cit., pp. 43–58.
8. For example, cf. A. VAN HOVE, *De legibus ecclesiasticis* (Malines-Rome 1930), p. 323.
9. G. MICHIELS, *Normae generales iuris canonici*, I (Paris-Tournai-Rome 1949), p. 596.

the old formulation "*norma sumenda est*" by the current "*causa dirimenda est*" constitutes the second proof. This expression, if we recall the rationale that was presented when it was introduced,[10] modifies some of the assumptions that underlie the commentary on the old c. 20. Indeed, suppletion of the law is no longer held to entail creation or confection of a norm (undoubtedly with a peculiar structure), but rather the resolution of a case. It is a single episode that does not create law in the normative sense.

This modification ("*causa dirimenda est*"), together with the clause about custom, shows that the intention was to include, while keeping separate, two distinct categories: the sources of normative law, and the juridical instruments of supplementation that enter into the integration of cases not contemplated by law or custom. The first have the nature of positive norms, while the second are resources for the practical issuing of law. The use of these norms, however, does not always make them juridical norms[11] capable of being extended to future situations, unless the process of integration or supplementation is performed by the legislator himself or by one who has been granted the power to supplement the norm.

3. *Subjects of supplementation of the law*

If we speak not of formulating a norm, but of resolving a case (understanding this word in a broad sense, not necessarily as litigation subject to the rules of procedure),[12] we will not be able to demand the very strict subjective conditions that the doctrine used to require in the past. It was then said that the interpreter, the operator of the law, and the private individual affected by the law had no capacity whatsoever to intervene in the process of suppletion.[13] Private relations between faithful can also be governed by c. 19 inasmuch as they require suppletion of the law, and the resolution of the juridical matter at issue directly affects the faithful (e.g., a contract, or certain conventional statutes).

In any case, it is certainly clear that those directly affected by c. 19 (by supplementation of the law) are the judges, bound to administer justice, provided they are competent (c. 1457 § 1). Absence of a norm cannot

10. Cf. *Comm.* 17 (1985), pp. 34–35; cf. also H. SOCHA, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1985ff), 19/3, no. 6.

11. Insofar as the analogy to law or general principles can be considered an application of a previous juridical norm, as argued by A. VAN HOVE, *De legibus ecclesiasticis*, cit., p. 321.

12. As the majority does and as is clear from the process of codification: cf. J.M. PIÑERO CARRIÓN, *La ley de la Iglesia*, cit., p. 127; H. SOCHA, in K. LÜDICKE (ed.), *Münsterischer Kommentar...*, cit., 19/4, no. 6.

13. Cf., to a certain degree, G. MICHIELS, *Normae generales...*, cit., pp. 585–588; and above all L. BENDER, *Legum ecclesiasticarum interpretatio et suppletio. Commentarius in canones 17, 18, 19 et 20* (Rome-Paris-New York-Tournai 1961), pp. 220–221, 247–250, 292, and *passim*.

be alleged as a reason for incompetence or inhibition. The judge is obligated to pronounce sentence (c. 1607). The reply, however, does not constitute a binding legal precedent nor is it to be applied generally. (It is neither a general norm nor, as it has often been put, is it objective.) It simply "afficit personas pro quibus lata est" (cf. c. 16 § 3).

It is worthwhile to ask whether the PCILT is competent ("*per modum legis exhibita*") to supplement the law. Properly speaking, it is not, since its competence lies in the interpretation of the law. Nevertheless, the line that separates the extensive interpretation from proceeding by analogy is at times a thin one. In such cases, it would be difficult to deny legitimacy to the reply of the Council.

4. *The object of supplementation of the law*

For a norm to be supplemented, the issue to be decided must not be addressed by (contained in) custom or law. Therefore, the "express prescription" should not be understood as a mechanical reproduction, in the text of the law, of the supposition of fact that must be evaluated. Such an assumption would discredit the value of general norms. Since c. 87, for instance, grants to bishops the power to dispense from universal disciplinary laws that are not procedural or penal, that juridical power need not be proven in each case. As should be obvious, no lacuna of law exists for that reason. If one does exist, the exception, reservation, or non-disciplinary nature of a given law shall be verified when appropriate.

We should judge those instances of laws that grant a capacity, or which are enabling or attributive of power, in a similar way. A law that grants specific juridical situations that can be granted only by law excludes concession by other means. It certainly prevents the occurrence of a lacuna of law that must be supplemented. There is no absence of law, nor is the law silent, but rather by including the concession of something, it excludes other forms of concession.

Moreover, the supplementation of law or custom governs only intersubjective juridical situations that *require* a reply from the law. Clearly, there is no place for suppletion (because there is no lacuna) in the absence of norms that mandate the performance or omission of something that lacks intersubjective repercussions. It is understood that in such a case the liberty of the faithful prevails. On the other hand, "si agitur de facultate exercenda aut de iuribus mutuis ordinandis, supplendum erit silentio legis."[14] In fact, we are referring to faculties that *must* be exercised, to juridical acts that *must* be carried out, or to litigation that *must* be resolved. Only in these instances can we say that "*deest le*gem," that there is

14. A. VAN HOVE, *De legibus ecclesiasticis*, cit., p. 320.

indeed a genuine defect of law. Normally, this will refer to a needed solution as required by the law itself. If the law requires or foresees the production of an act but does not establish any procedure for carrying it out, we may speak of a defect of law. If the law establishes two institutions but does not indicate the relationship between them, we may speak likewise of a lacuna of law. If the law is utterly silent about the regulation of a subject that by its very nature gives rise to intersubjective relations of order and justice, then there is a place for the intervention of suppletory law.

Doubtful norms with "*iuris et de iure*" doubt also constitute an object of supplementation of law or custom (that is, doubt which overshadows the actual formulation of the law, which thereby turns out to be misleading or obscure in most cases: see commentary on c. 14). Such a law is truly null, and the resources of suppletion can therefore be used.

No suppletion is possible, however, in cases of absence of penal law, as c. 19 provides ("causa, nisi sit poenalis, dirimenda est..."). An analogous or inductive application of general principles, or one motivated by an equality of cause in the case of penal law (cf. cc. 221 § 3 and 1313), is not permissible. The same must be said of invalidating and incapacitating laws, which, like laws containing punishments, must be express and specific, and do not even permit the use of equivalence (c. 10). Nor does suppletion appear to be possible in the instances of strict interpretation contained in c. 18 (see commentary on c. 18), by virtue of the traditional principle "quae a iure commune exorbitant, nequaquam ad consequentiam sunt trahenda."[15] Odious laws, it is certain, cannot be enforced in analogous or derived situations.[16]

5. *Laws given for similar cases*

The first supplementary aid prescribed in c. 19 is recourse to the laws enacted "*in*," that is, to legal analogy. In its logic, the "*analogia legis*" proceeds from the particular to the particular, from a specific norm that acts as the proposition, to another specific decision of the law that resolves a case. Between these two logical processes the following should operate: the determination that similarity of matter between the normative proposition and the supposition of the case can be established, and the belief that there exists an equivalence of cause between one and the other.[17] The extensive interpretation of the law (not supplementation "*in similibus*") requires identity of cause, which is present in comparable, related, correlative, contained, and exemplary cases. Recourse to parallel

15. *VI*, *Regula iuris* 28.
16. Cf. G. MICHIELS, *Normae generales...*, cit., pp. 593–595; for a dissent, cf. A. CRNICA, "De lacunis legis supplendis ad normam Codicis J. C.," in *Ius Pontificium* 17 (1937), p. 248.
17. Cf. L. DÍEZ PICAZO-A. GULLÓN, *Sistema de Derecho civil*, I, 5th ed. (Madrid 1987), p. 193.

places, another resource for interpretation, requires identity of matter. As has been emphasized, legal analogy goes beyond the range of interpretation and is applied within the law due to requirements of the system and of natural equity ("in similibus idem debet esse iudicium"), and even because of the demands of the legislator's own will manifested in c. 19. However, it cannot truthfully be said that it really extends to what the legislator intended in the principal or normative analogue.[18]

The similarity of matter, based on an objective quality common to both cases, can be found without much difficulty in a wide variety of topics addressed by the Code.[19] Examples would be: the collegial acts of juridical persons and those of associations which have not yet attained personality; the competence to give dismissive letters on the part of the Bishop himself, the apostolic administrator, or the diocesan administrator (c. 1018 § 1), and the capacity of the prelate of a personal prelature (c. 295 § 1); the transfer from one religious institute to another (c. 684 §§ 1–3) and the transfer from one society of apostolic life to another (c. 744 § 1); the procedure for the removal or transfer of parish priests (cc. 1740–1747) and the procedure for the removal and transfer of other officials, whose offices are also conferred for an indeterminate time (c. 193 § 1). Apart from that, it seems obvious that the proportion of similarity cannot always be the same. In the area of analogy, the perspective is always much more open-ended than in that of identity.

Equivalence of cause often turns out to be difficult to verify. Indeed, if the "*ratio legis*" is the motivating reason, the extrinsic cause that has prompted the legislator to enact the law, there will not always be complete certainty in the use of equivalence of cause, so much so that, perhaps with a bit of exaggeration, it has been thought to be "*in praxi dificillimam* esse et non raro *incertam.*"[20] The reason why it is judged to be problematic and why the application of the recourse to similar laws is held to be even more so, is above all the notion of the "*ratio*" (just as in the area of interpretation) as an extrinsic cause by which the legislator effectively works his will, a cause that is not always found with complete certainty. In our opinion, it is not desirable to be overly rigorous in the analysis of this cause. The general principles of law, which are also suppletory aids, look to the intrinsic "*ratio*" of (the rationale for) law. Clearly, if these can be used without needing support in the similarity of legal matter, surely they can be used if they are supported by similarity of legal matter.

The *CIC* has transformed into norms some of the authoritative suppletions of law made during the lifetime of the *CIC*/1917. For example, c. 700 states that, for a decree of expulsion of a member of a religious

18. Cf. G. MICHIELS, *Normae generales...*, cit., pp. 600–601.
19. These examples are some of the ones suggested by H. SOCHA, in K. LÜDICKE (ed.), *Münsterischer Kommentar...*, cit., 19/5, no. 8.
20. G. MICHIELS, *Normae generales...*, cit., p. 607.

institute to be valid, it must indicate the right to appeal, with suspensive effect, within ten days of receiving notification of the decree. This norm originates in the reply of the SCR of January 20, 1923, which fixed its opinion "*iuxta normam traditam in similibus casibus*,"[21] probably in connection with the time-period that was required in the old cc. 2146 § 1; 1881, 2153 § 1; 1465 § 1, and 1709 § 3. In this case, in addition to similarity of matter, it appears that equivalence of cause was also postulated, between the time periods established in the quoted canons and the case about which the law was silent. In both cases, the intention was to avoid periods of indefinite deferral.[22]

We can also find examples of suppletion in the current Code, both in the similar matters that we have already noted and in others that can be induced from a careful analysis of the prescriptions of the law. For instance, there is similarity of matter and equivalence of cause between the appointment of a priest who has taken charge of a diocese in an impeded see (c. 414) and the priest elected and appointed to be the diocesan administrator in times of a vacant see (c. 421). Accordingly, the norms governing the election requirements in the second instance (cc. 423–424) are also applicable in the first instance.

6. *The general principles of law*

The general principles of law, in their most usual meaning, reflect the "*analogia iuris*"; they too are the result of an analogical procedure. A juridical principle can be induced from a group of norms. The case that is to be decided, even if it does not happen to be identical to any one of the specific norms in that group, may reflect (be analogous to) the extracted juridical principle. For some, however, the analogical method is not a procedure synonymous with the elaboration or extraction of general principles. This is true because general principles require that the process of abstraction and generalization be exercised on the whole of the juridical system or institution and not on only a part of them,[23] (or at least, that the principle be based on a collection of similar matter and not be contained within the matter itself).[24] In our opinion, one can speak without difficulty of analogy of law in referring to the induction and application of general principles.

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21. *AAS* 15 (1923), p. 457.

22. For the commentary on this reply, cf. T. GARCÍA BARBERENA, "La interpretación extensiva y la restrictiva," in *Investigación y elaboración del derecho canónico. Trabajos de la V Semana de Derecho canónico* (Barcelona-Madrid-Valencia-Lisbon 1956), pp. 256–257.

23. Cf. the sharp critique on this point by A. RAVÁ, *Il problema delle lacune...*, cit., pp. 62 and 112.

24. Cf. CH. LEFÉBVRE, *Les pouvoirs du juge in droit canonique...*, cit., pp. 109–110.

Nevertheless, it is not easy to define the concept of general principles of law, a concept which has been "tortured"[25] over time by speculative jurists. Even so, however, it is clear that the term is connected with the rationale of justice and the basic consistency that underlies and imbues the whole juridical system (and all of its parts).

Although in speaking of analogy of law we have assumed that the general principles are a result of juridical abstraction, we cannot say that all authors agree on this, nor can we say that all general principles can be obtained strictly through the method of generalization, as though it were a process of logic. The positions taken with regard to the identification and configuration of the general principles have been and continue to be very different. Some jurists understand them as principles antecedent to the system of positive canon law. In this vein, it has been said that the general principles of canon law can be resolved into the principles of natural law,[26] or into those of positive divine law, or into those of Roman law.[27] These jurists employ a method of inquiry that is, in some sense, external. They look beyond the positive canonical system for the general principles that regulate the system. In contrast, others believe that the general principles can be deduced from positive law itself, that they are extracted from it, that they are subsequent to it (as the result of a process of cognition), and that they are inherent (as regards their nature) in the juridical system, yet without transcending it.[28] Thus, these jurists use an internal method of inquiry in the conviction that the general principles are inscribed in the positive norms themselves. Often, however, canonical authors incorporate both perspectives in their positions.[29] They concede the primacy of the principles of natural law and those of the system of positive law, and place particular emphasis (in an intermediate compromise that admits both magnitudes) on the universal juridical rules. (Apothegms or juridical maxims, time-honored written guidelines, distillations of juridical wisdom, which apart from their effective validity as norms of positive law at a specific time in the past, also have universal recognition; hence the authentic "*regulae iuris*" and even the "*brocarda*" or doctrinal rules.)

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25. V. SCIALOJA, *Del diritto positivo e dell'equità* (Camerino 1880), p. 24.

26. Thus, e.g., P. FEDELE, "*Generalia iuris principia cum aequitate canonica servata,*" in *Studi Urbinati* 10 (1936), pp. 108–111, *passim*; and M.F. POMPEDDA, "L'equità nell'ordinamento canonico," in *Studi sul primo libro del Codex iuris canonici*, ed. S. GUERRO (Padova 1993), p. 23.

27. Cf. S. D'ANGELO, "Le lacune nel vigente ordinamento giuridico canonico," in *Saggi su questioni giuridiche*, I (Turin 1928), pp. 79–86; and A. RAVÁ, *Il problema delle lacune...*, cit., pp. 161–168.

28. Cf., e.g., M. FALCO, *Introduzione allo studio del "Codex Iuris canonici"* (Turin 1925), pp. 103–104; and P. LOMBARDÍA, commentary on c. 19, in *Pamplona Com.*

29. Cf., for a classification of the authors who do this, and a condemnation, as he sees it, of their failure to proceed linearly in their methodology, A. RAVÁ, *Il problema delle lacune...*, cit., pp. 111–119.

In order to give definition to the concept, we must bear in mind the reason that prompted the legislator to use this formulation ("generalibus iuris principibus cum aequitate canonica servatis"), insofar as that reason can be deduced from the preparatory works of the codification. If the first *schemata* spoke of the "*iuris canonici principiis*," then the explicit reference to canon law was superseded.[30] Therefore, it is reasonable to assume that the intention of the legislator was to include principles external to positive canon law as well. Moreover, the reference to the "*aequitas canonica*" seems to corroborate that same interpretation (from the origin of the canon in the *CIC*/1917), since it would not make much sense to invoke canonical equity if the legislator is already referring to canonical principles. On the other hand, it would obviously be overreaching to claim, on the basis of this evidence, that the general principles that can be extracted from positive canon law should be rendered invalid.

In our opinion, the following can be considered general principles of canon law:

a) Principles of natural divine law and of positive law

Divine law is a direct source of canon law. It does not require human approbation to be juridical. Notwithstanding, it requires positive incarnation to be efficacious, which does not always happen through formal juridical norms, but can take place as well through the formalization of rules or operative juridical concepts. Divine law cannot be invoked for purposes of supplementation (or interpretation) while it is still unlimited, prepositive, and without form (e.g., the evangelical doctrine,[31] the precepts of the Decalogue, the first principles of moral behavior, etc.). Divine law (natural and positive) functions as a limitation within the context of positive canon law (cc. 22, 24 § 1; 1059, 1075 § 1; 1163 § 2; 1165 § 2; 1290, 1692 § 2), as well as a criterial standard, offering to the positive system general principles to be actively applied within the scope of law. This second function can be discovered (seen to be present) in the positive norms themselves or in the juridical rules extolled throughout the course of history which embody principles of natural law, themselves applicable as suppletory norms. Some examples are:[32] "pacta sunt servanda" (cc. 3, 1062), "nemo potest ad imposibile obligari" (*VI, Reg. iuris* 6), "*nemo* iudex in causa propria" (cc. 1419 § 2, 1448), "in malis promissis fidem non expedit observari" (*VI, Reg. iuris* 69), "nemo potest plus iuris transferre in alium, quam sibi competere dinoscatur" (*VI, Reg. iuris* 79).

b) General principles that can be assigned to the whole positive juridical system

30. Cf. *Comm.* 19 (1987), pp. 57 and 94–95; 23 (1991), p. 158.

31. As is seen, for example, in P. FEDELE, *Generalia iuris principia...*, cit., pp. 103–104.

32. The first three examples were suggested by H. SOCHA, in K. LÜDICKE (ed.), *Münsterischer Kommentar...*, cit., 19/7, no. 9.

These are principles that are in conformity with the canonical system and form part of it. Most of the *Regulae iuris in VI*, received from the Roman law and used to greater or lesser degree by *both* systems of law (canonical and civil), which were once authentic rules of canon law, can be considered general principles. This is not because they are exceptionally traditional (as if they were canonical *auctoritates*), but because they distill certain valuable principles of general juridical wisdom. It then becomes unnecessary to observe that the *Regulae iuris* do not form a system. They are often enunciated in response to specific juridical decisions that were later made universal because they were thought to transcend the situation that created them. They must, therefore, be used cautiously. The content of the *CIC* incorporates numerous *regulae iuris*, albeit with certain modifications in their formulation.[33] *Liber I*, on general norms, is of course the best context to illustrate the incorporation of the rules of law.

c) General principles deduced from positive canon law

These principles are obtained by deduction from the whole of the normative system, or from a subsection of it that exhibits the principle of unity, or from canonical institutions. By "general principles of the law" we should understand the fundamental guidelines that explain the solutions offered by the canonical norms, which are deduced as the product of a scientific elaboration that correctly applies the systematic method."[34] As for the principles deduced from the whole of the canonical system, it is not at all easy to reach a level of sufficient certainty, although there have been numerous attempts to list and define them. In our view, it is more useful to elucidate them from institutional principles, that is, fundamental criteria or organizing ideas that structure each of the canonical institutions, and that offer, as has been said in reference to state institutions, a "functional key to the whole technical mechanism in which the institution consists."[35] The utility of these principles, at once sufficiently general to reflect suprapositive values and directed enough toward reality to be efficacious, is, in our judgment, beyond doubt. In the matrimonial institution, for instance, we can identify: *a*) the principle of consent; *b*) the principle of "I;" *c*) the principle of maximum respect for and minimum intervention in the "I;" *d*) the principle of identity between pact and sacrament; etc. In the institution of legal procedure we can identify: *a*) the principle of written documents; *b*) the principle of initiative of a party in beginning a process; *c*) the principle of officiality in the course of the process; etc. Finally, in penal matters, we can deduce, among others: *a*) the principle of legality as regards the delict and the punishment; *b*) the principle of "*favor delinquentis*;" *c*) the principle of penal responsibility for fraud or culpability; etc.

33. Cf. V. BARTOCETTI, *De Regulis juris canonici* (Rome 1935), which details the incorporation by the *CIC*/1917 of each of the 88 *Regulae iuris in VI*.

34. P. LOMBARDÍA, commentary on c. 19, in *Pamplona Com.*

35. E. GARCÍA DE ENTERRÍA *Reflexiones sobre la ley y los principios generales del Derecho* (Madrid 1984), p. 66.

Such principles are *principios* proper, keys to understanding the dynamic of an institution or an isolated juridical phenomenon. This does not mean, however, that they can be applied mechanically or that they lack exceptions. In any event, they are always useful guidelines in filling the silence of the law.

These principles are doubtless already generally recognized to be embodied in the positive norms themselves.[36] Accordingly, they are to be applied not only in the supplementation of law but in the application of law as well. Of course, this does not prevent them from being operative in the integration of lacunae. Let us analyze, for example, the topic of precedence among offices, which, as we all know, is presently unregulated by the Code. To a certain extent, it can be regulated by custom, but not in every instance. Since the problem of precedence is undoubtedly juridical in nature (because it is a reflection of the juridical position of those constituted in authority and entails exercise of rights), and because the law itself defines and structures the offices, it seems obvious that the relationships among them should be regulated by a norm. If the law is silent on the subject, the norm can be deduced from general principles. Since the subject of precedence exemplifies the principle of unity, it can be understood as a uniform juridical subject (although not, properly speaking, as an institutional one). Therefore, the general norms of the old c. 106, which contain principles (of representation, authority, rank, etc.) for structuring the relation of precedence among physical and juridical persons, can be applied for now in the absence of law. This conclusion does not hold for the specific dispositions of the old Code, even for those concerning the same subject.

7. *"Cum aequitate canonica servatis"*

The general principles of law are to be applied with canonical equity. By "canonical equity", passing over the changes in its definition over time[37] as well as the extremely lengthy bibliography on this subject,[38] we should understand the perfect justice that transcends the written law (the general norms being necessarily schematic) to give a solution that can be applied justly to a specific case. Thus, canonical equity, "in its effort to

36. Along these lines, cf. A. VAN HOVE, *De legibus ecclesiasticis*, cit., p. 328.
37. Cf., all in all, A. VAN HOVE, *De legibus ecclesiasticis*, cit., pp. 274–304; CH. LEFÉBVRE, *Les pouvoirs du juge en droit canonique...*, cit., especially pp. 163–212; idem, "Équité," in *Dictionaire de droit canonique*, vol. V (1953), col. 394–410.
38. Cf. F.X. URRUTIA, "Aequitas canonica," in *Periodica de re morali canonica liturgica* 73 (1984), pp. 33–88 (with extensive bibliography on pp. 79–88); T. SCHÜLLER, *Die Barmherzigkeit als Prinzip der Rechtsapplikation in der Kirche im Dienste der salus animarum. Ein kanonistischer Beitrag zu Methodenproblemen der Kirchenrechtstheorie* (Würzburg 1993), pp. XVII–XLVI.

preserve moral values within the juridical space, secures the infusion of those values into the interpretation of the law, the essential concomitant and justification of the positive juridical norms."[39] The concept of canonical equity also implies that the application of the law must be benign, charitable, and merciful ("*iustitia dulcore misericordiae temperata*"). Accordingly, harshness (the increase in punishment or juridical requirements), even when justified in a particular case, cannot be considered an exercise in canonical equity. The "*aequitas canonica*" cannot be an "*aequitas severitatis,*" but rather carries forbearance within its very structure,[40] and always looks to the salvation of souls.

Clearly, the doctrine on canonical equity cannot be dealt with in just a few paragraphs, or in the brief mention of its use to which it is reduced in c. 19 of the *CIC*. Canonical equity can operate on very different levels: as a norm of juridical hermeneutics, as a supplementary source of law, and as the essence of the whole canonical system.[41] There is the assumption that canon law is itself a "*ius aequum,*" tending toward humaneness in contrast to other systems (above all, the Roman, against which the canonical system defined its ultimate characteristics) that made frequent appeals to strictness and displayed less sensitivity to the benefits of the spiritual order. Thanks to this tendency, the "*aequitas*" is present in the canonical laws themselves. We could even say, loosely speaking, that the "*aequitas*" is also a resource of the legislator (and not only of the judge), so that "aequitati studeatur non solum in applicatione legum ab animarum pastoribus facienda, sed in ipsa legislatione."[42] Nevertheless, this is not the most exact or typical notion of equity in the sphere of canon law.

Canonical equity can also be understood as an instrument of juridical hermeneutics. In this sense, the judge or the superior interprets the presumed mind of the legislator (one of whose essential elements is mercy) when he or she endeavors to correct the rigor of the "*ius scriptum.*" This function is not understood to create law, but to interpret and correct it. Nevertheless, despite all efforts to maintain a distinction, it bleeds into and becomes wholly subsumed in the purview of juridical creation.[43] Not only does it remove a prejudicial juridical effect and restrict the application of the law (like interpretation), it constructs a solution that supplements the norm. Only if the hermeneutics is limited to the "*aequitas scripta,*" that is, to the use of equity insofar as it is required by the law itself (cf., for example, cc. 271 § 3, 686 § 3, 702 § 2, 1148 § 3) for the resolution of a particular case, can we say that its use does not exceed the legislative framework and the explicit mind of the legislator.

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39. W. AYMANS-K. MÖRSDORF, *Kanonisches Recht,* I (Paderborn-Munich-Vienna-Zürich 1991), p. 188.
40. Cf. T. SHÜLLER, *Die Barmherzigkeit...*, cit., pp. 431–432, *passim.*
41. These three categories were suggested by M.F. POMPEDDA, *L'equità...*, cit., p. 8.
42. *Praefatium CIC* (quoting from the third principle of the revision).
43. This is observed, e.g., by M.F. POMPEDDA, *L'equità...*, cit., p. 22.

Recently it has been said that the "*aequitas canonica*," as it has been designed by the current *CIC* (according to cc. 19, 221 § 2, and 1752), cannot be understood as interpretation of the law, but rather as application of the law. The concept of canonical equity would then not refer to the interpretation of the mind of the legislator. It would not be mechanically subsumed in the judicial or administrative decision in the system of law as though its function were to reproduce in each case something anticipated by the legislator. On the contrary, the "*aequitas canonica*" would operate in the application of every law by virtue of a fundamental and previous requirement, as an imperative of the "*salus animarum*" (the "twin brother"[44] of canonical equity). Canons 19, 221 § 2, and above all 1752, would grant competence over the juridical creation of merciful solutions, a phenomenon peculiar to the ecclesial juridical system, to the one who applies the law. The "*salus animarum*" takes precedence over any general normative provision; and it is a basic condition for the application of each norm, not a final result deduced from the whole juridical system or implicit in the normative provisions.

In our judgment, this doctrine would obviate the distinction between the "*aequitas scripta*" and the "*aequitas non scripta*," as it would the distinction between canonical equity in its corrective function and canonical equity in its reconstructive or supplementary function. In all cases, appeal to equity would be required. In all cases, the principle of "*salus animarum*" would be of outstanding importance in the practice of the application of the law. In other words, the use of this juridical recourse could finally be defined.

The role of equity in the application of the law is undeniable. The only problem consists in determining the conditions under which that application can be carried out. One can have recourse to "*aequitas non scripta*" when natural law or the common good is at issue. (This would imply the understanding of natural law as natural equity, not as universal and immutable natural law; e.g., a disproportion which does not harm commutable or legal justice, but which is detrimental to someone in particular.) One can also appeal to "*aequitas non scripta*" in the case of partial or contrary cessation of the end of the law, or when the law is objectively impossible to fulfill or entails excessive difficulty.[45] In light of the intrinsic limits of the "*aequitas canonica*," there can be no intervention of equity (in juridical application or creation) if the nature of the law that it intends to correct or suspend is a negative or prohibitory natural law, or if it pertains to a subject in which there is no role for negotiation or dispensation. Moreover, in all cases, it requires a just cause, and a reason, a principle of law, must be invoked.[46] Thus, for example, some commenta-

44. T. SHÜLLER, *Die Barmherzigkeit...*, p. 439.
45. Cf. THOMAS AQUINAS, *S. Th.* II–II, q. 60, a. 5.
46. Cf. M.F. POMPEDDA, *L'equità...*, cit., p. 17.

tors of the old Code allowed for the possibility that equity might intervene in extraordinary cases that affect the current c. 1086 (validity of a marriage without dispensation from the impediment of disparity of cult) and c. 977 (validity of the absolution of an accomplice, apart from the case of danger of death), as well as in other similar cases.[47]

Nevertheless, we are more interested, in considering c. 19, in discovering the function of equity in instances of silence of the law. It is notably here that equity plays its positive or reconstructive role.[48] This is a role which, albeit only analogically and loosely, can nevertheless be termed "nomopoetic", "legislative", or a "formal source of law"[49] because, according to the text of c. 19, the resources of supplementation are not meant to create a norm but rather to resolve a case. Moreover, we should not forget that, by the text of the canon, canonical equity is presented in conjunction with the general principles. This placement is meant to show that equitable solutions flow from the general principles of the system and take their inspiration from them. They are never arbitrary replies, but rather are in keeping with the interconnected normative design.

Equity should not be confused with *epieikeia*. This second term denotes the prudential judgment made by a private individual to exempt himself from the law, and operates only at the level of conscience itself. Although the reasons that enter into the use of equity and *epieikeia* are the same, or similar, equity is normally invoked by public authority, and it always has an element of external jurisdiction.

8. *The jurisprudence and practice of the Roman Curia*

The current expression "jurisprudence and practice of the *Roman Curia*" derives from a different formulation of classical antecedents: the "*stylus curiae.*" These comprised both the formal (process, procedure) and the substantive (solutions of law) characteristics of the replies of the *Curia*, whether they were judicial, interpretive of the law, or in the nature of an administrative decision or concession. With the disappearance of the term "*stylus*" and the resolution of its content into jurisprudence and practice, it appears that the intention was to distinguish between the constant and homogeneous modes in the resolution of judicial litigation and administrative matters.

There is no doubt that the jurisprudence of the central tribunals, in addition to being a resource for supplementation of law (which is the function assigned to it in c. 19), is also a dynamic resource in the interpretation of law and in the modeling of the juridical system. Accordingly,

47. Cf. A. VAN HOVE, *De legibus ecclesiasticis*, cit., p. 302.
48. Cf. CH. LEFÉBVRE, *Les pouvoirs du juge en droit canonique...*, cit., pp. 211–212.
49. As in, e.g., M.F. POMPEDDA, *L'equità...*, pp. 18, 22, and 26.

some authors have supposed that the supplementary function attributed to jurisprudence in c. 19 does not offer "a complete picture of the capacity of jurisprudence for producing juridical norms,"[50] since if jurisprudence exhausted its potential in filling lacunae of the law, then the "essential creative aspect inherent to every judgment"[51] would be forgotten. Jurisprudence would not be merely the means of the system for supplementing its lacunae, but rather the means of the law for determining its own normative value. The law, previous to its application, would be no more than an open juridical project, an incomplete outline, which would necessarily require judicial implementation in order to have normative effect. Actual cases would not be automatically subsumed in the conceptual language of the law's assumptions.[52]

Even if we accept the interpretive dimension of jurisprudence and thereby concede that its function "clearly exceeds the notion of 'application of norms' even when this expression is construed very loosely,"[53] we do not think that it is appropriate to assign a real "nomopoetic," norm-creating status to jurisprudence. It is true that its interpretive function in determining the authentic meaning of the canons of the *CIC* has been explicitly recognized by the Roman Pontiff (e.g., cc. 1095 and 1098).[54] It is also true that it has been granted a very specific status in the evolutionary interpretation of norms: "the jurisprudence of the *Rota* has acquired, in the history of the Church, with regard to the evolution of norms, a growing authority, not only moral but juridical."[55] This status, however, must be placed in the context of the constant warnings of the Roman Pontiff to respect the normative "choice" made by the legislator,[56] along with his constant injunctions to judges that they remain faithful to the law.[57] The judge is bound by canon law, but this commitment does not imply a mechanical application of the norms, or one which merely reproduces them.

If we wish to be in harmony with the *CIC*, we must note that the interpretation (or the application) of the law made by way of a court judgment or of an administrative act in a particular case "does not have the

50. F. FINOCCHIARO, "La giurisprudenza nell'ordinamento canonico," in *La norma en el Derecho canónico. Actas del III Congreso Internacional de Derecho canónico. Pamplona 10–15.X.1976*, I (Pamplona 1979), p. 999.

51. A. M. PUNZI NICOLÓ, "L'efficacia normativa della sentenza canonica e il problema del giudicato ingiusto," in *La norma en el Derecho canónico...*, cit., I, p. 1072.

52. Cf. G. MAY-A. EGLER, *Einführung in die kirchenrechtliche Methode* (Mainz 1986), p. 255.

53. P. LOMBARDÍA, *Lecciones de Derecho canónico* (Madrid 1984), p. 169.

54. Cf. John Paul II, *Address to the Roman Rota*, January 26, 1984, no. 7, in *AAS* 76 (1984), p. 648.

55. John Paul II, *Address to the Roman Rota*, February 26, 1983, no. 4, in *AAS* 75 (1983), p. 558.

56. Cf. John Paul II, *Address to the Roman Rota*, January 26, 1984, no. 4, in *AAS* 76 (1984), p. 646.

57. Cf., e.g., John Paul II, *Addresses to the Roman Rota*, February 4, 1980, nos. 7–9, in *AAS* 72 (1980), pp. 176–178; January 26, 1984, no. 4, in *AAS* 76 (1984), pp. 645–646.

force of law, and binds only those persons and affects only those matters for which it was given" (c. 16 § 3), and that an adjudged matter "*facit ius inter partes*" (c. 1642 § 2). Therefore, in order to conceive jurisprudence (or practice) as a juridical norm or as a criterion in supplementation, a certain uniformity in the judicial (or administrative) reply is necessary so as to transform that which was only applicable in a specific instance into something of general juridical value. In turn, the uniformity required for jurisprudence (and practice) of a normative nature will not be the same uniformity required for the use of jurisprudence in supplementation.

The normative value of jurisprudence and practice has traditionally been granted[58] in canon law to those modes of resolution of controversies that were already considered to constitute consolidated custom, or to the sentences that had been approved by the Pope (a practice which has now lapsed, and is even contrary to the provisions of *Pastor Bonus* 18). In these cases, jurisprudence and practice would have juridical *normativity* ("*vis legis*"). Thus, this case is not the one referenced in c. 19, since supplementation alone operates in the absence of law or custom, and in this case, custom is not absent, there is a norm to be applied. Admittedly, we are using a very peculiar notion of custom, and in some respects, not a very technical one[59] (especially in saying that the community has the capacity to introduce it and that the introduced acts are homogeneous in nature), but one which enjoys the almost unanimous acceptance of the doctrine.

A lesser uniformity is both necessary and sufficient in order to have a criterion of supplementation, which has been called jurisprudence and practice "*meri facti*," a way of resolving judicial and administrative problems which have not yet acquired the nature of custom and thereby the force of law. The number of concordant sentences (or of uniform administrative decisions) necessary to provide sufficient grounds for supplementation of law can vary depending on the matter at issue. Most important is that the uniformity be established "on a foundation of implicit adhesion to specific principles."[60] That does not mean, however, that these guidelines, especially in the case of judicial judgments, *must* be followed. In other words, jurisprudence and practice "*meri facti*" do not prevent a judge from adducing better reasons, nor do these principles constitute obligatory rules that bind tribunals or administrative superiors in their decisions.

In order to define the effect of judicial sentences and the normative or supplementary applicability of jurisprudence in a strict sense, it is nec-

58. Cf. CH. LEFÉBVRE, *Les pouvoirs du juge en droit canonique...*, cit., pp. 256–257.

59. For a critique of the customary character of jurisprudence, cf. Z. VARALTA, "De jurisprudentiae conceptu," in *Periodica de re morali canonica liturgica* 62 (1973), p. 47.

60. T. MAURO, "Le fonti del diritto canonico dalla promulgazione del Codex fino al Concilio Vaticano II," in *La norma en el Derecho canónico...*, cit., I, p. 575.

essary to remember *Pastor Bonus*, 126, which assigns to the Roman *Rota* the function of ensuring the "unity of jurisprudence" in such a way that, "through its own sentences, it is a help to the lower tribunals." This is unquestionably an explicit ratification of the existence of the very concept of jurisprudence and an invitation from the law for it to be operative. In reality, the concept of "unity of jurisprudence" is redundant. Jurisprudence, in a technical sense (regarding criteria, or normatively) cannot be other than uniform. The expression is valuable for three reasons, it proves its existence from the law; advocates its use; and (most of all) attributes it to a specific jurisdictional body. It seems clear that the system itself intends to establish the guidelines of a doctrine of jurisprudence of a normative character (especially in the area of matrimonial law),[61] a doctrine that posits a guarantee of unity and coherence in the resolution of judicial litigation. Moreover, this doctrine has more than illustrative value; indeed, it is to be juridically inspiring of solutions for the lower tribunals.[62] Obviously, it also promotes the use of the jurisprudence of the *Rota* as a criterion of supplementation, although it cannot detract in this sense from the effect of the sentences of the *Signatura* (or the AP). The sentences of the lower tribunals do not make jurisprudence with normative or supplementary effects in regard to matters regulated by higher law.

As for administrative practice as a criterion of supplementation, we have three observations. In situations where the norms of the Code expressly refer to it, we find no reason to speak of a criterion of supplementation, since it is understood to have the force of law, it constitutes an already established customary norm whose application is required by the law. Such is the case, for example, with the practice of dispensation referenced in cc. 14, 87 § 2 and 180 § 1; and with the purely formal or procedural practice ("*stilus et praxis canonica*") referred to in c. 63 § 1 as required for the valid obtaining of rescripts. By contrast, a practice that has not yet been consolidated as custom, a *de facto* practice that can derive from certain administrative decisions or concessions, will have a supplementary character.

Canon 19 puts forward, as resources for supplementation, only the jurisprudence and practice of the *Roman Curia*. Diocesan curiae can likewise generate a proper jurisprudence and practice in those matters of particular law that concerns them. This jurisprudence and practice will normally (if they do not fulfill the conditions of a custom contrary to law) never be contrary to those of the *Roman Curia*. Nevertheless, by analogy

61. Cf. Z. GROCHOLEWSKI, "Processi di nullità matrimoniale nella realtà odierna," in *Il processo matrimoniale canonico* (Vatican City 1988), pp. 19–20.

62. For a complete discussion of this subject, cf. R. RODRÍGUEZ-OCAÑA, "El tribunal de la Rota y la unidad de la jurisprudencia," in *Ius canonicum* 60 (1990), especially pp. 431–436 and 441–442.

with the provisions of c. 19, nothing prevents diocesan jurisprudence or practice from being applied in the supplementation of particular law.[63]

Canonical practice has been understood by one author[64] to be an especially useful means of subjecting the behavior of bodies that have only administrative power to the rule of the principle of legality, so that these bodies are able to act only with sufficient cause (c. 90 § 1) in giving dispensations, when a cause arises that has been consolidated by practice as custom.

9. *The common and constant opinion of learned authors*

The nature of canonical doctrine as common and constant is relative. The status of common is bestowed upon an opinion that is supported by a number of authors capable of making doctrine (six, according to a more or less random number set by post-classical doctrine). Accordingly, this opinion is not a personal one, nor one formulated to support particular interests, nor one opposed to the opinion of the majority of scholars of canon law. At the same time, the doctrine need not be unanimous on the subject, not even morally unanimous. The common opinion should be, above all, firmly grounded in reasoning, because the excessive and dangerous prestige of common opinions has often been dominant[65] in the history of canon law. Consequently, many authors have accepted them uncritically and have helped to give them still greater renown by accepting them. Therefore, "the common doctrine itself, independent of the reasons by which it can be supported, is not a complete and correct rule for the interpretation and application of the law."[66] The authors to whom we refer must have treated the problem in a deliberate and thematic fashion. A generic adhesion to the doctrine supported by others will not suffice.

(Regarding the concept of canonical tradition, see c. 6 § 2 and commentary.)

63. This is the interpretation of A. VAN HOVE, *De legibus ecclesiasticis*, cit., p. 337 and G. MICHIELS, *Normae generales*..., cit., p. 631.

64. Cf. P. LOMBARDÍA, "Ley, costumbre y actos administrativos en el nuevo Código de Derecho canónico," in *Escritos de Derecho canónico y Derecho eclesiástico del Estado*, V (Pamplona 1991), p. 131.

65. On these excesses, cf. CH. LEFÉBVRE, *Les pouvoirs du juge en droit canonique*..., cit., pp. 298–300.

66. A. VAN HOVE, *De legibus ecclesiasticis*, cit., p. 338.

20 **Lex posterior abrogat priorem aut eidem derogat, si id expresse edicat aut illi sit directe contraria, aut totam de integro ordinet legis prioris materiam; sed lex universalis minime derogat iuri particulari aut speciali, nisi aliud in iure expresse caveatur.**

A later law abrogates or derogates from an earlier law, if it expressly so states, or if it is directly contrary to that law, or if it integrally reorders the whole subject matter of the earlier law. A universal law, however, does not derogate from a particular or from a special law, unless the law expressly provides otherwise.

SOURCES: c. 22

CROSS REFERENCES: cc. 6 § 1, 7, 21, 28, 33 § 2, 34 § 3, 53, 94 § 3, 135 § 2, 505, 587 § 2, 1670, 1739

COMMENTARY

Javier Otaduy

Canon 20 introduces the topic of the revocation of law. Within the classical treatment of the cessation of law, the Code only considers the cessation "*ab extrinseco*," that is, the cessation that is produced as a result of the direct intervention of the legislator through his acts of authority. Accordingly, neither the cessation "*ab intrinseco*" of canonical tradition nor the cessation of the law by contrary custom (which is regulated by c. 28 of the *CIC*) are included in the purview of c. 20. Obviously, cases of singular cessation of the law, which can arise from causes that excuse subjects from obedience to the law (ignorance, doubt, *epikeia*), or from singular administrative acts (especially privileges and dispensations), are also not considered here. We find ourselves, therefore, strictly within the realm of revocation, cessation of law by a later legislative act. The revocation of the law definitively implies the affirmation of the power of the legislator over his own law throughout the whole course of its validity. The legislator is not technically and exclusively the proprietor of the law. Such a claim would ignore the real influence of the community affected by it, of the judges and superiors who apply it, of the doctrinal interpretation of it, and of the effect on it of the rest of the norms. Nevertheless, he or she clearly always retains the power to weaken its effect through revocation, provided there is sufficient cause for such a course of action.

Although it is not relevant to c. 20, cessation of the law "*ab intrinseco*" is said to occur when the circumstances of the object or substance of a given law change in such a way that, for the society that has received the norm, its fulfillment is now unjust, impossible (or at least unreasonably difficult for most addressees), or useless. The same applies to cessation of the final cause of the law (the extrinsic "*ratio*," or rationale for, alleged by the legislator). In this case, canonical doctrine requires that the cessation of the final cause be constant and adequate (that it cover completely, not just partially, the intent of the legislator).

1. *The author of the revocation*

Even though c. 20 says nothing about this, the author of the revocation is the same as the author of the promulgation. Anyone who can promulgate can also revoke. Nevertheless, everything relating to the hierarchy of subjects must also be applied here. Higher legislators (c. 135 § 2) have the capacity to revoke norms issued by lower legislators, although the law establishes certain requirements for this. By extension, the supreme legislative authority (the Roman Pontiff and the episcopal college) is competent to revoke any particular normative provision. There are also assumptions of hierarchy among particular legislators (the diocesan bishop and equivalents, the military ordinary, the prelate of a personal prelature, the plenary and provincial councils, the bishops' conferences, the superiors and the chapters of clerical religious institutes of pontifical right). It should be emphasized that there is no meaningful correlation between supreme authority and universal legislation. The supreme authority also produces particular legislation, and does so quite often.

When two legislators are involved in the same act, doubt can arise concerning which one has the capacity to revoke it. This occurs in the case of a law (or of a norm without the status of law) given by one legislator and confirmed by a second legislator who is hierarchically superior to the first. If the approval was "*in forma specifica,*" then the legislative act cannot be revoked by anyone other than the legislator who confirmed it (cf. cc. 505, 587 § 2). Under the current regimen, a document that has been specifically approved by the Roman Pontiff must note in the text: "*in forma specifica approbavit*" (*RGCR*, 110 § 4). As for normative provisions that antedate the validity of this formal requirement, we will have to stand by the formulae of approval that have been used. Specific approval normally takes place "post diligens examen, absolute, nulla adiecta conditione, addita clausula ex Motu proprio et ex certa scientia."[1]

1. G. MICHIELS, *Normae generales iuris canonici*, I (Paris-Tournai-Rome 1949), p. 653.

2. *Express revocation*

The first part of c. 20 establishes the types of revocation. It is nearly an exact transposition of art. 15 of the Italian Civil Code: "Le leggi non sono abrogate che da leggi posteriori per dichiarazione espressa del legislatore, o per incompatibilità tra le nuove disposizioni e le precedenti o perchè la nuova legge regola l'intera materia già regolata dalla legge anteriore." The *CIC* speaks, at least in general terms, of *abrogation* when the revocation is total, that is, when all of the normative material of the previous law is revoked; and of *derogation*, when the revocation is partial (although sometimes it is also used improperly: c. 1670). The term "abrogation," which was often used in the old Code to refer to the substitution of one law for another, has disappeared from the context of the revocation of law (although it is still retained in the context of administrative acts: cc. 53 and 1739).

The first of the "*capita revocationis*" is the express revocation: "si (lex posterior) id expresse edicat." If the later law expressly mentions the revocation of the earlier one ("*abroga*" or "*deroga*"), the earlier one is to be considered revoked. Such is the case, for example, with c. 6 § 1, which expressly mentions the revocation of the *CIC*/1917 and other categories of laws that it describes. Although with a form and publicity that are very debatable, since the provision has gone almost unnoticed, an express clause has likewise been used in the derogation contained within the last clause of c. 1037 of the *CIC*. This canon did not require religious persons who had taken perpetual vows, in the case of diaconal ordination, to undertake publicly the obligation of celibacy: "de speciali autem mandato Summi Pontificis ... derogato praescripto canonis 1037 Codicis Iuris Canonici."[2] This clause has also been used in the MP *Inde a Pontificatus Nostri* to derogate arts. 163–168 of the Ap. Const. *Pastor Bonus* ("derogando statutis constitutionis Apostolicae *Pastor Bonus*"),[3] and to unify in one Pontifical Council the Pontifical Councils of Culture and Dialogue with unbelievers.

Canonical doctrine, the commentators of the *CIC*/1917, and the practice of the *Curia* also include here (in the "*expressa edictio*") the revocation carried out through universal derogatory clauses; that is, when the derogation is made not "*nominatim et aperte*," but "*generatim et aequivalenter*."[4] The *express* mention of derogation or abrogation would thereby not need to be *explicit*, but instead could also be implicit, by means of a generic clause.[5] This type of clause[6] is now used chiefly and almost exclu-

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2. *CDWDS*, *Decretum* (Jun 29, 1989), no. 5, in *Pontificale Romanum. De ordinatione episcopi, presbyterorum et diaconorum*, ed. typ. alt. (Typis polyglottis Vaticanis 1990), p. IV.
3. JOHN PAUL II, MP *Inde a Pontificatus Nostri*, March 8, 1993, in *AAS* 85 (1993), p. 550.
4. G. MICHIELS, *Normae generales...*, cit., p. 655.
5. Cf. H. SOCHA, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1985ff), 20/3, no. 4.
6. To see the use of the clauses in their historical dimension and their great differentiation, which is no longer apparent, cf. A. BARBOSA, "De clausulis usufrequentioribus," in *Tractatus varii* (Lyons 1678), claus. 82–88, pp. 410–420.

sively by universal legislation as a system of abrogation or derogation of earlier norms, whether they are universal or not. The formulations can be completely unconditional or absolute, as for example, "contrariis quibuslibet (etiam specialissima mentione dignis) minime (non) obstantibus," or they can be more nuanced, as for example, "non obstantibus (quatenus opus est) Constitutionibus apostolicis ceterisque praescriptionibus (etiam peculiari mentione et derogatione dignis)." General clauses are those in which the norm that is being revoked is neither mentioned nor explicitly or adequately described, and in which even the type of norm affected is not specified (that is, whether it is a supposition of universal law, or also of particular law, or even of custom). The use of general clauses of revocation has increased considerably in modern canon law, because they provide a simple method of derogation. On the other hand, they testify to a legislative system that is much less jealous of the particular and of provisions containing privileges. We will consider below some possible negative aspects of this generic method of revocation.

These would include, of course, administrative norms of an executory or accessory nature, norms of urgency and declarative interpretation of the law (the general executory decrees and the instructions, for instance). This is because they suffer the fate of the law that they expound of whose fulfillment they urge or interpret (cc. 33 § 2 and 34 § 3).[7] They do not require an express clause of revocation, although nothing forbids one.

3. *Revocation by direct contradiction*

The second form of revocation by formal succession of laws is the revocation by reason of direct contrariety. "Directly contrary" means nothing other than incompatibility (which is discussed in art. 15 of the Italian Civil Code, but which does not appear to be a Latin term).[8] If there is direct contradiction thereby, the earlier law gives way insofar as it is incompatible, even if nothing to this effect is expressly stated, and even if there is no derogatory clause of any kind. It should be remembered that in doubtful cases, c. 21 is the controlling authority that requires that the two norms be reconciled. If contradiction is in fact understood as incompatibility, it seems beside the point to discuss, as does a considerable part of the doctrine, whether the contradiction must be direct or indirect in nature. All incompatibility constitutes a direct contradiction.[9] By reason of

7. The new Ecumenical Directive restores the validity of documents of this type that had been derogated, e.g., two instructions of 1972 and 1973 that interpreted the criteria for admission of non-Catholic Christians to Eucharistic Communion: cf. DE/1993, 130, note 135.

8. Cf. F.X. URRUTIA, commentary on c. 20, in *De normis generalibus. Adnotationes in Codicem: Liber I* (Rome 1983), p. 21.

9. Along these lines, cf. J. ARIAS GÓMEZ, "Revocación, irretroactividad y derechos adquiridos," in *Ius canonicum* 42 (1981), pp. 724–726.

direct contradiction with the norms of the Decree of the CC approved by the Roman Pontiff *in forma specifica*,[10] we must consider as derogated the absolute stipulation of c. 948 regarding the application of a separate Mass for each intention.

In practice, direct contradiction or incompatibility has come to be very similar to the first type of revocation, the express revocation. In fact, clauses of the type "non obstante quibuscumque in contrario" are nothing more than provisions of the law for the derogation of that which is contrary to its prescriptions. They are not total abrogations. The only difference is that an express clause is also capable of derogating suppositions of particular law, which would not be revoked by reason of simple incompatibility unless the law expressly directed it.

4. *Revocation by complete reordering of subject matter*

This third type of revocation, which is unquestionably the most complete, consists of the integral reordering of the regimen of a juridical subject. The new regimen completely replaces the old subject matter. The subject matter must exhibit a certain element of unity, and must be an institution or "*argumentum iuridicum*"[11] that is, to a certain degree, autonomous and systematic (e.g. parish churches, indulgences, the episcopal ministry, matrimonial impediments, ecumenism). The effect of the integral reordering is to completely abrogate the old norms to the full measure of their scope, no matter whether they are contrary or compatible. Consequently, there is no possibility that the two laws may complement each other. The reordering "*de integro*" is the most common method of abrogation of universal laws.

In practice, it is not always easy to determine at what point one has truly verified the integral reordering of the subject matter. The problem consists precisely in determining the extent of the integral reordering. What constitutes a whole in one respect may constitute a part in another, for example: "a matrimonial impediment can be considered an integral subject in the context of impediments, but it is also a part of marriage."[12] Accordingly, only "from the tenor of the new law and the various circumstances that accompany it, should we infer whether the legislator has intended to order subject matter or rather has only sought to maintain the legal validity of the other provisions concerning that subject matter while making a determination on a particular point."[13] We must carefully analyze the purpose of the new law and its method of operation within the area of

10. CC, *Decretum* (February 22, 1991), art. 2 § 1, in *AAS* 83 (1991), pp. 443–446.
11. G. MICHIELS, *Normae generales...*, cit., p. 658.
12. Cf. A. VAN HOVE, *De legibus ecclesiasticis* (Malines-Rome 1930), p. 355, note 3.
13. Cf. *ibid.*, p. 355; also cited by G. MICHIELS, *Normae generales...*, cit., p. 659.

its normative subject matter in order to gain a sure indication of the extent of the integrity. (Regarding certain normative documents that have been subjected to integral reordering by the *CIC*, and the problems that its definition occasions, see commentary on c. 6, no. 4.) Indeed, it is important to remember that the codification of canon law implies an intent to reorder a large part of the juridical institutions, with the result that those subjects whose fundamental normative essence has been incorporated in the *CIC*[14] are affected by a presumption of abrogation ("*iuris tantum*").

5. *The revocation of particular law*

The revocation of particular law[15] by universal law has its own system, contained in the second part of c. 20. It is not understood to be revoked if there is no express clause of revocation. Therefore, neither direct contrariety nor integral reordering is sufficient for the revocation of particular law. The difficulty lies in defining the formula to be required, or in other words, what should be understood by express formula of revocation of particular law. The question is not an idle one. By "express formula" we can understand an express statement of derogation (simple and generic) or, just as well, a provision of derogation that expressly cites what it derogates: particular law. With the help of the doctrine and canonical practice, the answer is beyond doubt. A comprehensive, universal, or generic provision of derogation of the type "*contrariis quibuscumque minime obstantibus*," or one of its derivatives, is sufficient. Such is the understanding of the doctrinal authors[16] and the Apostolic See accepts it in practice. Nevertheless, there are some documents that, like c. 6, observe strict formality in explicitly citing what is derogated.[17] In our view, for purposes of the future practice of derogation, one would have to admit that a certain over-subtlety as well as a strong measure of make-believe are required to suppose that a formula can be express without being explicit, and that it can avoid invoking precisely what it intends to abrogate.[18]

14. Cf. J. OTADUY, "El derecho canónico postconciliar como *ius vetus* (c. 6 § 1)," in *Le nouveau Code de droit canonique. Ve Congrès International de Droit canonique. Ottawa, 1984*, I (Ottawa 1986), pp. 122–128.

15. To become acquainted with the subjects competent to give particular law, it is useful to consult J. TRASERRA, "La legislación particular *contra ius*," in *Revista catalana de Teología* 12 (1987), pp. 166–171.

16. Cf. A. VAN HOVE, *De legibus...*, cit., p. 352; L. RODRIGO, *Tractatus de legibus* (Santander 1944), p. 409; G. MICHIELS, *Normae generales...*, cit., pp. 664–665.

17. Cf., e.g., Ap. Const. *Deus scientiarum Dominus*, in *AAS* 23 (1931), p. 262; and Ap. Const. *Sapientia Christiana*, in *AAS* 71 (1979), p. 499.

18. We have set forth our doubts about clauses of this type in J. OTADUY, "La relación entre el derecho universal y el particular," in *Ius canonicum* 60 (1990), pp. 485–489.

It can be said, therefore, that universal law behaves very differently in relation to particular law depending on whether the particular norm is "*nondum condita*" or "*iam condita*." If the particular norm has not been produced or constituted, we must always defer to the universal norm that is already established. If the particular norm already has juridical validity, the universal norm assumes a deferential position toward it. This is not to say that it cannot derogate a particular norm, of course, but to do so it must fulfill a requirement that it sets for itself: the legislator's intent to revoke must be expressly stated. This provision of c. 20 originates historically in the *Licet* Decretal of Boniface VIII (*VI* I, 2, 1). This Decretal declared that, for purposes of revocation, it was assumed that the Roman Pontiff was unaware of all particular law (even that issued from his own authority, if the words of the article are construed literally). Therefore, insofar as the pontifical law made no express mention of it, it was not to be understood as having revoked it, even if it were contrary. The Roman Pontiff alone had the "*ius commune*" (nowadays we would say "*ius universale*") "*in scrinio pectoris sui*," and revocatory power should be attributed to him alone. For these purposes, particular pontifical law[19] or that issuing from the Apostolic See is also included in particular law.

Thus, particular law does not give way merely because it contradicts universal law or because of a reordering of subject matter accomplished by universal law. If there is no express clause of revocation in the new law, contrary particular law can maintain its juridical validity, and, in the case of "*ordinatio de integro*," particular law that is complementary to universal law can also maintain its juridical validity. Consequently, this system of revocation is distinct from the one that governs the succession of universal laws.

The legislator did not intend to resolve in c. 20 the problems of succession of particular laws, when a later particular law has a greater range or scope of effect (e.g., between particular diocesan law and the general decretals subsequent to a provincial council or a bishops' conference). Canon 20 speaks of universal law; it does not even use the term "*lex generalis*" from the old Code, whereby it was possible to imagine a particular law that would be "*relative generalior*"[20] with respect to another particular law. All things considered, however, and even though there is not strict parallelism of reason,[21] we believe that an express clause of derogation is also required in this case.

(With regard to the application to the statutes of all criteria for revocation relating to the particular laws, see commentary on c. 6, no. 2.)

19. Cf. J. Traserra, "La legislación particular *contra ius...*," cit., pp. 181–190.
20. G. Michiels, *Normae generales...*, cit., p. 665.
21. As is sharply argued by A. van Hove, *De legibus ecclesiasticis...*, cit., pp. 356–357. Obviously, this does not fall within the context of ch. *Licet*.

6. *The revocation of special law*

Special law is not revoked by reason of mere contradiction without an express clause of revocation. The text of c. 20 makes a comparison between special law and particular law with regard to the effects of derogation of universal legislation. It is not entirely clear what "*ius speciale*" means in the context of c. 20. For some, it is indistinguishable from particular law.[22] The evolution of the expression in the preparatory works of the Code appears to favor this opinion. The expression issues from what was understood in the previous *schemata* as "*specialia statuta personarum*"[23] or simply "*specialia statuta*."[24] If we wish to make the meaning of "*ius speciale*" dependent on these expressions, it will be difficult to avoid assimilating it to "*ius particulare*." It would then be just another type of particular legislation given on the basis of persons rather than on that of territory, and would refer above all to the statutes on juridical persons.[25] It would be concerned with statutes that are given or specifically sanctioned by whoever holds the legislative power (e.g. the diocesan bishop) to establish the internal juridical regimen of particular institutions or bodies that have personality. It should be understood that we do not mean the purely conventional statutes (norms of autonomy), which "are not imposed by any authority, and therefore can put forward no claim whatsoever to be respected by the law when they are contrary to it."[26]

This interpretation takes into account that special law has always been understood to be something different. It is a norm that affects a category or species of persons (e.g. clerics or religious), and nothing forbids its becoming universal, having effect "ubique terrarum omnibus pro quibus latum est" (cf. c. 12 § 1), (which is precisely the notion of universal law offered by the *CIC*). Then, however, one would have no choice but to admit that the legislator has said the same thing with two different terms (particular law and special law). The first would refer to the most common criterion for defining particular law (it affects the subject on the basis of territory),[27] whereas the second would use instead a criterion of personality (i.e., the addressee is affected through membership in a group, institution, or juridical person). While this hypothesis is passable, certain problems of terminology argue against it. In that case, the legislator might have used the terms "*statuta*" (as he did in c. 94 § 3), or "*ius proprium*," which are used abundantly in the Code and are sufficiently well-developed.

22. Cf. F.X. URRUTIA, "De quibusdam quaestionibus ad librum primum Codicis pertinentibus," in *Periodica de re morali canonica liturgica* 73 (1984), pp. 297–301.
23. Cf. *Comm.* 16 (1984), p. 151.
24. Cf. Code Commission, *Schema Codicis iuris canonici* (TPV 1980), c. 20.
25. Cf. F.X. URRUTIA, "De quibusdam quaestionibus...," cit., p. 300.
26. M. CABREROS DE ANTA, *Derecho canónico fundamental* (Madrid 1960), p. 306.
27. Cf. M. PESENDORFER, *Partikulares Gesetz und partikularer Gesentzgeber im System des Geltenden latinischen Kirchenrechts* (Vienna 1975), pp. 23–24 and *passim*.

If he did not employ them, perhaps it was because he intended to denote something else by the term "*ius speciale.*"

In our opinion, the authors of c. 20 intended by the concept of "*ius speciale,*" although departing from the traditional terminology, to invoke a specialty of legislative subject matter, and not of personal, institutional, or territorial categories. Instead, it answers the question[28] of whether a previously established law that contains a specialty of subject matter (a more specific embodiment of the juridical supposition) requires, in order to be revoked, an express provision of revocation in a succeeding contrary law that has a more abstract or more general regulatory perspective. As we see it, the answer must be in the affirmative. This case should be compared to the cases of revocation of particular law, provided, of course, that we are not dealing merely with executory or accessory norms of the old law, which would be implicitly revoked with the revocation of the fundamental document. For the revocation of a specific law that is superseded by a contrary general law, some authors[29] even require, which seems reasonable to us, not only the express formula of revocation, but a specific clause as well, describing the supposition that is being derogated.

28. Raised chiefly, and answered in the affirmative, by L. RODRIGO, *Tractatus de legibus*..., cit., pp. 409–413.
29. Ibid., p. 409.

21 **In dubio revocatio legis praeexistentis non praesumitur, sed leges posteriores ad priores trahendae sunt et his, quantum fieri potest, conciliandae.**

In doubt, the revocation of a previous law is not presumed; rather, later laws are to be related to earlier ones and, as far as possible, harmonized with them.

SOURCES: c. 23

CROSS REFERENCES: cc. 6, 14, 20

COMMENTARY

Javier Otaduy

Preexisting law, according to c. 21, has the favor of the law when there is doubt of revocation. The revocation of that law is not to be presumed.

The doubt referred to in c. 21 is true doubt. Therefore, it should not be interpreted as if it read: "so long as a particular doubt of law with regard to the revocation of a law has not been stated (that is, during the process of configuration of the doubt), that law retains its force". On the contrary, once the supposition of revocation has been characterized as doubtful law, c. 14 immediately becomes applicable, and the law does not oblige, because a doubtful law with doubt of law does not urge (and is null, if the doubt affects, as the case may be, its own normative basis). Thus far, we have discussed, in our opinion, what c. 21 does not say. What it does say is that revocation is not to be presumed so long as doubt exists. Accordingly, there are situations of authentic doubt of revocation in which there is an obligation to harmonize compatible laws.

It must be remembered, however, that neither does c. 21 say, in case of doubt, that the previous law is maintained. It is not given a positive or absolute formulation, but rather a negative and limiting one. Indeed, to say that the previous law is *not* presumed to be revoked is not the same as saying, as has been asserted, "the previous law is presumed not to be revoked."[1] *It is not*, properly, a presumption of retention, but rather a lack of presumption about its cessation.

1. G. MICHIELS, *Normae generales iuris canonici*, I (Paris-Tournai-Rome 1949), p. 669.

An analysis of the words of c. 21 leads us to the following conclusion: only a qualified doubt is juridically sufficient for the revocation of law. In the ordinary cases of "*dubium iuris*" (see commentary on c. 14, no. 1), a *relative doubt*, that is, an opinion that was fairly probable (not necessarily the most probable), was sufficient to cripple its force of law. Here, a characteristic doubt is required, one of greater intensity, which in the end consists of an opinion that is more probable than its opposite. This is what some authors seem to mean by expressions such as "intense", "important", or "serious" doubt regarding the probability of revocation.[2] Moreover, it seems reasonable to require this type of doubt in this case, in which we are not properly confronted with a supposition of "urgency of law" for a specific case (c. 14), but rather with a loss of effect for a general normative provision.

In which cases of juridical experience can this doubt of revocation operate? An intelligent analysis of c. 20 brings us to the conclusion that we can encounter these instances of doubt above all in the case of the integral reordering of subject matter of a previous law. There is no doubt of revocation in the case of direct contradiction. In that case there is nothing to harmonize. Nor does c. 21 primarily address cases involving express clauses of revocation, in which all doubt falls on the sufficiency of the formula rather than on the substance of the laws affected. In this case, it is less important to harmonize the laws than to determine the will of the legislator with regard to the revocation. Furthermore, the express-clause formula, if it *truly* is such, indicates what is revoked. It does not raise doubts. On the other hand, the mere diversity of laws does not engender doubt. Technically, there is no such thing as "indirect contradiction." The contradiction mentioned in c. 20 is either direct (incompatibility) or it is not a contradiction at all.[3]

Therefore, it is principally in the integral reordering of subject matter that we can encounter doubts of revocation of the old legislation. The reordering can stem from a wish to collect in just one legislative document all of the norms for a specific subject that had previously been scattered. Often cited as examples of this are the Constitutions *Apostolicae Sedis* of Pius IX on the censures "*latae sententiae*," *Officiorum et munerum* of Leo XIII on the discipline of prohibition of books, *Poenitemini* of Paul VI on the discipline of penance. In these cases, little doubt arises about the revocation of the old laws, since the character of the integral reordering is manifest and even express.[4] Nor does doubt arise when the integral reordering is sufficiently substitutive, that is, when the new legislative document covers, to the same degree, the normative material of

2. Cf. C. DAMEN, "De vitanda juris correctione ad normam Codicis," in *Apollinaris* 5 (1932), pp. 200–201; A. VAN HOVE, *De legibus ecclesiasticis* (Malines-Rome 1930), pp. 358–359.

3. Thus, following N. Hilling, A. VAN HOVE, *De legibus ecclesiasticis*..., cit., p. 354.

4. E.g., in the Ap. Const. *Poenitemini* I § 2: *AAS* 58 (1966), p. 183.

the previous document. Thus, for example, *Pastor Bonus* completely reorders and revokes *REU*. More doubts arise, however (see commentary on c. 6, no. 4), when the integral reordering is made *per modum codicis*; that is, when the reordering affects a wide variety of matters, indeed the whole of the subject matter of the Code, but does not do so to sufficient effect. All information indicates, however, that in such cases the doubt is qualified, or in other words, that the preexisting legislative documents are to be considered revoked. In this respect, the attitude of ecclesiastical authority toward the revocation (by integral reordering) of certain documents[5] has been very significant, as has been the directive of the Secretary of the Code Commission: "the laws given by the Sacred Congregations are abrogated by the new Code, and must be elaborated or promulgated anew, a proposition which, though laborious, is best for the sake of juridical certainty."[6] This refers without doubt to those laws which contain many prescriptions compatible with the new law, but whose fundamental essence has been reordered, even though this may involve only a small part of the total normative text.

5. Cf. *Rationale fundamentalis institutionis sacerdotalis (editio approbata post Codicem Iuris canonici promulgatum)* (TPV Rome 1985), pp. 3–4; Litt. circ. *De processu super matrimonio rato et non consummato*, of December 20, 1986, in *Comm.* 20 (1988), p. 78.

6. *Comm.* 14 (1982), p. 131; cf. also 23 (1991), p. 119.

22 Leges civiles ad quas ius Ecclesiae remittit, in iure canonico iisdem cum effectibus serventur, quatenus iuri divino non sint contrariae et nisi aliud iure canonico caveatur.

When the law of the Church remits some issue to the civil law, the latter is to be observed with the same effects in canon law, in so far as it is not contrary to divine Law, and provided it is not otherwise stipulated in canon law.

SOURCES: cc. 255, 547 § 2, 581 § 2, 987,5°, 1016, 1059, 1063 § 3, 1080, 1186, 1301 § 1, 1508, 1529, 1553 § 2, 1770 § 2,1°, 1813 § 2, 1926, 1933 § 3, 1961, 2191 § 3,3°, 2198, 2223 § 3,2° et 3°; SCDS Resp., 2 iul. 1917; CodCom Resp., 23 mar. 1919; SCDS Resp., 20 iun. 1919; SCR Rescr., 3 feb. 1921; SCDS Ind., 16 iun. 1922; SCDS Resol., 25 ian. 1927; SCCouncil Litt. circ., 20 iun. 1929 (*AAS* 21 [1929] 384-399); SCR Instr. *Questa Sacra Congregazione*, 6 feb. 1930 (*AAS* 22 [1930] 138-144); Secr. St. Litt. circ., 5 sep. 1935; SCHO Resp., 28 iun. 1938; Secr. St. Litt. circ., 10 aug. 1941; *SCCong* Instr. *Solemne semper*, 23 apr. 1951, XIV (*AAS* 43 [1951] 564); SCR Rescr., 1 apr. 1955; SCR Resp., 26 mar. 1957; SCR Resp., 1 mar. 1958; SCR Rescr., 22 aug. 1959; SCHO Resp., 1 mar. 1961; *CD* 19; *GS* 74; Secr. St. *Notif.*, 22 aug. 1966; Secr. St. *Notif.*, 16 feb. 1967; *CM* II

CROSS REFERENCES: cc. 98, 197, 231, 1059, 1105, 1286, 1290, 1500, 1672, 1714

COMMENTARY

Javier Otaduy

Remittal to the civil law[1] has been placed "with undeniable technical acumen"[2] under the title "*De legibus.*" It therefore constitutes a new canon, even though substantively its text is largely derived from the old c. 1529 on contracts. An overview of the matters in which the *CIC* remits to the civil law yields the following list: contracts (c. 1290), prescription (c. 197), settlements and compromises reached through arbitration

1. For the influence of P. Ciprotti in the formulation and current placement of c. 22, cf. P. CIPROTTI, "Le 'leggi civili' nel nuovo Codice di diritto canonico," in *Il nuovo Codice di diritto canonico, novità, motivazione, significato* (Rome 1983), p. 532, note 19.
2. P. LOMBARDÍA, commentary on c. 22, in *Pamplona Com.*

(c. 1714), the civil effects of marriage (cc. 1059 and 1672), guardianship (c. 98), the mandate to contract marriage by proxy (c. 1105), actions for possession (c. 1500), and labor relations and social security (cc. 231 and 1286). We are dealing with matters in which "the coincidence of the criteria of the law of Church and State"[3] is important.

1. *Juridical nature and types of remittal*

Remittal to the civil law must be distinguished from other relationships between canon and civil law. It is not a relationship of *exemplariness* (the norms of one system finding inspiration in the norms of the other).[4] Nor is it an exhortative relationship or one of *preceptive observance*, a mandate or exhortation to comply with the norms of the other system of law, but without considering them to be proper to itself or deferring to them for the regulation of relationships that have effect within the canonical order: Such is the case with, for example, cc. 668 §§ 1 and 4;1275 § 5; 1284 § 2, 2°-3°; 1286 § 1; and 1299 § 2. In these instances, rather than norms of remittal, we should speak of precautionary norms that avert unnecessary conflicts between the two juridical systems. Nor is it an *appreciative* relationship or one of mere acknowledgment, by which the existence of the institutions of the other system is recognized, sometimes even with some effects in the system itself, as can be the case, for example, with, cc. 377 § 5; 1152 § 2; 1405 § 1, 1°; and 1479.[5]

The essential feature of the remittal "consists in the fact that the norm which carries out such a remittal does not regulate its own supposition of fact, but rather accepts the regulation that the other system makes in the same circumstances."[6] Two types of remittal have been forcefully outlined in the canonical jurisprudence of the last century (and less so in the secular doctrine). The first is the formal remittal (or the non-receptive remittal), in which the received norm does not become part of the canonical system proper. The second is the material remittal (or receptive remittal), in which the received norm is incorporated into the canonical system proper. This second case is often referred to as the "canonization" of the civil law.[7] In receptive remittal, the canonized norm becomes part of the receiving system of law, obviously without losing its normative nature in

3. Ibid.

4. Cf. the long list of Code norms "imitating" civil legislation made by P. CIPROTTI, "Le 'leggi civili'...," cit., pp. 527–528.

5. Cf. on this point, as on a great deal of the discussion in this commentary, J. MIÑAMBRES, *La remisión de la ley canónica al derecho civil* (Rome 1992), pp. 5–17.

6. J. MIÑAMBRES, "Análisis de la técnica de la remisión a otros ordenamientos jurídicos en el Código de 1983," in *Ius canonicum* 64 (1992), p. 716.

7. A different meaning of the concept of canonization is employed by V. DEL GIUDICE, "Il diritto dello Stato nell'ordinamento canonico," in *Archivio giuridico* 91 (1924), pp. 12–13.

the original system of law. In the formal or non-receptive remittal, which is not always easy to verify, the canonical system acknowledges its incompetence in the matters which it remits,[8] but these do not thereby constitute part of its own system of law.

Although this distinction between receptive remittal and formal remittal has led to abundant doctrinal controversy, it does not seem to have any serious practical consequences.[9] On one hand, analysis of the formulae used in the canonizing norms of the Code shows that an authentic receptive remittal is being carried out, a process which in all other regards is congruent with the matters to which it makes reference. It shows that these are all matters concerning the competence of the Church (and obviously, the competence of states as well). On the other hand, c. 22 warns that the civil laws to which the canon law remits "*iisdem cum effectibus serventur,*" i.e., are to operate in canon law with the same effects as in secular law. In other words, the canonized norm is canonical (without ceasing to be civil). It must be interpreted and applied in accordance with its original system of law (by using the overall regulation of the institution as well as the juridical and jurisprudential resources that it offers), taking care only to observe the limits introduced by the canonical legislator himself in c. 22. Moreover, this seems to be the prevailing jurisprudential opinion,[10] thereby avoiding the interpretation or application of norms in isolation from their original system of law. Nevertheless, we must not forget that the canonical limits are very generic and that the "canonical" nature of the norm and the spirit of the law of the Church can forcefully emerge when the canonical judge, "acting freely,"[11] goes beyond "the barriers of civil law."[12]

2. *The norm of remittal or canonizing norm*

The norm of remittal (or canonizing norm, if the remittal is receptive) is a canonical norm similar to those of international private law.[13] By virtue of this norm, a reception of norms from other systems of law is brought about in such a way that changes in the original system of law produce the same changes in the receiving system of law. It is, if you will, a blank norm whose content is received from another norm. The similarity

8. Cf. P. CIPROTTI, *Contributo a la teoria della canonizzazione delle leggi civili* (Rome 1941), p. 19.
9. Along the same lines, cf. J. MIÑAMBRES, *La remisión...*, cit., p. 192.
10. Cf., for example, the opinions c. Pinna March 23, 1959 (*SRR Dec* 51, 1959, pp. 268–281), c. Lefebvre July 16, 1966 (*SRR Dec* 58,1966, pp. 600–615), and c. De Jorio December 6, 1967 (*SRR Dec* 59, 1967, pp. 817–830): cited by J. MIÑAMBRES, *La remisión...*, cit., pp. 47–48, 59.
11. P. LOMBARDÍA, commentary on c. 22, in *Pamplona Com.*
12. Opinion c. Parrillo July 5, 1927 (*SRR Dec* 19, 1927, p. 292).
13. Cf. V. BELLINI, "Receptio juris civilis in Codice Juris canonici respectu rationum juris internationalis privati," in *Ephemerides Juris Canonici* (1947), p. 130.

with norms of international private law does not mean identity, because, *inter alia*, canon law is unique and sovereign over these effects of remittal. Therefore, no disputes about competence can arise between the various systems of law that claim for themselves the evaluation of the juridical relationship at issue. Rather, what can happen, as we shall see, is conflict over objective or material problems.

In the structure of the canonical norm of remittal, it is important to distinguish a supposition of fact that must be understood according to the interpretive resources of canon law (which for canon law are "*contractus,*" "*solutio,*" "*praescriptio*"), a reference to normative inhibition as well as transferal of the matter to the civil jurisdiction, and some criteria of connection ("*criteri di collegamento,*" "*punto de conexión*") by virtue of which the juridical relationship is attracted to one particular civil juridical system and not to another. In fact, "if there were only one state juridical system, a generic remittal to the state law would be sufficient to identify the juridical system from which the regulating norms are to be drawn. But since there are many coexisting state juridical systems, the canonizing norm necessarily must indicate from which system(s) the regulating norms are to be drawn."[14]

This last point, much discussed in international doctrine, is less clear in canon law, which offers few clues for resolving the hypothetical problems of conflict between systems of law. The criteria of connection would be "all of the juridically relevant circumstances ... that serve to determine the applicable system of law: for example, the nationality or residence of the person, the place in which something is located, the place of realization of an act, or consummation of a contract, or fulfillment of an obligation, or the place chosen by the parties, etc."[15] Sometimes these criteria of connection are obvious and there is no need to determine them (for example, the place of a thing for the acquisitive prescription), but at other times they raise problems of concurrence that must be resolved by the criteria of contact or attraction. Examples would be, whether the applicable system of law is that of the place of origin of the contract, the place of its consummation, or the place where the consequent obligations are to be fulfilled, whether one or another system of law is to be applied to citizens of a given state, or whether one or another system is applicable to a person of dual nationality. These types of problems can be resolved by recourse to the criteria of connection, which are, however, very underdeveloped in the canonical norms of remittal. In the case of silence, one must refer to the resources of supplementation contained in c. 19.

14. P. CIPROTTI, *Contributo...*, cit., p. 65.
15. J. MIÑAMBRES, "Análisis de la técnica...," cit., p. 727.

3. *The received or canonized norm*

Canon 22 remits to the "*leges civiles.*" This term, although it has undergone a significant change in the Reform Commission,[16] should be understood as referring to laws in a substantive sense rather than in a strict or formal sense. It remits to the norms proper to a juridical system (legal, administrative, customary, jurisprudential criteria). If the concept of systematic unity of a system is present, as it is in the secular systems without exception, then this reference to the civil law cannot be understood in any other way. Moreover, civil law, as envisioned in c. 22, essentially means non-canon law.[17] The appeal, therefore, is not only to the law of states, but also to the normative phenomena of all institutional societies with subjectivity in the national or international domain (infrastatal, such as an autonomous community, or suprastatal, such as federated states or the international system itself).

As we have said above, and as c. 22 warns, the canonized norm is to be interpreted and applied "*iisdem cum effectibus*" that it has in civil law.

4. *The limits of remittal*

The received or canonized norms are to be applied with the same effects as they have in their original system of law, and c. 22 says, "in so far as they are not contrary to divine law, and provided it is not otherwise stipulated in canon law." This general warning renders unnecessary any other restatement of the limits, which otherwise are natural, in each of the specific instances of remittal, although restatement does occur in a couple of instances (cc. 197, 1290). If in a given case these limits are thought to be present, the case will have to be resolved by recourse to c. 19.

The reference to "*ius divinum*" is not illogical. It is true that this refers to a natural limit and an assumption underlying every canonical norm such that it is not strictly necessary to state it expressly. Nevertheless, the ecclesiastical legislator, precisely because he cannot assume "*a priori*" that the norms issued by external legislators are congruent with divine law, warns that this is not a typical case, and that therefore particular and specific care must be taken to insure conformity with divine law as a basic principle of congruence. It should be noted that, in this case, divine law functions as a limit. It is not understood as an underlying reality, indivisibly united with all of the norms of canon law, as an essential component that functions to inculcate or imbue. Rather, it is understood as a point of reference that describes the juridical content that the human legislator does not recognize as his own, but rather as revealed, and thus essentially

16. Cf. *Comm.* 11 (1979), p. 76: "quoties lex canonica ad ius civile remittit."
17. Cf. D. GALLES, "*The civil law,*" in *The Jurist* 49 (1989), p. 241.

inalterable. Therefore, it is not a question of determining whether the canonized norms more or less reflect the divine law, but rather of simply verifying whether or not they respect it. On the other hand, although the presence of divine law in the positivistic canonical system is accepted straightforwardly, and not as a mere metajuridical reality, one has no choice but to accept that the intent of the legislator here is to distinguish between canon law and divine law, attributing to each a specific meaning and a specific competence with respect to the limits of normative remittal.

"Et nisi aliud iure canonico caveatur." The limits that human canon law can place on the remittal are of two types. First, they operate in a more immediate way as specific norms that limit those canonical institutions that are subject to remittal. Such are, for example, the limits on canonical prescription contained in cc. 198–199 and the norms of cc. 1291–1298, to which contracts of alienation are subject, sometimes as a condition for their validity. They can, however, also be understood in a more abstract and more basic way. Canon law constitutes a limit on remittal only to the extent that a supposition of fact is identified in a canonical norm that is better suited to the solution of the case than to the norm of remittal. We might say that there is a presumption in favor of the suppositions of fact that have been originally designed by the legislator of canon law. Otherwise, this presumption is no more than an "application of the principle of the impossibility that, in the same system of law, there are different incompatible norms."[18] Among the applicable canonical norms[19] we must also include the norms relating to the succession of laws (cc. 20 and 21), the special status of particular and special law (c. 20), and the conditions for the validity of the customs "*contra*" or "*praeter legem*" (cc. 24, 26 and 28).

18. P. CIPROTTI, *Contributo...*, cit., pp. 95–96.
19. Cf. O. CASSOLA, *De receptione legum civilium in iure canonico* (Rome 1944), p. 83.

TITULUS II
De consuetudine

TITLE II
Custom

INTRODUCTION

Javier Otaduy

The title *De consuetudine* (cc. 23–28) contains the fundamental juridical guidelines concerning the custom of law. It describes custom as a specific means of normative production; that is, it establishes the conditions necessary for custom to be considered a formal source of law. The title "undeniably fulfills a descriptive function of custom as a source of law, insofar as it contains certain canons of an instrumental nature, that is, canons capable of permitting the behavior of the Christian community to be traced back to an abstract type of source."[1]

The following themes are addressed in this title: the introduction and approval of custom (c. 23); the objective requirements for the lawfulness of its use, conformity with divine law and reasonableness, (c. 24); the subjective requirements of the introducing community, the capable community and the intention of introducing law, (c. 25); the special characteristics of the time period which customs contrary to law and extralegal customs must have (c. 26); the interpretative function of custom in accordance with law (c. 27); and the modes of cessation of custom (c. 28).

1. *The ecclesiological foundation*

Ecclesiology is a young science. None of the doctrine on customary law developed in reference to the *Corpus iuris canonici* and to the *CIC*/1917 had the intention of explaining custom from an ecclesiological perspective. It outlined an extensive theory of great subtlety and technical finesse, but its general orientation and conclusions had their basis in positive law and organizational and social fact. Obviously, this does not

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1. G. COMOTTI, *La consuetudine nel diritto canonico* (Padova 1993), p. 77.

mean that traditional doctrine did not operate with a specific notion of Church. It was a presupposed notion, however, not a considered one. It served to adopt limits, not to guide theoretical speculation or to define and illustrate practical conclusions.

With the doctrinal impulse of the Second Vatican Council, canonical science has been obliged to rethink the basis of customary law. It did not set out to deny the validity of the traditional thinking or to compromise the technical discoveries, nor did it attempt to diminish a long-standing and carefully developed system. Rather, it meant to improve some formulations and to illustrate more forcefully, certain components of customary law employed by the tradition.

The participation of all the faithful in the *munera Christi* is perhaps the most representative element of that ecclesiological enrichment. The faithful participate in the sacerdotal function, prophetic and real, of Christ. Thus it is possible to say that "there is a true equality among all with regard to the dignity and to the activity ... in the building up of the Body of Christ" (*LG* 32). The behavior of the faithful forms part of the *aedificatio Ecclesiae*. It is not simply a neutral manifestation, fit to be evaluated and screened by the hierarchical ministry but incapable of claiming its proper status and dignity. The communal behavior of the faithful has a positive ecclesiological importance. This facilitates the understanding of communal activity as a custom, that is, as an authentic building up of the canonical order. The community of the faithful as such does not participate in the power of the leadership, but it does make a positive contribution with its activity to the creation of the juridical order.

In this system of ideas, the words of c. 1506 of the *CCEO* can be understood: "Consuetudo communitatis christianae, quatenus actuositati Spiritus Sancti in corpore ecclesiali respondet, vim iuris obtinere possit." The activity of the Holy Spirit orients and impels the Christian community. Although this is incontrovertible, a kind of "*imago Spiritus*," or behavior that reproduces and makes known a gift of the Spirit, cannot be demanded of every customary phenomenon. This risk, which is not absent from current canonical doctrine, would be worse than the opposite scenario. It would place custom on an unreal level, inaccessible to many reasonable social behaviors, and would contradict the habitual understanding of the custom.

In the years since the Second Vatican Council, many other doctrinal guidelines have been developed to give an ecclesiological foundation to the functioning of canonical custom. Examples include *communio* as a foundation that would reflect an essential dimension of the Church;[2] the *sensus fidei* as a basic structure that would confer the greatest possible

2. Cf. W. AYMANS-K. MÖRSDORF, *Kanonisches Recht. Lehrbuch Aufgrund des Codex Iuris Canonici*, I (Paderborn-Munich-Vienna-Zürich 1991), pp. 208–212.

normative status on communal activity;[3] and tradition as a theological paradigm of juridical custom. These doctrinal guidelines have not received approval from positive law, although in some cases they offer interesting suggestions. Other times they tend to confuse similar notions instead of providing clarification and reliability,[4] notions, moreover, that the doctrine since ancient times has endeavored to distinguish and classify as distinct.[5]

Nevertheless, the title *De consuetudine* has come in for criticism on the grounds that it has insufficient ecclesiology, as if it were excessively devoted to secular modes of expression and valuation.[6] In our judgment, however, the title reflects the function that should be assigned to it in canon law, and it has improved the technical definition of custom.

2. *Dependence on history*

Custom is not justified solely from a strictly ecclesiological perspective. More precisely, custom cannot be explained exclusively by the proper and common instruments of theology of the Church. In order to be comprehensive and to convey its true sense, the law must mediate and be allowed to evaluate social factors. It is also necessary to look to history. Custom is thoroughly imbued with metahistorical and metajuridical elements. It arises as an historical and juridical demand on canon law.

It has been said that custom confers on positive law a just adaptation to social reality, and that, if there is one system of law that cannot do without it, it is canon law.[7] One must never forget that the law of the Church has a universal reach. It is impossible to ignore the great variety of communities, the intertwining of such distinct social and organizational situations, or the multiplicity of uses in a universal community. This is undoubtedly true, but it is neither the only nor the most important consideration. In bestowing institutional status on canonical custom, the most solid argument is the historical one. Since its origin, canonical custom has been considered to be a venerable normative source. It has never been a matter of caprice or mere juridical convenience for the law of the Church to maintain custom as a source of law, but rather a requirement for authenticity. Canon law respects custom in order to sustain its own identity.

3. Cf., e.g., R. Bertolino, "Spunti metodologici per una dottrina della consuetudine nel diritto canonico," in *Studi in memoria di Pietro Gismondi*, I (Milan 1987), pp. 99–123.

4. E.g., for a clear and rigorous critique of the comparison between custom and the *sensus fidei*, cf. G. Comotti, *La consuetudine...*, cit., pp. 104–115.

5. Cf. I. Ibán, "Notas acerca de la costumbre en el derecho canónico," in *Il diritto ecclesiastico* 97 (1986), I, p. 275.

6. Cf., e.g., F.X. Urrutia, "Reflexiones acerca de la costumbre jurídica en la Iglesia," in *Investigationes theologico-canonicae* (Rome 1978), pp. 457–458.

7. Cf. P. Lombardía, *Lecciones de Derecho canónico* (Madrid 1984), p. 157.

Not even in peak times of legalism or desire for juridical uniformity has it been possible to ignore custom;[8] currently, most of those prejudices have fallen by the wayside.

It is precisely because of this profound adherence to history, however, that, when examining specific features of customary canon law, one can get the impression that such law is ill-suited to a juridical reality such as ours. The subtleties involved in the modes of approval of the legislator, in how to discover and describe the intention of the community, in the necessity and scope of the formulae of revocation, in the characteristics that define capable communities, in the respect that private custom commands, and in many other matters, may seem unnecessary or outdated in a modern juridical system.

Without doubt, a great deal of the canonical doctrine on custom was developed in a milieu of law that was quite different from that which prevails today. It was more vigorous, more dynamic, more wide-ranging, more capable of respecting difference, and, although this may seem contradictory, more closely bound by the law and steeped in juridical awareness. Where the ties of legal obligation are stronger, the need to justify communal behavior that develops apart from law or in opposition to it is also greater. Amidst a climate in which all things legislative enjoy prestige, it follows that phenomena would be fostered which attribute *vim legis* to behavior, in short, that the normative force of custom would be affirmed. To the extent that a social group abides by the law, customs are reckoned as a juridical good: they are brought forward and proved before tribunals of justice; they establish their validity as normative channels in order to function with lawfulness. When a community is subject to a living juridical conscience, it is very important that its acts be lawful, that they be supported by a normative title, and that they are able to have legal effect.

It is important to recognize that this canonical viewpoint has been greatly eroded. Moreover, and this is very important, the strength of written law has grown over time, as has the tendency to value the law above all else as an instrument of certainty and social equality. According to this view, written law is an indispensable instrument, and custom constitutes a risk. Custom would then be merely a necessary vestige of history whose real importance disappears once a more complete formalization of written law has been carried out. The necessary uniformity of the law would require, in addition, a certain prejudice against social usages not contained or evaluated by the laws, and more so if they are contrary to the laws.

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8. Cf. the anti-custom project presented (for the preparation of this title in the *CIC*/1917) by the most prestigious consultor, F.X. WERNZ, *Votum Rmi. Francisci Xav. Wernz S. I. consultoris* (Rome-Vatican City 1904). Cf. also G. FELICIANI, "Lineamenti di ricerca sulle origini della codificazione canonica vigente," in *Annali della Facoltà de Giurisprudenza in onore di Attilio Moroni*, I, Università di Macerata (Milan 1982), pp. 217–218.

In spite of all these prejudices, the title *De consuetudine* reaffirms that custom continues to play a preponderant role among the sources of canon law, through the demands of history, of course, but also through institutional expediency. Canon law has not lost its simplicity through the influence of custom; nor has custom become either obsolete or discredited as a normative source.

3. *Aspects of continuity*

There exists a continuity between the old title and the new one which was affirmed right from the beginning by the Code Commission: "servantur eaedem quoad substantiam normae, sed clariore modo et ordine magis logico sunt traditae."[9] Clearly, the substantive features of juridical custom remain the same. The intention of the legislator has been not to effect a radical alteration in the status to be held by custom as a source of law, or to change its most important juridical requirements. Rather, the intention has essentially been to present the same material in a more ordered manner and to introduce some technical nuances that define its nature and function. The lines of continuity, notwithstanding minor changes, can be summed up as follows:

a) Some aspects contain express *constitutional requirements* which are accordingly unalterable, such as the approval of the legislator (c. 23), conformity with divine law (c. 24 § 1), or the reasonableness required of the usage (c. 24 § 2).

b) Other aspects also maintain the parallelism for reasons of respect for the *basic elements of the customary institution.* These include the intention of introducing law, the concept of the capable community, the mandatory time period for the constitution of normative value for custom (c. 26), the interpretive function of custom (c. 27), and the modes of revocation (c. 28).

c) The continuity between the previous Code and the new one is also maintained through various technical means which, without being constitutional requirements or basic elements of the customary institution, do constitute *aspects clearly characteristic of the regimen of the canonical custom.* These include the unreasonableness of a custom expressly reprobated *in iure* (c. 24 § 2), the definition of a community capable of introducing custom as a community capable of receiving law (c. 25), the efficacy of the prohibitory clause (c. 26), the privileged nature of centennial and immemorial customs (cc. 26 and 28), and the requirement for an express and descriptive clause for the revocation of both privileged and particular customs (by a universal law) (c. 28).

9. *Comm.* 9 (1977), p. 232.

4. *Aspects of reform*

It has not been all continuity, however. The title has effected a considerable technical improvement on the previous normative material to the point that this title has come to be called "one of the most successful of the new corpus of law."[10] This technical improvement consists of a representative set of subtle changes, which we present under the following headings:

a) *Efficient cause of custom.* Canon 23 states that only a custom introduced by the *communitas fidelium* can have the force of law. This certainly does not suppose any innovation, as it is perfectly clear that the community introduces custom. Even so, no mention of the introducing community was made in the former c. 25. On the contrary, the juridical force of the norm that was introduced was made entirely ("*unice*") dependent on the Superior. Thus the communal behavior was considered only material and neutral and without any juridical status, so that it might be absorbed by canonical power. Canon 23 has made no change in the requirement of approval, nor has it bestowed the power of regimen on the community of faithful capable of introducing custom. It has, however, recognized that its activity does have a leading role and an undeniable importance in the creation of norms.

b) *Approval of the legislator.* The modifications here have also been very characteristic ones. First, the term "superior" has been modified to "legislator" (cc. 23 and 26), with the intention not only of equating the normative force of law and custom, but also of emphasizing that the approval is carried out by virtue of legislative power and through a legislator acting as such. Accordingly, the approval by law has become the favored mechanism. The final clause of c. 23 notes that the approval of the legislator is to be carried out "*ad normam canonum qui sequuntur*," with the result that the tacit approval has become discredited, (at least as the ordinary mechanism of approval). Nevertheless, c. 26 speaks of a custom "specifically approved by the competent legislator," which probably implies the possibility of tacit approval in exceptional circumstances.

c) *Intention of introducing law.* The term itself presupposes a modification because it represents a shift from a subjective vision ("*animus se obligandi*") to one of more objective scope ("*animus iuris inducendi*," c. 25). The more significant change, however, is the requirement that every custom be observed with the intention of introducing law, including customs contrary to law (c. 25). The previous Code did not require an intention of obliging itself, and that silence led to vigorous doctrinal contro-

10. P. LOMBARDÍA, "Ley, costumbre y actos administrativos en el nuevo Código de Derecho canónico," in *Escritos de Derecho canónico y de Derecho eclesiástico del Estado*, V (Pamplona 1991), p. 120.

versy. The *CIC* has placed the subject of the communal *animus* on a level more in line with objective rationality.

d) *Requirements of time.* The time period required for the consolidation of normative force for custom has been reduced from forty years to thirty (c. 26), in accordance with a clear wish to accelerate the process and facilitate the operation of customary law. The Code has reserved the term "prescription" for the process of acquiring and losing subjective rights and being freed from obligations, with the intention of placing customary law in the sphere of objective and public law. Thus the term is no longer used for the passage of time necessary for a custom to obtain normative value.

e) *The revocation of particular customs by a universal law.* The old expression, "general law," has been modified to the current "universal law" (c. 28). Though it may seem to be a mere question of diction, it led to multiple opinions regarding the existence of particular laws that were general in a relative sense. This terminological change therefore renders obsolete, as often happens in law, a problem of juridical doctrine.

5. *The silences of the title*

In reality, the silences of the Code regarding specific aspects of customary law are nothing more than a faithful transferal of the silences that existed in the *CIC*/1917. Nor is it strange that silences should exist: "*Codex sex canonibus absolvit materiam intricatissimam.*"[11] Some of the aspects that go unregulated reflect the practical impossibility of formulating a suitable definition of positive law where they are concerned. Others reflect the wish to leave in the hands of the doctrine that which the legislator has preferred not to establish specifically.

a) *The definition of custom.* It is fitting that the *CIC* offers no definition of custom, since it is not its province to do so. It does, however, present many of the defining characteristics of custom, though they are somewhat dispersed. It lacks, however, a definition sufficient to clearly distinguish custom from other similar juridical phenomena, such as the internal observance of certain smaller communities, administrative or judicial practice (the *stylus*), conventional usages, or prescription. Notwithstanding, we believe, as will be explained below, that most of these similar meanings can be clarified through careful study of the requirements pertaining to customary law presented by the *CIC*, and even by the terminology itself. Canonical custom can be defined, in its most elemental, technical sense, as "a type of general norm (c. 25), consisting of the actual usages of communities which can acquire normative efficacy in accor-

11. A. VAN HOVE, *De consuetudine. De temporis supputatione* (Malines-Rome 1933), p. 3.

dance with the principles established by the legislator in cc. 23–28 of the Code."[12]

b) *The determination of the capable community.* Finding one characteristic that would truly capture the subject capable of introducing canonical custom was as much an unfulfilled objective of the *CIC* as of the old Code. The former manages only to establish the principle that the subject capable of introducing custom must at least be capable of receiving a law. This is not very helpful in a practical or immediate sense, though of course, it is a definition that finds strong support in canonical tradition. It was alternately proposed that a more specific definition be established,[13] and even that a specific list of such communities be offered which would resolve from the outset any doubt about the capable subject. That attempt was abandoned, however, owing to the historical contradictions that a closed list would entail, the vacillations of the authors, and their inability to settle on one criterion.

c) *The frequency and nature of the introductory acts.* The title is also silent on the number, nature, and frequency required of the communal acts through which the usage is established. The basic problem was probably thought to have been adequately resolved by the provision of c. 26, in which the completion of thirty *continuous* years is required. This continuity requires that the acts be uniform and uninterrupted. Even so, nothing is said about their frequency. The reason for this omission lies in the difficulty of establishing one criterion which is truly representative on this point. Frequency contains a moral dimension. It varies widely from case to case. The judge "*pensabit, quot actus sint necessarii.*"[14] The number of acts required is at the discretion of the judge and depends on the type of usage at issue. A communal behavior that occurs very infrequently will require fewer acts than one which occurs daily or which can be carried out easily. The acts must also be public and must be performed with sufficient notoriety within the relevant purview of validity.

d) *The proof of custom.* This may be the most important topic to be extracted from this title. A custom is a norm that must be brought forward often by parties before tribunals of justice, as it may be unknown to the judges. By contrast, law does not need to be either brought forward or proved, because its proof is already contained in its promulgation. A customary usage, for evidential purposes, functions like a fact that must be proved. It is not, of course, a fact submitted to a judge as if it were a dispute between parties[15] which the judge must resolve. A custom is a true

12. P. LOMBARDÍA, *Lecciones...*, cit., p. 157.
13. Cf. *Comm.* 16 (1984), p. 152.
14. A. REIFFENSTUEL, *Ius canonicum universum*, L. I, cit. 4, no. 120 (Paris 1864), p. 288.
15. Taking custom in this sense, some authors deny the factual nature of custom. Cf. G. MICHIELS, *Normae generales juris canonici*, II (Paris-Tournai-Rome 1949), p. 178; also G. PHILIPS, *Du Droit ecclésiastique* (trans. CROUZET), III (Paris 1851), p. 424.

juridical norm. It must demonstrate that it is in fact a custom, however, and therefore it often requires proof. The judge does not grant normative value to a custom. He or she simply recognizes its existence or declares it non-existent, having judged that it lacks one of the essential elements. The proof of custom has, therefore, the function of informing the judge, not of creating law. Thus, universal customs and well-known customs do not need to be proved.

Although the canons *De consuetudine* do not directly address the proof of custom, we must remember that they remit generally to cc. 1526–1586 concerning the regimen *De probationibus*. "Custom does not yet have, at least officially, means of proof that are unique to it."[16] That said, the means of proof are usually testimonial and documentary. One valid testimonial proof is the authentic testimony of the local ordinary. Identical jurisprudence in several opinions *similiter latae* constitutes full proof.[17] Proof extends not only to the existence or non-existence of the custom, but also to the constitutive elements (the reasonableness, frequency, and uniformity of the acts, the capable and integral community, the time period, and, if applicable, the consent of the legislator). Perhaps the element that the judge most often finds himself weighing is the reasonableness of the usage. These assumptions can serve as a method of proof in gauging the *animus communitatis* and the reasonableness of many customs.

16. R. WEHRLÉ, *De la coutume dans le droit canonique* (Paris 1928), p. 417.
17. Cf. A. VAN HOVE, *De consuetudine...*, cit., p. 236, note 4.

23 **Ea tantum consuetudo a communitate fidelium introducta vim legis habet, quae a legislatore approbata fuerit, ad normam canonum qui sequuntur.**

Only a custom introduced by a community of the faithful has the force of law if it has been approved by the legislator, in accordance with the following canons.

SOURCES: c. 25; SCCouncil 14 dec. 1918 (*AAS* 11 [1919] 128-133); SC-Council 11 dec. 1920 (*AAS* 13 [1921] 262-268)

CROSS REFERENCES: c. 25, 112 § 2, 135 § 2, 284, 392, 1062, 1176 § 3, 1279 § 1

COMMENTARY

Javier Otaduy

The first canon on custom reflects its introductory nature, for it highlights five aspects that are fundamental and, to a certain extent, defining of canonical custom. These are: *a*) its distinction from mere de facto usages; *b*) its status or normative force (the force of law); *c*) the active factor of its introduction (a community of the faithful); *d*) the indispensable approval of the legislator; and *e*) the mode of that approval (according to cc. 24–28).

1. *Custom de facto and Custom de iure*

When c. 23 states that only certain customs have the force of law, and consequently, juridical effects in canon law, it is clearly establishing implicitly the existence of other customs that are merely "*consuetudines facti.*" We cannot attribute the effects characteristic of juridical norms to the latter, either because they lack elements that are essential if they are to be canonical customs, or because they are still in the process of normative consolidation (they are inchoate), and have not yet completed the time period required by that same system of law. *De facto* customs cannot be irrelevant to the law (the Code often remits, for example, to usages, practice, or "mores"),[1] but they do not have the status of a juridical norm. They are mere points of objective reference that can be used in designing

1. Cf. G. COMOTTI, *La consuetudine nel diritto canonico* (Padova 1993), pp. 69–72.

the suppositions of fact of the norms. An ecclesial-community usage must conform to the canons of the tit. "*De consuetudine*" in order to secure the force of law. The *CIC* sometimes refers to custom improperly, as *de facto* custom (cc. 112 § 2, 1176 § 3). At other times it is unclear whether it is referring strictly to *de jure* custom (cc. 284, 1062, 1279 § 1). In these cases, we can apply Van Hove's opinion regarding other similar suppositions of the *CIC*/1917: "Here custom seems as if it should be understood not as true customary law, but rather as a traditional usage that the law makes obligatory."[2]

"*Vis legis*" does not mean formal status of law.[3] Although they have many similarities, and function with many of the same effects,[4] law and custom are two different formal sources. Yet even though many of their juridical effects turn out to be similar, their technical structures are markedly different (as far as their elaboration, efficient cause, incidence in the juridical order, and proof of their existence are concerned), and their classifications within the norms are also different. Law has pride of place, which is shown quite easily in that the law expresses approval, i.e. conformity with the formal law, which confers its normative status on custom. Thus, when we say that canonical custom has the force of law, we are essentially saying two things: that custom acquires the status of a general or abstract norm and is obligatory in nature, and that such a norm has effects similar to those of laws, and in some cases can even prevail over them. Custom, it has been said, "obliges like a law, but is not a law."[5]

2. *The community of the faithful as efficient cause of custom*

It cannot be said that c. 23 simply reproduces the content of the parallel canon of the *CIC*/1917.[6] The Code Commission introduced four fundamental modifications. It made express reference to the community of the faithful as the active agent of behavior ("*a communitate fidelium introducta*"); it mitigated the absolute and exclusive language with which the necessity of the consent of the Superior was formerly expressed ("*unice*"); it substituted the concept of the approval of the legislator for that of the consent of the Superior; and finally, it remitted to the canons of the title the establishment of the formal requirements for approval.

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2. A. VAN HOVE, *De consuetudine. De temporis supputatione* (Malines-Rome 1933), p. 12, in note 1.

3. Cf. F.X. URRUTIA, "De consuetudinecanonica novi canones studio proponuntur," in *Periodica de re morali canonica liturgica* 70 (1981), pp. 87–88.

4. Cf. J. OTADUY, "El sentido de la ley canónica a la luz del Libro I del nuevo Código," in *Temas fundamentales en el nuevo Código. XVIII Semana española de Derecho canónico* (Salamanca 1984), pp. 69–70.

5. H. SOCHA, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1985ff), 23/7, no. 8.

6. For a documentary outline of the formulation of c. 23, cf. *Comm.* 17 (1985), pp. 35–36.

The heart of c. 23 is focused on offering, (or at least on trying to offer), a solution to the dialectic between the element of community and the element of authority. Clearly, both participate in the introduction of canonical custom. The old version (c. 25 *CIC*/1917) emphasized, with no hint of equivocation, that the binding normative force of custom (its force of law) was exclusively ("*unice*") produced by the consent of the ecclesiastical superior. In the current version, the necessity for that consent is not put in doubt, but at the same time it indicates that the introduction rests with the community. It is clear that this textual addition reflected the wish to assign a more prominent role to the community.[7] Still more, it responded to the concern to avoid a fiction, for there was obviously something fictitious in not attributing any juridical influence whatsoever to the community in the introduction of custom.

The community is the efficient cause (with juridical importance) in the introduction of custom. The requirement of approval by the legislator, an indispensable requirement for the custom to acquire the force of law in the canonical system, does not diminish the influence of the community. The behavior of the community is not merely a neutral presupposition, purely material and pre-juridical, that obtains its essential juridical force from the intervention of authority. The behavior of the community, which the law itself requires in c. 25, is a behavior that connotes juridicity: it is carried out with the intention of introducing law. It would be a great contradiction to require that the community exhibit "*animus iuris inducendi*," and then once manifested, to deny it any active participation in the normativity thus introduced.[8]

3. *The intervention of the legislator in the approval of custom*

Traditionally (at least since the sixteenth century, and especially since the codification of 1917), the consent or approval of the legislator (formerly "superior") has been understood as "veram, immediatam et unicam causam efficientem elementi formalis normae juridicae consuetudinariae constitutivi."[9] Custom would then be, rather than an autonomous source of law, a mere mode, or certainly a characteristic one, of legislative activity. In other words, the source that gives custom its specifically juridical essence, which from this perspective, basically amounts to obtaining an unhindered capacity to oblige, is the legislator. Custom would be a compound of matter (the community usage) and form (the juridical ele-

7. Cf. *Comm.* 3 (1971), p. 86.

8. Along the same lines, cf. T.I. JIMÉNEZ URRESTI, commentary on c. 23, in *Salamanca Com.* Also in partial agreement is J.A. FERNÁNDEZ ARRUTI, "La costumbre en la nueva codificación canónica," in *Le nouveau Code de Droit canonique. V Congrès International de Droit canonique*, I (Ottawa 1986), pp. 178–181.

9. G. MICHIELS, *Normae generales juris canonici*, II (Paris-Tournai-Rome 1949), p. 39.

ment, the force of law). Keeping this compositeness in mind, "that which is properly called the creator of compound entities, is not the element that contains the matter, but the one that gives the entity its specific essence."[10] This interpretation was deduced easily enough from the expression of the old c. 25. Nevertheless, we believe that it cannot express what is meant by the current expression.[11] The efficient cause of normativity belongs to the community, although the intervention of the legislator proves to be an additional indispensable requirement for custom to be binding. Not all juridical matters can be resolved into concomitant operativity, imperative requirements, and immediate force of obligation. Normativity is also the introduction of behavior and rational modes of valuation, of societal importance, with an organizing juridical intention. This second aspect can (must) be attributed to the introducing community.

The approval of the legislator is a "qualified collaboration."[12] It is absolutely essential for the consolidation of custom as a juridical norm, and in that sense, it is part of a function that creates law.[13] The approval, however, is external to the custom itself. It is an indispensable subsequent control, but one which presupposes the existence of the custom, already with a certain juridical importance. The same term, "approval," which has replaced the previous term, "consent," is easily incorporated into the same line of reasoning.[14] The approvals, often indispensable for the perfection of juridical acts and the production of their characteristic effects, are subsequent proceedings that are added to the acts whose substance has already taken shape. Consent, by contrast, generally constitutes, in matters juridical, an essential element, and not just a subsequent requirement for perfection or efficacy.

In our opinion, there are at least two ways, each deficient, of understanding the significance of the approval of the legislator. The first would be the attribution to the community, and only to the community, of the juridical force of custom, in the belief that the approval of the legislator is a reality that is simply presupposed in the community usage, and therefore purely nominal. The community, if it works together with the legislator (that is, if it does not act out of contempt, rebelliousness, non-solidarity, or motives incompatible with the exercise of pastoral authority) introduces customs with juridical force. The acting party who consents is the community, not the legislator. The act of approval is not a specific act. In support of this doctrinal position, especially as regards customs that were

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10. L. RODRIGO, *Tractatus de legibus* (Santander 1944), p. 469.
11. Somewhat dissenting, H. SOCHA, in K. LÜDICKE (ed.), *Münsterischer Kommentar...*, cit., 23/6, no. 7.
12. Ibid., 23/1, no. 1.
13. Ibid., 23/3, no. 4.
14. In disagreement, R. BERTOLINO, "Spunti metodologici per una dottrina della consuetudine nel diritto canonico," in *Studi in memoria di Pietro Gismondi*, I (Milan 1987), p. 119.

not "contrary to canon law," there are a number of references from the first decretists and decretalists, up until the fifteenth century.[15] It was the doctrine itself, however, which ("happily"[16] emancipated from the principles of Roman law), reflecting on the characteristics proper to canonical norms, enriched this theoretical development.[17] The specific or positive approval (not simply presumed, interpretive, or nominal) of the ecclesiastical authority is required for custom to have the force of law. The obligatory effects of customs introduced by ecclesial communities depend on that approval, which will usually be embodied in a law. Communities of faithful, as such, do not have legislative power, i.e., the power required in order to impose a particular behavior with the force of law. That would violate the constitutional presuppositions of ecclesiastical authority.[18]

It does not, however, follow logically (as the second of the deficient views would hold) that the activity of the community is irrelevant from the juridical standpoint, as though it were only a material participant. On the contrary, the active function of the introduction rests with it, which in juridical terms means that it is the primary efficient cause of the norm. Rational behavior, with the intention of introducing law, already has an undeniable juridical dimension. Therefore, the act of approval by the legislator codetermines and collaborates, but does not actually constitute, canonical custom. It has been said that the intervention of the legislator is compromised, that there is "*un dovere di ascolto*," a juridical obligation to accept community behavior that fulfills the necessary conditions. As a result, "the choice of the legislator to give normative standing to custom cannot be considered absolutely free."[19] Without the approval of the legislator, custom does not obtain the force of law. The content and nature of custom, however, are not altered by the approval.

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15. Cf. A. VAN HOVE, *De consuetudine...*, pp. 48–53. Arguing strongly for this doctrinal position, and using it by extension as a paradigm for the current juridical theory on custom, J. ARIAS GÓMEZ, *El "consensus communitatis" en la eficacia normativa de la costumbre* (Pamplona 1966), pp. 19–43, *passim*.

16. G. MICHIELS, *Normae generales...*, cit., p. 34.

17. According to F.X. URRUTIA, *De consuetudine...*, cit., pp. 70–71, no emancipation whatsoever from the principles of Roman Law has taken place; rather, the new canons "De consuetudine," including the material relating to the approval of the legislator, represent an institution fully inscribed in the "secularization" of law.

18. For a strong stance on this point, cf. S. GHERRO, "Normazione canonica e Popolo di Dio (qualche riflessione sui cann. 7 e 23)," in S. GHERRO (Ed.), *Studi sul Primo Libro del Codex Iuris Canonici* (Padova 1993), pp. 96–97. Also G. COMOTTI, *La consuetudine..*, cit., pp.161–163.

19. G. COMOTTI, *La consuetudine...*, cit., p. 167.

4. *The types of approval of the legislator*

The approval of the legislator has traditionally been divided into special approval and legal approval. Both are positive approvals of the legislator (that is, they both consist of behavior or acts that specifically approve), but they have important differences. Special approval requires that the legislator have knowledge of the custom and that it can be manifested explicitly (also called expressly) or implicitly (tacitly). Tacit or implicit approval requires that the silence of the legislator be significant or conclusive. A "merely economical"[20] silence (tolerance or dissimulation) would not be sufficient because silence does not, in principle, constitute an indication of approval. The implicit or tacit special approval has long been subjected to strong criticism from some authors who have considered it morally impossible,[21] or at the least confusing and difficult to verify.[22]

The legal approval, by contrast, does not require that the legislator have knowledge of the custom. The legislator establishes in the law the conditions to which the community usage must conform, and if it fulfills them, then the custom is considered approved. It is the law itself that approves. Thus, the legal approval projects into the future and is forward-looking. Therefore, it affects customs of which the legislator cannot have detailed knowledge.

5. *The legal approval*

The Code has been highly praised for its legal approval. As we have already noted, it modifies the term, "consent" of the superior to "approval" of the legislator in order to avoid doubts about whether true consent is possible without actual knowledge. Canon 23 cautions that the approval is to be carried out "*ad normam canonum qui sequuntur.*" Moreover, it refers explicitly to the "approval of the legislator" (and not generically to the "approval of the superior"). This is a clear indication that it is the legislator in his or her capacity as such, through an anticipatory legal provision, who actually approves custom. The stance adopted by the Code is significant, because there used to be (and still are) authors opposed to legal approval.[23] The *CIC* does not discard the "special" approval (c. 26), which assumes express and actual knowledge of the custom on the part of the

20. G. MICHIELS, *Normae generales...*, cit., p. 43.
21. Cf. J.F. SCHULTE, *Das katholische Kirchenrecht*, I (Giessen 1860), p. 252.
22. Cf. P. LOMBARDÍA, commentary on c. 23, in *Pamplona Com*; F.X. URRUTIA, *De consuetudine...*, cit., pp. 95–96.
23. Cf. J.F. SCHULTE, *Das katholische...*, cit., pp. 251–252; T. GOUSSET, *Exposition des principes du droit canonique* (Paris 1959), pp. 361–368; S. ÁLVAREZ, *De consuetudine* (Rome 1954), pp. 22–23; F.X. URRUTIA, "Reflexiones acerca de la costumbre jurídica en la Iglesia," in *Investigationes theologico-canonicae* (Rome 1978), pp. 454–456, 476–478.

competent legislator and is not subject to the ordinary time periods, but this supposition is now designed as an exception. Furthermore, for some authors, the case of the "*specialiter probata*" custom would be no more than an instance of "a law based on the sensitivity of the legislator to the usages of the community."[24] In such cases, we would have before us a formal law whose purely material content would be provided by the usages of the community.

For some authors, the new schema has served to eliminate the efficacy of tacit or implicit consent. "By establishing in c. 23 that consent is incumbent upon the legislator in his capacity as such—that is, through acts which meet the prescriptions of cc. 7–8—the old discussion on tacit consent loses its significance to the undeniable advantages of juridical certainty."[25] In effect, it can be said that the new guidelines on custom do not encourage implicit consent. Nevertheless, it would be overreaching to eliminate the possibility that some customs are consolidated as a result of implicit consent, which of course is neither excluded from the Code nor incompatible with it.[26]

The particular legislator is competent to approve customs in the scope of his jurisdiction and within the purview of his normative competence. In other words, he can "*specialiter probare*" those customs that are generated in respect to his own particular legislation (contrary to law or extralegal), as well as those that arise "*praeter legem universalem.*" Otherwise, the provision of c. 26 regarding the "competent legislator" would not make sense. He can also establish the normative provisions necessary for the legal approval of particular custom, provided that these provisions respect cc. 23–28. The particular legislator is not competent to approve customs "contrary to the law of a higher legislator" (c. 135 § 2, *in fine*), whether it be pontifical, from an ecumenical council, from the *Roman Curia*, or from other superior particular authorities. The undoubted competence of diocesan bishops as regards the discipline common to the whole Church (c. 392) which makes them competent to promote, develop, and safeguard it, has the natural limit of respect or non-infringement.

When the legal approval of particular custom is carried out in accord with cc. 24–28, the custom thus approved obviously does not become a pontifical norm. The particular legislator retains his competence to derogate it. Borrowing an efficacious expression of Michiels, we will say that that type of approval is pontifical "*in fieri*" but not "*in facto esse*;"[27] or equivalently, that the custom thus approved maintains its particular nature.

24. P. LOMBARDÍA, commentary on c. 23, cit.; cf. also F.X. URRUTIA, *De consuetudine...*, cit., pp. 96–97.

25. P. LOMBARDÍA, "Ley, costumbre y actos administrativos en el nuevo Código de Derecho canónico," in *Escritos de Derecho canónico y de Derecho eclesiástico del Estado*, V (Pamplona 1991), p. 121.

26. Along these lines, cf. W. ONCLIN, in *Comm.* 3 (1971), p. 87.

27. Cf. G. MICHIELS, *Normae generales...*, cit., p. 50.

It is arguable whether it is appropriate to understand the legislator as an authority external to the community who approves another entity's behavior ("tamquam arbiter, qui quasi extra et supra suam communitatem versetur")[28] when in reality he is part of that community. It has been said that to understand the approval of the legislator anonymously,[29] as emanating from someone who is not personally connected with the conduct that has been introduced, is not congruent with how the pastoral office is exercised. The superior of an ecclesial community (especially the bishops, who have been charged with ministering to the flock), cannot simply contemplate from an external position the manner in which a usage is imposed, with no capacity to intervene. These criticisms, although they cannot be ignored, are unacceptable. Clearly, the legislator is the head of the community, and as such, is part of it, but precisely because he is the head, his function is not solely to show solidarity with the community, but also to preside over it.[30] All forms of presidency entail a certain degree of functional bifurcation: there is a function of solidarity, and there is a function of preeminence. In this instance, the second is the operating principle.

The biased criticism regarding the anonymous exercise of the power of the legislator through legal approval tries to pick up strength by citing particular customs whose approval rests in the hands of the universal law (cc. 23–28). Thus it is claimed that the particular legislator would be stripped of all competence over particular customs, concerning which he is the active protagonist, and over which he should have the last word. This, however, has very little truth to it. It would merely show one's ignorance of the phenomenology of canonical custom, to try to simplify it to phenomena that occur at the level of the general community (of all of the members of a particular church, or at least of all the local communities that constitute it), that are patently imposed on all. In such phenomena, the pastor could not remain uninvolved because he would be immersed in them. It should be obvious, however, that not all particular customs have this structure. Many of them are lacking in so obvious a factor as public or well-known, or they arise in smaller communities, and the pastor (the legislator) cannot be required to know each of them in detail.

The anonymous mode of approval of behavior should not be a cause of vexation. All general norms (the law, for instance) always and necessarily involve a measure of anonymity. The legislator does not know all the specific suppositions which will be regulated by the norm in the future, all the juridical situations and all the episodes that the norm will have to evaluate or attribute effects to. The power to make law, like the power to ap-

28. F.X. URRUTIA, *De consuetudine...*, cit., p. 73. Along similar lines, cf. R. BERTOLINO, "Spunti metodologici...," cit., p. 117.
29. Cf. ibid., pp. 74 and 78.
30. Along these lines, cf. G. COMOTTI, *La consuetudine...*, cit., p. 163.

prove custom, is a characteristic jurisdictional function that involves analysis of the whole juridical order.

On the other hand, we should not forget that canonical customs often arise in the area of competencies, i.e. that they often concern the capacity of subjects to exercise specific functions, and the configuration of the rights and responsibilities of offices. Moreover, they are cited in cases of conflict. We do not mean by this that they are a means of acquiring subjective laws. They *generate* objective law, but they can sometimes lead to instances of intra-community conflict. A usage can be introduced by the community as a whole, but one part of the community might subsequently denounce it. In addition, it is not always easy to distinguish two juridical concepts, undoubtedly different (theoretically differentiated in canon law), but very close in practice, as are custom and the *prescription* of beneficial juridical situations as regards third parties.[31] If there is a conflict, it makes little sense to pretend that the pastor places himself at the head of the community as the introducer of the usage or as the representative of part of the community.

31. Cf. A. VAN HOVE, *De consuetudine...*, cit., pp. 10 and 174–175.

24 **§ 1. Nulla consuetudo vim legis obtinere potest, quae sit iuri divino contraria.**

§ 2. Nec vim legis obtinere potest consuetudo contra aut praeter ius canonicum, nisi sit rationabilis; consuetudo autem quae in iure expresse reprobatur, non est rationabilis.

§ 1. No custom which is contrary to divine Law can acquire the force of law.

§ 2. A custom which is contrary to or apart from canon law, cannot acquire the force of law unless it is reasonable; a custom which is expressly reprobated in the law is not reasonable.

SOURCES: § 1: c.27 § 1
§ 2: cc. 27, 28; SCCouncil 14 dec. 1918 (*AAS* 11 [1919] 128–133); CodCom Resp. 15, 16 oct. 1919 (*AAS* 11 [1919] 479); SCCouncil Resol., 11 dec. 1920 (*AAS* 14 [1922] 42–46); CodCom Resp., 26 nov. 1922 (*AAS* 15 [1923] 128); SCDS Resol., 24 iul. 1925 (*AAS* 18 [1926] 43–44); SCDS Instr. *Ex responsionibus*, 25 nov. 1925 (*AAS* 18 [1926] 44–47), SCCouncil 23 apr. 1927 (*AAS* 19 [1927] 415)

CROSS REFERENCES: cc. 5 § 1, 6 § 2, 22, 25, 26, 28, 396 § 2, 423 § 1, 526 § 2, 1075 § 1, 1076, 1287 § 1, 1290, 1425 § 1, 1692 § 2

COMMENTARY

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Canon 24 formulates the basic objective requirements for a legal usage to become a juridical custom. We should understand objective requirements as those which apply to the usage per se, not so much those which apply to the introducing community. Conformity to divine law and the criterion of reasonableness are attributed, of course, to the community (for to act reasonably is the province of the community), but this is done through its behavior, through the usage introduced by it.

1. *The requirement of non-opposition to divine law* (§ 1)

Within the objective requirements for community usages, respect for divine, natural, and positive law is a *sine qua non*. Strictly speaking, this provision would not even be necessary, since it is an implicit limit on all of canon law, not just on the law of custom. If it is mentioned, and mentioned first, then it must be for two reasons. First, a usage is introduced without

the intervention of the jurisdictional authority and is inherently more fragile and prone to abuse. It contains the "risk that it may be an excessively close echo of human weakness."[1] Secondly, the provision privileging divine law as an indispensable requirement of the community usage reflects the classical formulation of the requirements for canonical customs. This provision is found in doctrinal and legislative commentaries on custom, and its characteristic language is outlined in the decretal *Cum tanto* of Gregory IX.[2] In this decretal, respect for divine law and reasonableness are both clearly discernible. The latter, taking the divine law for granted, goes on to introduce a further, defining requirement.

Canon 24 § 1 refers to divine law as a limit. No custom "quae sit iuri divino contraria" can obtain the force of law. A similar criterion is used in cc. 22 and 1290 (concerning the reception of civil law in general and the civil law of contracts and payments), c. 1692 § 2 (concerning civil sentences of separation of spouses), and c. 1075 § 1 (concerning the authentic declaration of the cases in which divine law prohibits or invalidates a marriage). Canon 24 does not require that canonical customs positively reflect or contain values of divine law (the verification of which would entail a difficult task of apprehension), or that "they must represent an ecclesial embodiment of the faith,"[3] but only that they not be contrary to natural law or positive divine law.

The doctrinal elaboration of divine law has had a long history. Initially, it was understood as that material which was contained in the sources of revelation ("quod in Lege et in Evangelio continetur"), regardless of the nature of its precepts. The result was that the ceremonial precepts of the Old Testament or the provisions on the discipline of the early Church were judged to be divine law. Accordingly, custom could "augere, diminuere et distinguere ius divinum." It could, in short, affect the *material* content of the sources of revelation (e.g., it could derogate the ceremonial precepts of the Old Testament, mitigate the apostolic discipline, find exceptions to the evangelical maxims that had been given a general formulation, and discern the mode of compliance with the precepts of the Decalogue). Over time, divine law has been redefined as the unalterable core of revelation circumscribing faith and customs. This body of dogmatic and moral truths, which constitutes the inner essence of the Church and measures the behavior of the people of God, cannot by its very nature be subjected to historical changes or the fluctuations of community behavior. The classic subject of reprobation of customs because of their opposition to divine law is one which pertains to sinful usages or usages that nurture or encourage sin, such as simony or usury.

1. P. LOMBARDÍA, commentary on tit. II, "De consuetudine," in *Pamplona Com*, p. 82.
2. Cf. *X* I, 4, 11. For a commentary on the content of this decretal of Gregory IX, cf. R. WEHRLÉ, *De la coutume dans le Droit canonique* (Paris 1928), pp. 110–127.
3. H. SOCHA, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1985ff), 24/2, no. 3.

2. *The criterion of reasonableness* (§ 2)

The second section of c. 24 requires that extralegal customs and customs contrary to law have the characteristic of reasonableness. The same is not required of the custom according to law, because it is assumed that such a custom shares in the reasonableness of the law itself. The position of the text in § 2 clearly indicates that the *CIC* regards reasonableness as a characteristic that goes beyond simple respect for divine law, although the contents of divine law must of course be considered reasonable, in that they imbue and inform the reason and the spirit of the introducing community. Thus, as traditional doctrine has made clear in a composed way, behavior that violated the contents of divine law would immediately be unreasonable.

Reasonableness constitutes an essential criterion of custom. Custom, like law, is an "*ordinatio rationis*."[4] Reasonableness, therefore, extends beyond the status of a requirement, and is in fact a constitutive element that gauges the very normativity of the usage "*ab intra*."[5] If we interpret it in this way, however, we might be going a bit beyond the intent of c. 24. For in truth, the positive disposition of the law is limited to "underlining, through the provisions of c. 24, the need for *rationabilitas* in the choice carried out by the community."[6] The intent of c. 24 is not so much to affirm the subjective reasonableness of those introducing the usage (which is better seen in the "*animus inducendi*") as to require that the behavior itself, objectively, be reasonable.

In this spirit, custom is reasonable to the extent that it reflects the truth and the good that should be required of social behavior "*in Ecclesia*." Gregory IX reminds us that Christ said "*ego sum veritas*;" but he did not say that he was "usage or custom." The creators of doctrine have described that element from a theoretical point of view, using completely generic expressions ("si bonum suadet publicum et religioni conveniens sit").[7] The truth of the matter, though, is that the criterion of customary reasonableness has relied on defining by contrast and by experience. By contrast, we mean by identifying examples of customs that proved to be unreasonable; by experience, we mean by limiting itself to periodic

4. Cf. the strong stance taken on this point (*in contra*, i.e., claiming that reasonableness is only a condition of custom and not of law, as Schwering and Wislicki proposed) by G. MICHIELS, *Normae generales juris canonici*, II (Paris-Tournai-Rome 1949), pp. 160–161.

5. Cf. P. LOMBARDÍA, "Ley, costumbre y actos administrativos en el nuevo Código de Derecho canónico," in *Escritos de Derecho canónico y de Derecho eclesiástico del Estado*, V (Pamplona 1991), pp. 121–122.

6. G. COMOTTI, *La consuetudine nel diritto canonico* (Padova 1993), p. 144.

7. A. DE BUTRIO, *Super Prima Primi Decretalium comentarii*, L. I, tit. 4, c. 11, no. 14 (Venice 1578), p. 80. Cf. also *S. Th.*, I–II, q. 97, a. 3. For a commentary on these expressions, cf. J. ARIAS GÓMEZ, "Racionalidad y buena fe en la introducción de la costumbre," in *Ius canonicum* 4 (1964), pp. 77–82.

enumerations of reprobated corrupt usages in more or less open lists.[8] Doctrine has not provided sure clues or criteria of verification by which customs could be defined as reasonable. It is more a topical matter than a systematic one. It is generally left in the hands of the judge: "whether or not the custom is reasonable I leave to the judge, because a sure rule cannot be given."[9]

The tradition does, however, accept some theoretical notions of the general order. As we have already noted, allowing for exceptions among authors, the condition of customary reasonableness required of custom does not simply entail respect for divine law. Rather it further requires conformity with the specific contents of positive human or canon law, that is, a positive reasonableness. It is not enough for the custom to discuss reasonable material, or even for the behavior to be eminently moral. It must also be "tolerable and useful for the common welfare;"[10] that is to say, it must be socially suitable. On this point it must be said that unsuitability through excess is also conceivable, e.g. through attempting to make imperative (in the case of the "*praeter ius*" customs) behavior that entails disproportionate requirements. In this regard, custom and law must meet the same demand: that their fulfillment be possible, fair, and usefully ordered for the common welfare. The positive reasonableness of "*contra legem*" customary behavior indicates less clearly that it consists of a non-action: an inhibition or a non-fulfillment especially if it simply concerns a *desuetudo*. Although in this instance it seems that no more than a negative reasonableness or non-opposition can be required, "I believe that it is almost impossible for a custom with these conditions of non-opposition not to be at the same time, *positively* reasonable by virtue of some general reason, such as, for example, that as a result of the operation of that custom, though it may be contrary to law, the people are governed more smoothly, the number of laws is reduced, or anxieties of conscience are avoided."[11] Thus in this case it is sufficient that there be reasons similar to those which would prompt the legislator to abrogate the law.

To the extent that they reproduce old law, the canons of the *CIC* are to be understood in light of canonical tradition (c. 6 § 2). Traditionally numbered among the unreasonable customs "contra legem mere ecclesiasticam inductae"[12] are, for example, those that can lead to sin (not those

8. Cf., e.g., U. GIRALDI, *Expositio juris pontificii*, I, L. I, Pars I, Tit. 9, sect. 36 (Rome 1829), pp. 20–24, where he collects 105 examples of abrogated customs; also J. A. ZALLINGER, *Institutiones juris ecclesiastici*, I, §§ 223–226 (Rome 1823), pp. 159–160.

9. HOSTIENSIS, *Summa aurea*, Lib. I, tit. IV, no. 2 (cited by G. MICHIELS, *Normae generales...*, cit., p.142).

10. F. SUÁREZ, *Tractatus de legibus ac Deo legislatore*, L. VII, c. VI, no. 16 (Coimbra 1612), p. 797.

11. V. PICHLER, *Candidatus abbreviatus iurisprudentiae sacrae hoc est iuris canonici summa seu compendium* (Augustae Vindelicorum 1752), Lib. I, tit. 4, no. 7 (cited by G. MICHIELS, *Normae generales...*, cit, pp. 142–143).

12. A. VAN HOVE, *De consuetudine. De temporis supputatione* (Malines-Rome 1933), p. 85.

that are sins, or those that necessarily imply sin, which would be contrary to divine law); those that concern the Sacrament of Orders (these grant priests the capacity or competence they lack for the administration of sacraments); those that encumber Churches or infringe upon their immunity (these impede the freedom of the canonical provisions concerning offices or impose inadmissible civil requirements for the exercise of canonical authority); and those that tear at the fiber of the ecclesiastical discipline. This last type is especially important. They concern behavior which, if it were to be consolidated as juridical custom, would weaken the force of canon law. That is, they would impede the exercise of authority (e.g., the custom of not receiving papal legates), or the correction of customs (the custom of not submitting to canonical penalties or the visitation of the ordinary), or would fundamentally damage the juridical institution with which they are concerned (the custom of appeal within the same procedural instance).

The nature of these unreasonable behaviors is often in the middle between opposition to divine law and simple violation of canon law.[13] This is because they frequently concern customs that damage, if not the fundamental constitution of the Church and the revealed content of the Christian work, then at least the conditions for their exercise.

3. *Reprobation "in iure"* (§ 2)

Canon 24 § 2 (*in fine*) says that when the law expressly reprobates a custom, said custom must be considered unreasonable. Those customs, as c. 5 § 1, warned in referring to usages generated previous to the promulgation of the *CIC*, "prorsus supressae sunt, nec in posterum reviviscere sinantur." We now find ourselves before an identical technical supposition, although the assessment applies not to the customs previous to the validity of the Code, but rather to all customary phenomena. Thus, in addition to the unreasonableness that stems from non-conformity with natural or positive divine law, and from violation of elements of positive canon law, unreasonableness can also stem from an express clause of reprobation elaborated by the legislator. Normally, customs reprobated by such a clause already include within themselves the aforementioned conditions of contradiction within the canonical order. In any case, the clause of reprobation sufficiently and unmistakably proves their unreasonable character. At the same time, it must be clear that express reprobation is not the only heading by which customs lose their status of reasonableness.

To understand the proper extent of the reprobation, it is appropriate to distinguish the ways in which the law can oppose or resist custom. This

13. So much so that some authors do not distinguish between them; e.g., G. MICHIELS, *Normae generales...*, cit. pp. 148–149.

opposition can be effected "*triplici modo apprime diverso.*"[14] It can *abrogate* a prevailing contrary custom ("non obstante quacumque consuetudine in contrario"); it can *prohibit* a future custom ("contra hanc legem consuetudinem prohibemus"); finally, it can *reprobate* the custom absolutely ("reprobata contraria consuetudine"). The effects of these legal positions are also different. Abrogation strips the custom of force, but does not render it unreasonable and it can be generated again, and fulfill anew the time periods for its consolidation. The same can be said of prohibition, but the requirements in this case are more rigorous. A prohibited custom is not in itself unreasonable, but the opposition of the law is very strong. For it to recover its force, it must fulfill some defined requirements, such as the centennial or immemorial nature of its introduction (c. 26 *in fine*). Reprobation, by contrast, destroys juridical force at its very roots, renders the usage unreasonable, and leaves it with no capacity whatsoever to be regenerated. Only a substantial change in the social circumstances that motivated the reprobation, a change that is not foreseen, could cause that observance of the community to recover its standing before the law.

The *CIC*, and modern canon law more generally, which is less enamored of formulae than is the classical law, resorts to clauses of reprobation, which are more certain for the written law and more rigorous with matters of custom, than are the prohibitory clauses. The generic clauses of derogation ("non obstante quibuslibet consuetudinibus") are also common in legislative documents (see commentary on c. 28).

The Code formalizes clauses of reprobation in connection with the following topics: any action that impedes the faculty of the bishop to select the clerics he wishes to accompany him in a visitation (c. 396 § 2); the election of more than one diocesan administrator (c. 423 § 1); the existence of more than one parish priest or moderator (c. 526 § 2); the introduction of new matrimonial impediments (c. 1076); the absence of the submission of accounts to the diocesan bishop on the part of the administrators of goods (c. 1287 § 1); any modification in the regime of the reservation of certain cases to a collegiate tribunal of three judges (c. 1425 § 1). Of course, these instances do not exhaust the possibilities of canonical reprobation, which can always be exercised by the legislative authority.

Reprobation "*in iure*" requires that the formula of reprobation be stated in the text of the law, so that the meaning of the reprobation can be deduced from the very words of the law, or in other words, so that "it can be recognized, at the very least conclusively, in an objective juridical norm."[15] Reprobation "*in iure*" cannot be assumed, "nor would a tacit negative attitude have any reprobatory value in itself."[16] As for its scope, the declarative character of the reprobation also cannot be presupposed.

14. Ibid., p. 150.
15. Cf. H. Socha, in K. Lüdicke (ed.), *Münsterischer Kommentar...*, cit., 24/3, no. 5.
16. P. Lombardía, commentary on c. 23, in *Pamplona Com.*

Usually, we distinguish between constitutive and declarative reprobation. The first lacks retroactive effect, because that which the law reprobates (and thereby strips of force and renders unreasonable) nevertheless carries great historical weight. This does not indicate that such a custom has been unreasonable "*ab exordio*," from the very beginning. Such is the case with the customs reprobated in the Code. Declarative reprobations, on the other hand, suppose matter "clare turpis, utpote contra jus naturale, aut divinum, vel quando evidenter est inutilis, et communi bono inimica, et nociva."[17] In this case, the force of the reprobation extends into the past as well, and strips of force (if the matter allows it) the juridical acts carried out in virtue of that custom.

17. F. SUÁREZ, *Tractatus de legibus...*, cit., Lib. VII, c. 7, no. 9, p. 801.

25 **Nulla consuetudo vim legis obtinet, nisi a communitate legis saltem recipiendae capaci cum animo iuris inducendi servata fuerit.**

No custom acquires the force of law unless it has been observed, with the intention of introducing a law, by a community capable at least of receiving a law.

SOURCES: c. 26

CROSS REFERENCES: cc. 23, 24, 26, 29, 94 § 1, 125, 126

COMMENTARY

Javier Otaduy

Canon 25 explains two very important requirements for the introduction of customary law: the nature of the introducing community ("*communitas capax legis recipiendae*"), and the intention with which the usage is introduced by the community ("*animus iuris inducendi*"). There is a shift in perspective from the objectivity of the usage (reasonableness) to the active or subjective aspect of the introducing agent.

1. *The community capable of introducing custom*

The notion of the community capable of introducing canonical custom is a point of doctrine that has been long debated and is extremely difficult to define. As c. 25 indicates, the community capable of introducing custom is the community capable of receiving law. Yet—even though this same expression is also used in c. 29—we do not find a single reference in positive law for identifying which communities specifically are those capable of receiving law.

The comparison between the passive subjects of law and custom finds its principal doctrinal support in the Suarezian doctrine which establishes the parity between custom and law. Suárez describes juridical custom in terms of the legislative paradigm. If the custom has "*vis legis*," it must also be generated by a subject "*capax legis*." The original opinion of Suárez was that the community capable of introducing custom was perfect (and thereby "*capax legis ferendae*," with a superior endowed with legislative capacity). In taking note of the historical reality of the introduction of canonical customs, however, there was no doubt that other, imperfect communities (or less perfect ones, whose superiors did not have legislative

power) could also introduce them. Therefore, one had to conclude that such communities at least (and this is the origin of "*saltem*" in c. 25)[1] were capable of *receiving* law.

This solution was accepted, not without debate, in the preparatory works of the *CIC*/1917, and has been transferred to the *CIC*. Everyone agreed that there had to be a relationship between the community capable of law and the community capable of custom, and that the subject capable of custom was bound up with the subject capable of law. There are various modalities of that capacity for law. A community can be understood to be capable of law because its superior or head has legislative capacity (or power of jurisdiction in the external forum), or because the community itself is governed by laws or statutes; or because the community can make laws for itself; or simply because the community can receive laws from another. In the end, the authors of the Code opted for this last alternative, the Suarezian solution. It makes few distinctions and allows for wide applicability. Accordingly, as we have already observed, it is not always easy to determine, in canonical practice, which communities are capable of receiving law and therefore of introducing custom. The doctrinal alternatives for defining the specific nature of this criterion have been highly diverse and have little in common with one another. The same must also be said, therefore, of the classifications of communities capable of law that various authors have presented. The idea of finding one characteristic that is defining, exclusive, and serviceable for clearly identifying the communities capable of custom has always been, even in the most recent codification,[2] a desire that is as futile as it is strong.

First of all, a community capable of receiving law is required to be a true community. The rather loose use in the *CIC* of the concept of community does not appear to be particularly helpful in elucidating this point.[3] We must take note above all of the features required by the nature of the community itself: a stable and enduring institution (that does not depend on the physical persons who currently comprise it), recognized by the law, ordained for a socially important function.[4] We are led to believe that to succeed in defining the capable community, we must look to some implicit conditions of that very concept of the community capable of receiving law.

In our opinion, there are two fundamental conditions contained in this concept.[5] The first is the reservation of the notion of custom for truly

1. The Code Commission, while admitting some doubts, nevertheless did not want to change the expression: cf. *Comm.* 23 (1991), p. 169.

2. Cf. *Comm.* 16 (1984), p. 152.

3. Cf. G. COMOTTI, *La consuetudine nel diritto canonico* (Padova 1993), pp. 130–131.

4. For other characteristics that can perhaps also be attributed to the capable community, cf. G. MICHIELS, *Normae generales juris canonici*, II (Paris-Tournai-Rome 1949), pp. 63–65.

5. On the possibility of assigning a specific ecclesiological value to the juridical usage of the community (which is difficult, in our opinion), cf. G. COMOTTI, *La consuetudine...*, cit., pp. 131–133.

general norms (not particular ones), which therefore must be established by a community sufficiently abstract and institutionalized so as to transcend the characteristics of the individuals who comprise it. Single individuals are not capable of law, still less so if they are making it for themselves. The second condition, much like the first, is the status of the behavior introduced by such a community. Custom creates objective law (*"formans non formatum," "disponens non dispositum,"* as the classicists would say). It must introduce a law that measures and conditions subjective juridical situations, but it must not be understood as a way of acquiring subjective rights over third parties who had no part in the introduction of the usage. No one can make law for his own benefit.

Thus the condition of *"comunitas capax legis recipiendae"* requires that the community introducing a custom be truly general and that the same social group that introduced the usage be bound by it. It also requires that the subject who generated the custom be the same as the one bound by it. In other words, "within the scope of the community that introduces it, custom should establish solutions from which both active and passive juridical situations may be derived, in accordance with the position in which the subjects who comprise the community are placed in each case, with regard to the suppositions of fact of the customary norm, as a result of juridical acts or facts."[6] Thus the possibility is ruled out that custom could be understood as a way of acquiring privileges by prescription or favorable juridical situations with regard to other parties. In our opinion, this is the juridical criterion that the *"capacitas legis recipiendae"*[7] means to emphasize.

The standing that such a community merits within the framework of the ecclesiastical organization (i.e. its structure, relationship to the hierarchy, and composition) is not decisive on this point. There is no reason to disqualify any community as *"capax consuetudinis"* provided it has the features necessary for it to be truly called a community.[8] Nevertheless, a word of caution is in order. There are in canon law numerous smaller communities inscribed in structures of authority (or in juridical entities) that are larger than mere parties or organs (the parish church in the diocese, the religious province in the institution). These are truly dependent and subordinate communities, for they are included in a higher organization. We are not referring here to particular churches or combinations of them. These smaller communities can introduce custom, provided there is no opposition from the superior, the head of the juridical entity, or the structure of authority. This is necessary because the community must participate in

6. P. LOMBARDÍA, commentary on c. 25, in *Pamplona Com.*

7. In agreement, cf. I. IBÁN, "Notas acerca de la costumbre en el derecho canónico," in *Il diritto ecclesiastico* 97 (1986), I, pp. 284–285.

8. There are authors who raise objections to smaller communities introducing custom. Cf., e.g., M. FALCO, *Introduzione allo studio del "Codex juris canonici"* (Turin 1925), pp. 120–121; J. TRUMMER, *Die Gewonheit als kirchliche Rechtsquelle* (Vienna 1932), p. 34.

its entirety ("*pars maior et sanior communitatis,*" according to the traditional formulation). An indispensable condition for the completeness of that entirety is the participation (or at least the non-opposition) of the natural authority of that community in the introduction of the usage. If the authority rejects the custom or does not consent to it (which has nothing to do with reprobation) the community will lack a *sine qua non* for it to be such, namely its own head. In this case the custom is not discredited because it lacks the approval of the legislator, but rather because it was introduced by something less than a full and authentic community.[9] Thus the approval of the legislator, for which the conditions are established by law, is not at issue here. Besides, that custom will have to be subjected to the conditions for legal approval.

In the case of smaller communities it also seems reasonable to speak of a relative capacity, that is, a capacity which maintains the relationship with the type of custom that was introduced. If the custom is introduced in the normative purview proper to the community (proportionate and appropriate to it), then the community will be a subject capable of introducing custom. Examples include, a chapter relative to the statutes by which it is governed, or a religious province in relation to the constitutions that establish its "*ius proprium.*" In these instances, the purview of the introduction of custom is appropriate. If, however, the custom is introduced relative to a normative matter that exceeds or transcends the purview of activity that is proper and appropriate for that community, then that is another matter altogether. Therefore, that chapter or religious community could not introduce custom regarding matters that exceeded their "purpose, constitution, governance and manner of acting" (c. 94 § 1). Some authors[10] prefer to speak of "observance" rather than custom to refer to behavior introduced in juridical persons as an effect of their own autonomy or "*ius statuendi.*" When that statute is produced tacitly or from mere observance, we would not technically refer to it as custom. In our opinion, that would render all those communities whose superior does not have legislative power incapable of custom "*in Ecclesia,*" which seems to us to be excessive.

2. *The intention of introducing law*

The *CIC*/1917 required that communities, when introducing customs, whether extralegal or according to law, demonstrate their intention to be bound by them (c. 28 *CIC*/1917). The current c. 25 requires that the com-

9. Along similar lines, cf. G. COMOTTI, *La consuetudine...*, cit., p. 133.
10. Cf. the opinion of Puchta, Sägmüller, Eichmann, Koeniger, Haring, and Eppler, cited by A. VAN HOVE, *De consuetudine. De temporis supputatione* (Malines-Rome 1933), pp. 6–7, note 3.

munity, in order to generate canonical custom, demonstrates its intention of introducing law.[11] The differences extend, therefore, to two important details. The "*animus communitatis*" is now required for the custom contrary to law, a point which in the *CIC*/1917 was deliberately left obscure. Secondly, the current Code presents the intention of the community in less subjective terms, it no longer speaks of an "intention to be bound," but rather of an "intention of introducing law." This is undoubtedly an expression with a flavor at once more objective and less entangled with the psychological dimension inherent in moral obligation. In short, these details of the formulation of the Code arose in response to the major theoretical and practical problems that canonical doctrine has raised concerning the intention that the community must demonstrate in introducing custom.

What is required of the behavior of the community is that it be capable of being juridical, that is, fit to have effects attributed to it by the law. Of course, behavior motivated by "liberality, opportunism, frivolity, or utter lack of concern for the common good"[12] would never be capable of being juridical. A usage introduced through liberality, or through a desire for more perfect behavior, lacks the conditions necessary to become a custom of law, because it is not technically imperative. There must be a "will of commitment."[13] A usage introduced through laziness, mere nonobservance, or indifference (or by contemptuousness) also lacks the conditions necessary to be consolidated as customary law. In addition, the intention of the community must contain juridical forethought. It is not merely a desired act; rather it is a reasoned intention to be obligated by that behavior, an intention which extends into the future as well.

The "*animus iuris inducendi*" has often been compared to the "*opinio iuris seu necessitatis.*" Nevertheless, they cannot be equated. The "*opinio iuris*" originates in a different context, namely the providing of a foundation (in the sphere of civil juridical doctrine dependent on the German historical school)[14] for the nature of customary law. This would have its basis in the conviction of the people that they are acting with the support of the law, and therefore are bound by a feeling of juridical obligation. This conviction or belief of the community is called the "*opinio iuris.*" The "*opinio iuris*" can have probative effects, but only with difficulty is it found in the birth of the customary norm. It could be a criterion sufficient to prove a custom that is already consolidated, but it does not

11. There was unanimity on these points in the coetus of consultors, cf. *Comm.* 16 (1984), p. 152.

12. G. Comotti, *La consuetudine...*, cit., p. 158.

13. J.A. Fernández Arruti, "La costumbre en la nueva codificación canónica," in *Le nouveau Code de Droit canonique. V Congrès International de Droit canonique. Ottawa, 1984*, I (Ottawa 1986), p. 180.

14. Although there was an attempt to translate the concept to canon law: cf. J. F. Schulte, *Das katholische Kirchenrecht*, I (Giessen 1860), pp. 209–222.

verify the origin of its normative value.[15] The "*opinio*" differs from the "*animus*" in that the latter is aware that it is acting against the law (in the case of a custom contrary to law) or it recognizes that the law entails no obligation (in the case of the extralegal custom). The "*opinio*," however, always involves a certain degree of fallacy and good faith. Moreover, the "*opinio iuris*" is strictly an act of the intelligence (a conviction), while the "*animus*" is undeniably a voluntary intention as well. The *CIC* is concerned with the "*animus iuris inducendi*," not with the "*opinio iuris seu necessitatis*."

It is in the area of custom contrary to law that the requirement of the "*animus*" became problematic for the commentators on the *CIC*/1917. The reason was obvious. The old c. 28 required only the "*animus se obligandi*" for extralegal customs, not for customs contrary to law. For some authors (especially Michiels),[16] this could not be interpreted only as silence. Rather, it had to indicate a positive exclusion of the "*animus*" effected by the law itself. Thus, if the community introduced behavior that was contrary to law, there was only the "*nudum factum non observandi legem*."[17] There was no intention whatsoever of abrogation or of breaking free of the bonds of the legislative mandate. Ignorance of the law, error regarding its existence or force, and the consequent good or bad faith of the introducing community[18] were all inoperative. Neither did they have juridical effects that invalidated the "*animus*" (they could hardly do this, if the "*animus*" was non-existent). Behind the silence of the *CIC*/1917 and the strong stance of Michiels, there was a far-reaching moral question: how could the law require an express intention, an explicit and unerring will, to break a just law? That would be something like requiring the commission of a formal sin. Certainly, if one adopts the moralist position, "explicatio introductionis iuris consuetudinarii, sub respectu morali, non caret difficultate."[19]

The maximalist view of Michiels, however, was not generally accepted by the doctrine. The most typical reply was that of Van Hove.[20] Every community needs, by virtue of the very nature of the customary norm, the "*animus inducendi ius*" if it wants to introduce an authentic canonical custom. The *CIC*/1917 was silent in the case of the "*animus*" in the custom contrary to law, but it did not exclude it or modify what is by

15. Cf. G. Comotti, *La consuetudine...*, cit., pp. 153–154.
16. Cf. G. Michiels, *Normae generales...*, cit., pp. 100–107.
17. Ibid., p. 94.
18. Cf. ibid., pp. 110–126.
19. A. van Hove, *De consuetudine...*, cit., p. 138. One treatment of the various doctrinal positions on verifying the good faith that the usage would require in the custom contrary to law can be found in J. Fornés, "La costumbre contra legem, hoy," in *La norma en el Derecho canónico. Actas del III Congreso Internacional de Derecho canónico. Pamplona 10–October 15, 1976* (Pamplona 1979), pp. 757–765.
20. Cf. ibid., pp. 109–119.

nature unchangeable. Tradition as a whole concurred in the acceptance of the "*animus communitatis*" in the custom contrary to law, and only a biased reading of the Code could arrive at the opposite conclusion. Not to accept it would lead to many paradoxes and contradictions. Finally, every common behavior of the community that was contrary to law would entail an abrogation, and the approval of the legislator would then be made to depend on the judgment of the community itself with regard to the general benefit and usefulness of the law. Therefore, there must be an adequate motivation in the community to explain the positive reply of the legislator: the "*nudum factum*" of the non-observance is neither sufficient nor capable of generating the reasoned consent of the legislative authority. In other words, if we wish to remain within the terms of customary law, a request that at least implicitly seeks the abrogation of the law (an attitude of petition that seeks a reply) must be deduced from the community behavior in such a way that it can be understood by the legislator. This perspective is strongly tied to the notion of the legislator as the efficient cause of custom, but otherwise it is essentially assured.

What type of "animus" can be required? Van Hove's solution[21] indicates that a hostile attitude toward the law is sufficient ("*animus legi infensus*"). In other words, the intention need only be generally contrary to the law; it need not seek to abrogate it. Furthermore, it would also suffice that the intention be merely interpretive.[22] This means that the community does not even need an actual and truly operative intention, but rather an intention that can be reasonably deduced from its realized acts. If the community acts in this way, it is a signal that the community does not desire the law, or desires its abrogation. The interpretive intention has often been denigrated for its unreality (because it does not correspond to an actual subject) and its purely speculative nature. Fedele made some very acute comments on the implausibility of attributing to a community introducing any custom whatsoever an "*animus*" that would claim truly juridical effects.[23] Nevertheless, we believe that a careful understanding of the topic does not exclude, and indeed favors, the adoption of the interpretative intention.[24] When considering the intention of the community (the "*animus communitatis*") we should not embrace ideas that are excessively individualist or psychological. Declaring the will (or consent, or understanding) of a community has a strong conceptual dimension and entails a certain amount of moral and juridical fiction, or, if one prefers, "sotto l'aspetto fenomenico, l'*animus communitatis* non ha un'autonoma

21. And before him, G. BAUDUIN, *De consuetudine in iure canonico* (Louvain 1988), nos. 125–126 (cited by Van Hove and Michiels in the foregoing references).

22. Cf. A. VAN HOVE, *De consuetudine...*, cit., pp. 128–131.

23. Cf. P. FEDELE, *Il problema dell' 'animus communitatis' nella dottrina canonistica della consuetudine* (Milan 1937), p. 52.

24. On this point, we agree, as we do with his general views on this subject, with COMOTTI, *La consuetudine...*, cit., note 138, pp. 157–158.

sussistenza."[25] There is not an adequate correlation between the intention of the community and the sum of the individual wills, although the formation of the common intention obviously depends on them. This means that the characteristics of the acts of the individual will cannot be uniformly attributed to the acts of the collective or communal will. The presence or absence of knowledge and purpose must be inferred in very different ways from one case to another. In the case of the "*animus comunitatis*," it is important to adopt a much more objective position deduced from its actual behavior, i.e. from the measure of control that the behavior itself acquires, without becoming unnecessarily involved in the subjective dimension. It is therefore reasonable that whoever must determine whether the intention of the community exists may be able to gain an "*ex post*" appreciation.[26] Instead of inquiring into the subjective origin of the "*animus*,"[27] that judgment will interpret the behavior of the community by using reasonable assumptions.

The thesis that claims[28] that the revised requirement of the Code ("*animus iuris inducendi*") is more demanding than the old one ("*animus se obligandi*") is not without support. This additional requirement, however, does not, in our opinion, lend itself to being understood as if it were "a pondering, or even better, a communal planning for normativity, which owing to the clarity with which it is described, would certainly refer to an intellective task previous to the will, which would be not only conscious, but even lofty and sublime."[29] That *extra* measure of exigency is rooted in the suitability with which the behavior of the community is inserted into the social canonical system. The social suitability of the behavior implies and requires an "*animus iuris inducendi.*"

"Custom must be observed with the intention of introducing law, i.e. with the organizing attitude that leads to reasonable and binding solutions to problems that arise in the life of the community."[30] The same organizing and reasonable quality of the custom will adequately attest to the "*animus*" of the introducers. Put another way, reasonableness takes in the subjective dimension of the "*animus communitatis.*"

In extreme situations, error can invalidate the intention. On this point, too, however, we must tread carefully. The same criteria do not apply to private juridical acts as to public ones. The same is true for acts

25. Ibid., p. 156.
26. Ibid., p. 157.
27. The method preferred by, e.g., J. ARIAS GÓMEZ, "Racionalidad y buena fe en la introducción de la costumbre," in *Ius canonicum* IV (1964), p. 94, which appears to endow the community with its own living subjectivity, with the capacity to produce just judgments and positive acts of will.
28. Cf. S. GHERRO, "L' 'animus communitatis' della consuetudine canonica," in *Ephemerides iuris canonici* 38 (1982), pp. 137–139.
29. Ibid., p. 138.
30. P. LOMBARDÍA, commentary on c. 25, in *Pamplona Com.*

in which subjective situations are assumed, and for those which introduce objective law, such as custom. In fact, the Code has omitted the requirement that it used to impose on the "*praeter legem*" custom, that it be introduced "*scienter*" (c. 28 *CIC*/1917), that is, consciously and unerringly. The burden for the assessment of the intention is transferred, as we have already noted, to more objective criteria. The conditions for the validity of juridical acts (that they be performed freely and with knowledge: cc. 125-126) can be applied here with caution. Generally speaking, authors concede that antecedent error invalidates the intention. This is true when antecedent error which is the cause of the behavior occurs precisely because it is wrongly though that there is no law, or that the law is already abrogated. The same does not hold for concomitant error, which is often implicit in the interpretive intention. Even an antecedent error, however, barring a better judgment, could be vindicated if the attitude of the community is truly constructive and organizing.

26 **Nisi a competenti legislatore specialiter fuerit probata, consuetudo vigenti iuri canonico contraria aut quae est praeter legem canonicam, vim legis obtinet tantum, si legitime per annos triginta continuos et completos servata fuerit; contra legem vero canonicam, quae clausulam contineat futuras consuetudines prohibentem, sola praevalere potest consuetudo centenaria aut immemorabilis.**

Unless it has been specifically approved by the competent legislator, a custom which is contrary to the canon law currently in force, or is apart from the canon law, acquires the force of law only when it has been lawfully observed for a period of thirty continuous and complete years. Only a centennial or immemorial custom can prevail over a canonical law which carries a clause forbidding future customs.

SOURCES: cc. 27 § 1, 28; SCCouncil Resol., 11 dec. 1920 (*AAS* 14 [1922] 42-46)

CROSS REFERENCES: cc. 5, 19, 23, 24 § 2, 31–34, 76 § 2, 197–199, 200–203

COMMENTARY

Javier Otaduy

Another essential requirement for custom is the fulfillment of the time period required by the law. This fulfillment affects those customs that are contrary to law (also called "*contra ius*" and antinomic) and extralegal ("*praeter legem*"). This is the canon that more directly confronts the question of lawfulness in canon law of customs contrary to law (they are mentioned indirectly in c. 24 § 2). Thus, it is appropriate here to discuss the nature and ends of the customs contrary to law and of the extralegal customs. We should also discuss the time period required for their accomplishment and fulfillment, as well as the exceptional situations that can be found in these cases, such as specially approved customs and centennial or immemorial customs.

1. *The custom "specifically approved by the competent legislator"*

The specific approval of the legislator (see commentary on c. 23, nos. 4–5) places an exception to the ordinary time period established for the custom to acquire normative value. This specific approval of the legislator undoubtedly leads to many questions. If by special approval of the

custom we mean the promulgation of a formal law founded on the practice of a community,[1] it is not useful, then, to speak of specific approval. This is because it is obvious that the legislator can always give a law, without needing to be authorized to do so by this canon; we would be speaking of law, not custom. Furthermore, the concept of "specific" approval refers to a usage that is already established and grounded in the doctrine, which is not the meaning of this line of interpretation.

The other position holds that these words refer to the tacit approval. It seems as if this was the opinion adopted by the *coetus* that worked on the title "I," or at least by its relator, W. Onclin: "expresse in canone recognito affirmatur hanc approbationem dari posse sive *specialem*, consensu nempe tacite saltem manifestato a legislatore, sive *generalem*, i.e. legalem."[2] This opinion, too, has notable conceptual contradictions. Behind the technical modification supposed by adoption of the term "legislator" in place of "Superior," it seems illogical to require the legislator to intervene outside of his legislative function, that is, to perform an action of approval that is based on silence (a tacit intervention), or through signs of approval not manifested "*per modum legis*" (in an express manner).

What happened with this canon throughout its formation process gives evidence of these problems. The *coetus studiorum* was opposed to the wording of the canon that said explicitly that tacit consent was enough, due to all the problems evident in the verification of tacit consent, and so that expression was taken out of the text. However, it did not want the concept of special approval to disappear, and it did not even allow the text of the law to state that only express consent was possible.[3] The final text testifies to the doubts of the consultants and ends in a compromise.

In our opinion, the tacit approval is not the best way to attain juridical security (or to carry out the pastoral duties). It seems reasonable that if decrees are required to disapprove a custom, then decrees should also be required to approve it without subjecting it to the legal time periods. It seems to us that the tacit approval, keeping in mind the inconsistency that this brings into the canonical institution of custom as found in the Code, and also taking into account the strong criticism of it by the Code Commission, should not be accepted as a means of approval by the legislator, or that the tacit approval should never be presumed. Nevertheless, we cannot say in light of c. 26, that the approval by express consent not manifested in the form of law has disappeared. Although this type of approval contains some conceptual inconsistencies, we cannot dismiss it easily. If we can deduce it from official manifestations from the superior with legis-

1. Cf. P. LOMBARDÍA, "Ley, costumbre y actos administrativos en el nuevo Código de Derecho canónico," in *Escritos de Derecho canónico y de Derecho eclesiástico del Estado*, V (Pamplona 1991), p. 121; idem, commentary on c. 23, in *Pamplona Com.*
2. *Comm.* 3 (1971), p. 87.
3. Cf. *Comm.* 23 (1991), p. 169.

lative power, it does not lessen the certainty of the law in the same way as does tacit consent. It seems clear that these manifestations, although not made in form of law, will never be *oretenus factae*. They would instead be true manifestations of the power of jurisdiction ("quando Superior transgressores suae legis punit, aut in tribunali pro lege sua contra consuetudinem iudicat")[4] or the exercise of the teaching ministry.

It is evident that the tacit approval does not require observance of any time period. The manner in which express approval is given to the custom is comparable, by contrast, to what was said before about disapproval or non-consent, to which effects have always been attributed in the canonical system. Express disapproval (which is not the same as derogation, let alone reprobation) suspends the computation of time limits for the normative perfection of usage. It definitely supposes a lack of consent from the superior with legislative power, although that lack of consent or disapproval takes place in a doctrinal or administrative manner, not a legislative one.[5]

Regarding the competent legislator for special approval (see commentary on c. 23, no. 5), it must be said that the inferior legislator is not competent to specially approve a usage that is contrary to universal law. On the other hand, he or she can deny (disapprove) consent to the usage itself,[6] and even reprobate it, since he or she has effective competence *pro lege universali* but not *contra legem universalem*.

2. *Nature and types of custom contrary to the law*

Canon 26 grants value in canon law to the custom "*iuri canonico contraria*" provided it fulfilled the requirements for legal approval (and certainly, the time period of thirty years). The expression "*iuri canonico contraria*" means to include certain other normative phenomena that are not strictly legal. Throughout history this expression has been applied to the usage meant to prevail over an already-established custom.[7] It can also include, without difficulty, the custom contrary to an administrative norm (cc. 31–34).

4. A. REIFFENSTUEL, *Ius canonicum universum*, L. I, tit. 4, no. 134 (Paris 1864), p. 290.

5. E.g., the positions of a doctrinal, but not strictly legislative, nature, taken by the Roman Pontiff regarding ecclesiastical dress, disapproving of any usage to the contrary. Cf. Letter *Novo incipiente*, April 8, 1979, no. 7, note 26 (*AAS* 71 (1979), p. 404); Allocution, November 9, 1978, in *L'Osservatore Romano* November 10, 1978 (English edition: November 16, 1978, p. 3); Letter to the Card. Vicar of Rome, September 8, 1982 (*L'Osservatore Romano*, October 18–19, 1982).

6. Cf. A. VAN HOVE, *De consuetudine. De temporis supputatione* (Malines-Rome 1933), pp. 66–67.

7. Cf. F. SUÁREZ, *Tractatus de legibus ac Deo legislatore*, L. VII, c. 20, no. 21 (Coimbra 1612), p. 865; G. MICHIELS, *Normae generales juris canonici*, II (Paris-Tournai-Rome 1949), p. 115.

The custom contrary to the law can simply be "*desuetudo*" or obsolescence, which is the abrogation of a law by repeated omissions; or it can be a contrary custom, if the custom introduces a mode of contrary behavior that is substituted for the legal norm. We must distinguish the "*desuetudo*" from the juridical phenomena created by the non-application of the law for a long period of time, due to lack of object or due to lack of cases which concern it.[8] It would be useless to speak of custom in this case. It would be a case of objective non-application, rather than a case of subjective non-observance. There is, then, no communal will to non-observe, nor is there a subject to whom behavior can be attributed. That law could become abrogated through a cessation of its purposes or because of uselessness, but never because of contrary custom.

3. *Nature and types of extralegal custom*

The *CIC* is very explicit when it comes to comparing law and custom for purposes of defining the object of supplementation of the norm: "If on a particular matter there is not an express provision of either universal or particular law, nor a custom ..." (c. 19). Thus the extralegal or "*praeter legem*" custom behaves as if it were law and it is not necessary to call upon the resources of supplementation if there is an authentic custom in force. This is but an implicit consequence of the strength of custom in the canonical system, a strength that the Code has highlighted very clearly.

The extralegal custom therefore consists of a customary norm that is elaborated in juridically free legal space: "*ubi lex deficit*,"[9] where there is an absence of law or where the law is simply silent. Therefore, the extralegal custom has the function of supplying, or, as the case may be, complementing, the written law or the canon. When this space is covered by a written norm which is not formally a law (for instance, general executory decrees and instructions), we cannot understand this as if the custom that has been developed is in reality an extralegal custom. Once again, we would have to come to the conclusion that the terms in which the canonical system defines the custom ("*praeter*," "*contra*," "*secundum legem*") in actuality speak of a relationship to the written law, rather than to a formal law, to the normative force rather than the juridical category. This is similar to what was said concerning "*vis legis*" of custom. We should not forget that all this terminology originated within the framework of a canon law that did not at all know the formal category of juridical acts.

Canon 26 requires the same time period (thirty years) in order for both the custom "*contra legem*" and the custom "*praeter legem*" to come into force as a norm. This might seem surprising, but in fact it is not. It is

8. The same opinion is held by A. VAN HOVE, *De consuetudine...*, cit., p. 12.
9. Ibid., p. 12.

true that, since the beginning, the tradition required a number of additional requisites, including "*diuturnitas*" or prolongation of the time period, for the custom "*contra canones.*" Soon, however, the authors realized that the introduction of a new juridical obligation (which always occurs in the extralegal custom) also had to be treated rigorously by the law, but not because the matter required special safeguards. The matter of the custom contrary to the law always has a certain touch of unreasonableness, or at least cannot enjoy the institutional benefits of the law. However, the case is different with the extralegal custom, which at first is considered reasonable because it does not have any intention of breaking the juridical order, but the custom contrary to the law is frequently a "*desuetudo,*" a privative or exclusive custom, a matter of ceasing to do something. There is no doubt that it is an active and voluntary abstention, but one which does not create an obligation, rather it releases from an obligation that is already present. It is commonly said that any juridical system, because of the respect that freedom deserves, must be "promptius ad solvendum quam ad ligandum," more prone to eliminating obligations than creating them for no reason. In this sense it is understood that the volitional component, (the "*animus communitatis*") required by the extralegal custom has to be closely circumscribed, since it always introduces new obligations. This is the reason why long periods of time are required as well. The community must clearly manifest that such behavior obliges it, not just that it may suit it eventually or that the circumstances urge the realization of this conduct.

(Concerning the extralegal custom "*praeter legem*" which antedates the entrance into force of the *CIC,* see commentary on c. 5 § 2.)

4. *The custom and the prescription of juridical situations*

Traditionally there has been a distinction made between the custom introduced tacitly and the prescribed custom. The former did not need any time period because it had the approval of the superior, who knew it and allowed it (*scienter et patienter*). The custom introduced by prescription, on the other hand, did not need to be known and became a norm through fulfillment of the legal time period. The real importance of this system is shown in what we have explained in the commentary on that canon. The Code has adopted, however, an interesting change of terminology and has avoided mentioning the "custom introduced by prescription." It has reserved the concept and the expression of "prescription," with technical accuracy, for "a means of acquiring or of losing a subjective right, or as a means of freeing oneself from obligations" (c. 197). Therefore, we can no longer speak of a custom introduced by prescription, but about a custom which is accomplished, fulfilled, consolidated, or which has already acquired its perfection as a norm. This takes place when, in addition to en-

joying the rest of the legal requisites of the law, it has fulfilled the legal time period of thirty years.

It is worth noting certain things regarding prescription. There are notable analogies between prescription and custom. They both have a common basis in "intertemporality," i.e., the passage of time required for a juridical situation to be modified. For that reason, in the first place, the concept of prescription was applied indiscriminately to every juridical phenomena of "intertemporality," in both objective law and subjective law. Yet it was soon noted that the analogy could not be generalized. Only in an improper sense was it possible to understand that the conditions for prescription, as they relate to custom, are fulfilled (as if there were two juridical situations clashing, that of the legislator and that of the community introducing the customary norm). The experts in civil law in particular came to realize that there was a substantial difference between prescription and custom: "because the purpose of the custom is directed to generality (*'ut plurimum'*) with the purpose of creating a public law, which cannot be appropriated and is held in common, prescription is directed to the acquisition of a private law that can be appropriated, which others call already determined (*'dispositum'*)."[10] In this form, prescription (along with its inherent conditions of justice, juridical claim, and good faith, as well as its natural limits concerning the object that can be determined) was destined to govern private or individual relationships. Custom was reserved for the creation of law that is objective and public, containing norms which are general. In general, canonists accepted this position, which moreover is incontrovertible. Yet, they continued to use the expression of "custom introduced by prescription" for that custom which took its value from the passage of time. This is why, generally speaking, the term prescription as applied to custom ceased to mean the acquisition of a subjective right and instead meant being subject to the time limit required by the law (or even to the condition "prescribed" by the law). However, the expression was not abandoned because it was used by Gregory IX in the decretal *Cum tanto*, which laid down the very foundations of canonical customary law.

The use of these two concepts[11] without sufficient distinctions, although both institutions are distinguished and each one of them has its own and unique character (cc. 23–28 and 197–199), has caused a series of confusions in the current canonical system (for example, the hypotheses of c. 199, 4° and 7°, which present matters that could not be affected by

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10. A. DE BUTRIO, *Super Prima Primi Decretalium commentarii*, L. I, tit. 4, c. 11 *Repetitio*, no. 49 (Venice 1578), p. 84A.

11. For some authors, the confusion endemic to these terms has occasioned the most serious problems as far as the correct understanding of canonical custom is concerned: cf. J. ARIAS GÓMEZ, "Racionalidad y buena fe en la introducción de la costumbre," in *Ius Canonicum*, 4 (1964), p. 93; cf. also J. FORNÉS, "La costumbre 'contra legem', hoy," in *La norma en el Derecho canónico. Actas del III Congreso Internacional de Derecho canónico. Pamplona 10-15.X.1976* (Pamplona 1979), pp. 771–778.

prescription, and therefore need not be listed as exceptions). And in certain instances there is also some merger of the juridical phenomena caused by both of these institutions. Thus, the existence of a "*consuetudo mixta cum praescriptione*"[12] has been proposed. In the legal figure of the custom, it is very strange that no interest of a physical or juridical person is present; that a subjective situation of a private nature is not implicated. "No one would litigate, with all the expenses that it entails, the simple derogation of a law by a contrary custom, unless at the same time there is a private interest at stake."[13] However, in these cases it must be determined if what is being alleged is a mere prescription of subjective rights. But if all of the conditions for the introduction of the custom are met (capable community, will to introduce a law), it is likely that we are confronted by a juridical custom, under which some members of the community (not outside third parties) are left in a disadvantageous or passive situation. It does not seem that in those cases the conditions of prescription ought to be required, nor should it be strictly necessary to resort to the formula of the custom mixed with prescription.

5. *The time limit for the normative fulfillment of use*

The *CIC*/1917 took a position in deciding a matter that has been debated in the doctrine, namely, what period of time was required for a custom to become a norm (in other words, for a custom to acquire normative perfection). The doctrinal alternatives, depending on what custom was at issue, were very distinct, because the customs vary so greatly among each other. The requirements for "*desuetudo*" of a law "*usu non recepta*" were not the same as those for "*desuetudo*" which properly implied actual disuse. Nor was the same period of time required for the custom contrary to law and for the extralegal custom. Anyway, the opinions were not unanimous. The *CIC*/1917 decided to require for all customs contrary to law and for all extralegal customs, the period of forty years, which was the time limit most required on those doctrines which proposed maximum time limits for the custom to become operative.[14] With the current codification the period of time has been reduced. The *schema* determined the period of time to be just twenty years, but the Commission accepted a suggestion and increased the period to thirty years.[15]

12. As is proposed by A. VAN HOVE, *De consuetudine...*, cit., pp. 172–176. The expression is taken from a rotal sentence dated July 18, 1914: in *AAS* 6 (1914), p. 556.
13. A. REIFFENSTUEL, *Ius canonicum universum*, Lib. I, tit. 4, no. 109 (Paris 1864), p. 286.
14. Probably under the influence of Wernz, the prestigious consultor on the 1917 codification and proponent of removing from the Code the normative value of custom. The preparatory work did not follow his counsel, but the conditions for the birth of the custom endured. Cf. F.X. WERNZ, *Ius Decretalium*, I, nos. 189–190 (Rome 1898), pp. 253–258.

The period of time required for the custom does not have as its purpose the creation of an anti-custom obstacle on the part of the canonical system, nor does it represent a symptom of mistrust of the legal system toward communal practice. Its function is precisely to arrange a time period long enough for the intention to introduce a law and the decision to abide by to be shown with certain guarantees. For some, who are concerned to attribute to the community the exclusive title to the act of introduction, the time period will be more of a "guarantee that the community actually exercises its juridical capability in communion with the legislator."[16]

According to the provision of c. 26, "a custom which is contrary to the law currently in force, or is apart from it, acquires the force of law only when it has been lawfully observed for a period of thirty continuous and complete years" (meaning, if it has fulfilled all the legal requirements, as well as the time period). Continuous time is the time that does not admit interruptions in its computation (c. 201 § 1). However, the canons used to compute time are not to be applied here without nuances. Rather, these canons (cc. 200–203) establish the rules for validity of juridical acts, not the validity of norms. The purpose of the rules regarding the computation of the time is to offer guarantees to one who could be affected by the expiration of the time periods. In custom, the expiration of the time periods is in favor of the community that introduces the use. Moreover, nullity comes from the non-fulfillment of the time period required of a juridical act, as well as from its rescindable nature or any other sanction resulting from that anomaly. In the case of the custom, however, the only result will be that the norm will not be formed, but will continue to be developed and move toward becoming a norm in force.

"*Fulfilled*" time means completed and finished time, as a condition for the usage to become a norm. Non-interrupted or "*continuous*" time means that the usage of the community has not been interrupted by contrary acts, that is, there is uniformity in the behavior, with no regressions (acts that interrupt the conduct), or parentheses (acts repeated without sufficient frequency). The introductory acts must be repeated in a public way, so that they can be noticed and proved. They are to be carried out by most of the community as well, so that there is a moral certainty on the part of the community as a whole. "*Paucorum dissensus nihil operatur.*"[17] Interruption of the behavior would require the process to be begun anew, which would also be the case if authority disapproves the usage. The number of acts required is a function of the type of usage and, in short, is left to the judgment of the judge or of a prudent person. However, one cannot ac-

15. Cf. *Comm.* 14 (1982), p. 135. The means is justified, in the *animadversio*, as a way to protect the canons of the Code from recent abuses, unless they were prevented from coming into being "per viam protracti abusus."

16. J. ARIAS GÓMEZ, *El "consensus communitatis" en la eficacia normativa de la costumbre* (Pamplona 1966), p. 149.

17. A. VAN HOVE, *De consuetudine...*, cit., p. 106.

cept the historical theme of the "*consuetudo ficta*," which could be introduced by a single act to which would have been added a manifested and solemn proof of the will to introduce it and abide by it. One cannot also accept the "*consuetudo intitulata*," whose act of foundation is in writing. The material habit of fulfillment through the repetition of acts seems to be the only way to obtain a necessary sign of its introduction.

6. *The prohibitive clause of custom*

The *in fine* of c. 26 deals with the prohibitive clause of custom (see commentary on c. 24 § 2). Against a law containing this clause, only centennial or immemorial customs can prevail. In the Code there is no canon that contains this clause, nor was there one in the *CIC*/1917. It seems as if the legislator has decided to use reprobational clauses, which are more efficient against custom, though also less subtle.

It is important to notice that the difference between the centennial and the immemorial custom (see commentary on c. 5 § 1) resides in the fact that the second is defined by the non-existence of contrary testimonies, while the first requires one hundred completed years. The proof of the immemorial character of a custom is always obtained through witnesses, who are to testify that neither they nor any of their predecessors ever did or heard of anything otherwise. There is nothing that prevents a centennial custom from being longer than an immemorial custom (because the time at which the immemorial custom began may be discovered at some point). From the point of view of the acts that affect singular juridical situations (which are not, therefore, juridical norms of general character, as is custom, for instance), the centennial or immemorial possession constitutes a presumption *iuris tantum* of the granting of a privilege (c. 76 § 2).

27 Consuetudo est optima legum interpres.

Custom is the best interpreter of laws.

SOURCES: c. 29

CROSS REFERENCES: cc. 14, 16 § 3, 19, 25, 26

COMMENTARY

Javier Otaduy

After establishing the juridical effects of the custom "*contra legem*" and "*praeter legem*," the *CIC* establishes in c. 27 the regimen of the so-called custom "*secundum legem.*" The norm is formulated according to a very old traditional text, which is difficult to understand without knowledge of its precedents and the doctrine that nourished it.

1. *The custom according to the law*

We are referring to the custom that generated in accordance with the law, or to be more precise, the community observance that is founded on or originates from legal prescription. The community observance that helps comprehend the law is its best interpretation. The legislator is not thereby trying to say that the community is the best interpreter in an absolute sense, for ecclesiological reasons and for reasons that go beyond positive law.[1] Nevertheless, one understands that the conduct of the community that lives under that law is especially apt for determining the meaning of the law.

The dependence of the canon on history is very strong. Its origin can be found in a *dictum* of the Roman jurisconsul Paulo and its use in classical canonical texts is as frequent as it is versatile. There is no doubt that this is a phrase which reflects a strong content of juridical truth and at the same time can be perceived as having diverse roles and functions.[2]

1. Along these lines, cf. L. ORSY, commentary on c. 27, in *The Code of canon law. A text and commentary* (New York-Mahwah 1985), p. 40.
2. Cf., for a rigorous historical study and sharp critique of the usual interpretation, G. SARACENI, "Consuetudo est optima legum interpres (Contributo all'interpretazione del can. 29 C. J. C.)," in *Ephemerides Iuris Canonici* 4 (1948), pp. 69–95.

But if we want to be exact, the custom according to law is not an authentic or true juridical custom. It is not a source of law. When the custom, i.e., the observance of the people, completes the law in accordance with the law (which authors call *consuetudo exsecutiva*), there is absolutely no juridical phenomenon that could not be attributed to the law itself. The force of the usage and the will of the community are immediately dependent on the law. The force of the observance shall be attributed to the law itself.[3] Only by being improper and over-subtle can one say that the force of a usage has juridical force in and of itself because it prevents the coalescence of contrary custom.[4] Every communal action, so long as it is contrary to another one, effectively prevents the consolidation of the latter.

2. *Interpretative custom*

In spite of this, the different ways in which a custom can be linked to the law without directly opposing it (in other words, without "*preiudicium afferre legi*," without damaging the law or disregarding it) are indeed diverse. It could perhaps be nothing but a custom of an executive custom law, or a custom that declares concepts clearly stated in the law. Yet, it can also be, and here there is a parallel with the means of interpretation of the law stated in c. 16 § 2, a custom that explains a doubtful law, as well as a custom which extends or restricts the dictates of the law. Only in an improper sense can one call the extensive and restrictive custom a "*consuetudo secundum legem*." If a custom limits the legal content (because it elects as the norm only one of the alternatives that the law proposes, leaving aside the others; or because it turns into an obligation a supposition of conduct that the law considered facultative), the custom is not merely interpretative. If the custom extends the content of the law (because it extends the prescriptions of the law to other similar situations, for instance), then, too, the custom is not merely interpretative. We cannot now understand things as we understood them under the heading of authentic interpretation. Under that heading, while admitting that the authority competent to interpret does not have the right *per se* to give replies that extend or restrict the law, we have to admit that it is the law which grants that such authentic interpretation "*legem coarctet vel extendat*." But that indication, reasonable for an institutionalized body that declares the content of the law through written and standardized replies, is not present here. Therefore, any customary extension or restriction of the law

3. And, as for the rest, this is the position taken by F. SUÁREZ, *Tractatus de legibus ac Deo legislatore*, L. VII, c. 4, nos. 14–17 (Coimbra 1612), pp. 785–787. Cf. on this point, G. SARACENI, *Consuetudo...*, cit., pp. 84–87.

4. Cf. A. VAN HOVE, *De consuetudine. De temporis supputatione* (Malines-Rome 1933), p. 212.

is a custom contrary to the law or an extralegal custom, and must meet their criteria. For it to acquire normative value, then, the necessary time period must be observed.

The "executive custom," whose sole purpose is to manifest the fulfillment of the law by the community, and the explanatory custom of a doubtful law, cannot be judged in the same manner as the customs previously described. They are not subject to time periods before becoming norms. The only one of these customs that can present conceptual problems is the second one. We have said, regarding the doubtful law, that every interpretation of it implies an exercise of power. If the doubtful law is null, it is said that every later explanatory interpretation creates a juridical bond and gives rise to the legal imperative weakened by the doubt. Yet, this is only partially true. Not every juridical matter of a doubtful law is considered as derogated (see commentary on c. 14, 3°). It is not true that the doubtful legal norm is absolutely null. The creation of a new or renewed juridical bond, if it exists, is only very partial. Moreover, an explanatory custom can be understood as a custom according to the law, i.e., one that does not "*exorbitat a lege.*" In other words, it is a custom truly interpretative of the law, which does not create a new objective law and that, therefore, does not need to adjust itself to the time periods used for the consolidation of its use. This position seems to be opposed to the reminder given by c. 16 § 2: the authentic explanatory interpretation of a doubtful law is not retroactive. Therefore, it is understood as a constitutive law, one that generates an obligation or a normative content that was not previously present. However, it is our opinion that the interpretative replies of explanatory character and the usual interpretation that ends up being explanatory of a doubtful law[5] cannot be discussed in the same way. The latter supposes a homogeneous and constant behavior of the community introducing it. It does not imply any external intervention of the authority competent in the subject matter regarding which the community is in doubt. Consequently, it is our opinion that no problems of creating a norm *ex novo* are encountered.

This means that the interpretative custom (the declarative as well as the explanatory custom) is only a custom of fact. It offers a signal or a testimony (*ratione signi, vel testis*)[6] of the observance by the community, which is enough for whoever is to judge the true sense of the law to have sufficient resources to do so. Yet, it does not entail new obligations. This is evident, on the other hand, by the use that jurisprudence has made of this type of customs, especially Rotal jurisprudence.[7]

5. On the contrary, A. VAN HOVE, *De consuetudine...*, cit., p. 211.
6. F. SUÁREZ, *Tractatus de legibus...*, cit., Lib. VII, c. 17, no. 2, p. 839.
7. For some interesting references in this sense, cf. G. SARACENI, *Consuetudo...*, cit., pp. 87–89, and A. TOSO, *Ad Codicem juris canonici commentaria minora*, Lib. I (Rome 1921), pp. 92–93.

In the treatment of the usual interpretation (produced by virtue of the usage by the community), canonical doctrine laid out in the commentaries to the parallel canon in the *CIC*/1917 included (although with nuances) every supposed custom that presented a non-contradictory relation with the law. They deserved this justified disapproval from Saraceni: "the clear teaching of Suárez is a warning to the many authors ... who consider as interpretative customs all traditional types of customs."[8]

3. *Practice and jurisprudence as usual interpretation*

When we refer to administrative practice and jurisprudence as juridical custom, we need to be very careful. Jurisprudence and practice (the traditional "*stylus curiae*" of a material nature, the consistent group of decisions within judicial and administrative organizations) do not constitute juridical customs. The community capable of introducing customs is missing and the presence of the will to introduce a norm and of the uniformity of the acts through which the usage of community manifests itself are highly doubtful.[9] What can happen, however, is that the jurisprudential and administrative decisions turn into norms according to another legal title, because either the legislator gives his express consent (and these decisions then become laws) or the executive power does the same (and they then become administrative norms). This can also happen because they so permeate the feeling of the community that the community assumes them as its own (then, we would have an authentic custom, with the will of the community to introduce a norm). Meanwhile the "auctoritas in perpetuo rerum similiter iudicatarum" will not yet be consolidated. This is why we cannot readily accept that the interpretative custom is "that source of interpretation which formalizes usage sufficiently prolonged in time and accredited in the consciousness of the judges."[10] The consciousness of the judges does not create custom, because the judges do not constitute a community capable of introducing it, although they can certainly become an important canonical instrument for inferring the "animus" of the community.

8. G. SARACENI, *Consuetudo...*, cit., p. 90.
9. Cf. Z. VARALTA, "De jurisprudentiae conceptu," in *Periodica de re morali canonica liturgica* 62 (1973), p. 47.
10. G. SARACENI, *Consuetudo...*, cit., p. 94.

28 **Firmo praescripto can. 5, consuetudo, sive contra sive praeter legem per contrariam consuetudinem aut legem revocatur; sed, nisi expressam de iis mentionem faciat, lex non revocat consuetudines centenarias aut immemorabiles, nec lex universalis consuetudines particulares.**

Without prejudice to the provisions of can. 5, a custom, whether contrary to or apart from the law, is revoked by a contrary custom or law. But unless the law makes express mention of them, it does not revoke centennial or immemorial customs, nor does a universal law revoke particular customs.

SOURCES: c. 30; *ES* I, 18 § 1

CROSS REFERENCES: cc. 5, 20, 23, 26, 135 § 2, 392

COMMENTARY

Javier Otaduy

In speaking of custom, the last canon of title II refers to revocation, just as was discussed with respect to law. It presents a general principle for the revocation of customs (which can be revoked either by contrary custom or by contrary laws), as well as three exceptional principles of a different nature and scope. The first of these is the regimen followed by the pre-Code customs, which have already been established by the *CIC* ("*firmo praescripto* c. 5"; see c. 5 and its commentary) and therefore are exempt from being affected by c. 28. The customs in force at the moment of the promulgation of the *CIC* must be evaluated according to the dispositions of the introductory canon on customary law. That system is not identical to the one that is now in force. The other two exceptional clauses explain the relation to the so-called privileged customs (centennial and immemorial customs), as well as to particular customs. They both require, because of their nature, special conditions for revocation.

1. *The revocation of a custom by a contrary custom*

This refers to the first *caput revocationis*, mentioned in c. 28 for systematic and historical reasons. If the equivalency of effects between law and custom is total, there must be no doubt that a custom (like a law) can

be revoked by a contrary custom, and so it was understood by the classical canonists. But although systematic or historical reasons prevail, it is not unprofitable to standardize this mode of revocation. Its occurrence is infrequent and seemingly paradoxical, but when all the possible examples of community intervention are observed, we will see that it does become operative.

It is not easy to find examples of cessation of an extralegal custom by another, opposing extralegal custom. What can occur, however, is that the contrary usage turns out to be a negative *desuetudo*, or obsolescence, returning community behavior to the previous condition of obedience to the law. In other words, one passes from a customary conduct contrary to the law to a customary behavior in agreement with the law. It is rare that the community which introduces the second usage is coextensive with the community which had introduced the first, that is to say, the same community which introduced a custom rarely introduces a contrary usage derogating from the first. More commonly, the contrary usage is introduced by a smaller community, still capable of introducing a law, within a larger community (a diocesan custom that is opposed to another custom of national scope, for instance).

The time requirements for the first custom to lapse and the second custom to attain juridical force are the same as are required in the case of the custom contrary to the law (c. 26). Also in the case of a second custom which abrogates the first, "*nos reduceret ad legem scriptam*,"[1] the same criteria must be met. Some authors understood, under the *CIC*/1917 (substantially similar in this point), that the legal time period for normative consolidation[2] was not necessary. Yet, there is no reason at all to affirm this. The very text of c. 26 requires the observance of the thirty year time period for the custom "*iuri canonico contraria*;" that is, contrary to the Code, not merely to a specific law.

What seems clear, however, if we accept the tacit approval (see commentaries to cc. 23, no. 4 and 26, no. 1), is that in the case of the custom that produces the "*reditus ad legem scriptam*," the approval of the legislator is much easier and can be presumed. In this case the fulfillment of the time period for the consolidation of the usage would not be required (see commentary on c. 23, nos. 4–5).

1. A. Van Hove, *De consuetudine. De temporis supputatione* (Malines-Rome 1933), p. 218. Cf. also pp. 164–166.
2. Cf. R. Wehrlé, *De la coutume dans le droit canonique* (Paris 1928), p. 417. Also in doubt is M. Falco, *Introduzione allo studio del "Codex Iuris canonici"* (Turin 1925), pp. 124–125.

2. *The revocation of a custom by a contrary law*

This is the most common mechanism for the revocation of a custom. The types of abrogation of custom by a subsequent law are very diverse, however. The reasons for these basic differences are: *a*) the territorial scope (universal or particular) of the revoked custom; *b*) the territorial scope (universal or particular) of the revoking law; *c*) the will (qualified or not) of the revoking law, whose content can simply be contrary to the custom or which can contain more or less explicit clauses of revocation; and *d*) whether the custom that is being revoked is of a privileged custom (centennial or immemorial). Obviously, these distinguishing causes are not pure alternatives but rather can be mingled and intertwined. Let us consider the most significant hypotheses.

3. *The law revoking a universal custom*

The universal law revokes the contrary universal custom, unless the custom is centennial or immemorial, because, in these instances, it would need to meet the criteria required for the abrogation of these customs. The universal law does not have to manifest explicitly, through derogating clauses, its intention to revoke the universal custom. It is sufficient that it be directly contrary, i.e., its prescriptions are "*incompossibiles*"[3] with the custom. Besides, every universal law can contain revoking formulae. Any of the customs, even the less qualified ones (e.g., "*non obstante consuetudine contraria*,") are thought to be competent to revoke the contrary universal custom. Throughout history, the reason that has been given for this simple practice of abrogation of universal custom by universal law is very simple: it is part of the personalist conception that the canonical system has for the issuance and revocation of a norm. The legislator revokes all the contrary normative occurrences that he knows of specifically or that are presumed to be known by him. It is reasonable to think that the universal legislator knows of universal customs. Thus, he revokes them if he issues a contrary law. If he does not preserve them, it is understood that he abrogates them.

4. *The law revoking a particular custom*

For the particular customs, c. 28 establishes, as we said before, a special regimen. It is not thought that contrary universal law revokes them "nisi expressam de iis mentionem faciat." We find ourselves with a regimen almost parallel to the one on the revocation of particular law (see

3. A. VAN HOVE, *De consuetudine...*, cit., p. 219.

commentary on c. 20, no. 5). The reason for this change could be found in the same notion of the law that we stated before. The Roman Pontiff (or the author of the universal law) can derogate from any universal normative phenomenon because it is understood that he knows it, but "the particular customs and laws (*'statuta'*), because they are factual and consist of an action ('cum sint facti et in facto consistant'), that is, because they behave in the same way that actions do, and differently from the written norms, which do not need proof), he can probably ignore. Therefore, as long as they are reasonable, a new law does not derogate from them at all, unless it is expressly indicated by the law itself."[4] This means that the universal law needs to indicate its purpose of derogating the contrary particular custom. It is not enough for the custom to be incompatible with such law, nor is it enough that the universal law use a general clause that may not in itself encompass the particular custom.

The question arises as to what is the required formula; in other words, what must be understood by the "*expressa mentio*" of c. 28? The question is important, because for "*expressa mentio*" we can understand (see commentary on c. 20) an express derogatory statement that is generically comprehensive ("*non obstante quacumque in contrario*") or a derogative indication that expressly indicates what is being derogated: the particular custom. The canonical doctrine and practice, in general, consider that a comprehensive indication of derogation, universal or generic, of the type "*contrariis quibuscumque minime obstantibus*" or its derivatives is sufficient.[5] There were authors that did not even demand such a nuanced clause.[6] But in any case, "nunquam requiritur mentio expressa: 'non obstante consuetudine etiam particulari'."[7]

But there is also a sector of doctrine that requires more strictness in the clauses of derogation *ex lege* of the particular custom. In this instance, the parallel between the revocation of particular law and particular custom would be broken. The clause "*contrariis quibuslibet*" is sufficient to terminate a particular law; but it does not appear to be equally sufficient to revoke a particular custom. "Due to the explicit will of the supreme legislator, which is indubitably manifested in c. 30 [the present c. 28], an implicit revocatory clause or an explicitly universal one is probably not enough. A more specific clause is required, which explicitly revokes the particular customs, such as 'nulla vel non obstante consuetudine contraria, etiam particulari' aut 'non obstante jure particulari contrario.'"[8] Thus, a "clausulam specificam earundem (consuetudinum particularium) explicite

4. Decretal *Licet*, Bonifacio VIII (*VI* I, 2, 1).
5. Cf. for all, A. VAN HOVE, *De consuetudine...*, cit., p. 222.
6. Before the first codification, cf. F.X. WERNZ, *Ius decretalium*, I, no. 193 (Rome 1898), p. 262; afterward, L. RODRIGO, *Tractatus de legibus* (Santander 1944), pp. 516–517.
7. A. VAN HOVE, *De consuetudine...*, cit., p. 225.
8. G. MICHIELS, *Normae generales iuris canonici*, II (Paris-Tournai-Rome 1949), p. 210. In agreement with Michiels, Trummer, Claeys Boúúaert-Simenon, Sipos.

revocatoriam"[9] is required, i.e. not just an explicit formula of revocation (which indicates the intention to revoke), but a specific clause of revocation (which denotes *what* is revoked).

The distinct formulations of cc. 28 and 30 (the present cc. 20 and 28) prompted Michiels to affirm this. In the former, with regard to the revocation of particular law, is the statement: "nisi aliud in iure expresse caveatur;" the latter, with regard to the revocation of particular custom, states "nisi expressam de iis (lex universalis) mentionem faciat."[10] We fully support his opinion[11] on the revocation of particular customs, but it seems to us that there is too little textual difference in the canons not to extend the same opinion to the revocation of particular law[12] as well.

Evidently, the clauses of reprobation turn out to be revocatory *a fortiori*, although their extension must also be judged by the same criteria: they will affect the particular custom only if they mention them expressly.

It would also be profitable to mention another consideration of the text of c. 28. The canon says that the universal law does not revoke particular customs if it does not indicate so. This formulation differs from the text of c. 30 of the *CIC*/1917. At that time, the canon did not speak of universal law, but of "general law," and this would have led one to believe that it was correct to allow this formula to include the relatively general laws. In other words, though it did not necessarily extend "*ubique terrarum*," it did have a broader territorial scope than the custom that was contrary. That doubt no longer exists. Particular law, although it is of broader territorial scope than the custom (and in that sense, *less particular*), does not need an explicit and specific indication to abrogate the customary particular law to which it is contrary. Nor is this clause needed in the pontifical particular laws or the particular norms issued by the Holy See.[13]

9. Ibid., p. 211.

10. Therefore, perhaps the statement of CARRIÓN can be accepted, in the sense that the generic formula which revokes "consuetudinibus contrariis etiam specialissima mentione dignis" is also capable of abrogating particular custom and even centennial custom: cf. J.M. PIÑERO CARRIÓN, *La law de la Iglesia*, I (Madrid 1985), p. 146.

11. Also partially supported by other authors of the commentary on the current Code: cf. H. SOCHA, in K. LÜDICKE (ed.), *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1985ff), 28/4–5, no. 14. In that same note can be found a list of formulae capable of revoking particular custom.

12. We have dealt with the clauses of revocation and explained our doubts about an excessively schematic use of them, in J. OTADUY, "La relación entre el universal law and el particular," in *Ius Canonicum* 60 (1990), pp. 485–492.

13. For an understanding of these norms, cf. J. TRASERRA, "La legislación particular '*contra ius*,'" in *Revista catalana de Teología* 12 (1987), pp. 181–190.

5. *The law revoking a centenary or immemorial custom*

There is little need to discuss again these types of customs, which we have already said are privileged. The entire technical system of revocation used to abrogate particular customs by the universal law is equally applicable here. The doctrine, however, is perfectly clear about the specifically expressed mention that is required in this case: the new law (universal or particular) must indicate that it revokes also the centennial and immemorial customs. The seemingly all-encompassing clauses, of the type "*contrariis quibuslibet minime obstantibus*," therefore would not be sufficient.

The immemorial custom does not require a greater "*diuturnitas*" than is required for the centennial custom. "An immemorial custom is proven by at least two concordant witnesses who testify that, since puberty and at least for forty years, they have faithfully observed that custom, and that they have heard from their elders that it was always observed, without ever having heard or seen anything contrary to it."[14]

6. *The author of the law revoking a custom*

Who is the legislator with the competence to revoke the custom through a law? It is one thing to say that the general requirements based on a law can be the cause of revocation, and something else to say that the author of the law (the legislator) is competent. Not all the active subjects of particular legislation have the same scope, and the particular customs also affect areas of very different extent.

We must refer again to c. 135 § 2, whose last clause observes that the inferior legislator cannot issue a law contrary to the law of a superior rank. The text can be read to refer also to written norms that are not properly laws (a particular legislator cannot issue a law, for instance, against an executory decree issued by a dicastery of the *Roman Curia*). Yet, it can have the same meaning regarding custom. The custom can be, with respect to the particular law, the law of superior rank. Thus it is understood to be beyond the power of the particular legislator to issue a law revoking a universal custom contrary to the law, if that custom has already become a norm through the observance of the time periods established by the law.

Less certain is whether an inferior particular legislator (a diocesan bishop, for instance) can issue a law which revokes a custom introduced by a community of larger scope than his own territorial jurisdiction which is contrary to the law of a particular legislator of superior rank (e.g., a pro-

14. A. VAN HOVE, *De consuetudine...*, cit., pp. 236–237; this is based on a decision of the Rota: *AAS* 12 (1920), pp. 134–135.

vincial or plenary synod, or a bishops' conference within its normative competence). The authors tend to affirm this possibility,[15] although with reservations and warnings about the many limitations that exist. In reality, there are not very many convincing reasons to affirm this. If the custom is perfect, it is a law of superior rank and it can be revoked only by the one who issued the law.

It is evident also that all particular legislators have a right-duty that they cannot be released from exercising, to see to it that the universal discipline of the Church is observed (c. 392). That right and duty give the legislator the ability to intervene in anything pertaining to the consolidation of the usages in his own ecclesiastical jurisdiction. He can deny his consent, and if that rejection is reasonable and juridically valid, then the custom, in our opinion, cannot be consolidated. This, however, is not the revocation of a consolidated *consuetudo iuris*. On the contrary, we are referring, as will be seen, to the instance in which the community introducing a custom is beyond the jurisdiction of the legislator. Of course, any particular legislator can revoke customs that are contrary to the universal law (or contrary to a particular law of greater rank) if the community introducing the custom is a social group that is, in an adequate proportion, under the power of the legislator that is carrying out the abrogation. Moreover, the legislator is always competent to revoke extralegal customs as well.

It is absurd to assert the consent of the law (effected through a universal law, i.e., through cc. 23–28) to custom in order to affirm that any custom, including the particular, enjoys pontifical status or is invested with the rank of universal law.[16] Consequently, any possibility of revoking custom, even particular custom, has been removed from the particular legislators. The particular custom always remains within the jurisdictional orbit of the competent legislator.

15. Cf., e.g., A. VAN HOVE, *De consuetudine...*, cit., pp. 228–230.

16. Among others, it is affirmed by A. TOSO, *Ad Codicem juris canonici commentaria minora*, Lib. I (Rome 1921), pp. 81–82. A majority of the doctrine disagrees: cf. A. VAN HOVE, *De consuetudine...*, cit., p. 227 and G. MICHIELS, *Normae generales iuris canonici*, II (Paris-Tournai-Rome 1949), p. 215.

TITULUS III
De decretis generalibus et de instructionibus

TITLE III
General Decrees and Instructions

INTRODUCTION

María José Ciáurriz

The CIC contains many canonical innovations with respect to the *CIC*/1917, among which is one that concerns the theme of the general dispositions of the ecclesiastical administration. This subject, which occupies title III of book I, is, in fact, completely new. The importance of this innovation is evident when one bears in mind that if the doctrine prior to 1983—which worked within the framework of the *CIC*/1917—had analyzed the bases of a possible development of administrative law in the Church, it would not have conceived of the appearance of new legislation to clarify the theme of the authority of the administrative bodies along the lines of title III of book I *CIC*.[1] As Delgado del Río has affirmed, "it is frankly difficult to determine the faculties of these departments [the author is referring to the central administrative departments of the Church] in the normative material. In order to be able to organize this material coherently, it is an indispensable requisite to have a clear idea of the legislative bodies in the Church and of the principle of normative hierarchy. Both points present, for one reason or another, a great many difficulties in the canonical system."[2]

Title III of book I is a brief title, comprising only six canons, but it possesses, despite its brevity, a high juridical value, in as much as it attempts to solve a problem that directly touches upon juridical certainty within ecclesiastical society: the problem of the difficult demarcation be-

1. Cf. in this regard P. LOMBARDÍA, "Estructura del ordenamiento canónico," in *Derecho Canónico* (Pamplona 1975), pp. 215–218; J.A. SOUTO, "Sugerencias para una visión actual del Derecho Administrativo canónico," in *Ius Canonicum* 5 (1965), pp. 139, with the bibliography cited by the two authors.

2. G. DELGADO, *La Curia Romana. El gobierno central de la Iglesia* (Pamplona 1973), p. 46.

tween acts issued in virtue of legislative authority and those generated by executive authority, when the latter are general prescriptions or administrative acts of a normative nature.[3]

The embodiment of the principle of distinction of powers in a positive legal provision first appears in the juridical system in c. 335 *CIC*/1917, which established the episcopal powers. Since the establishment of this principle, canonists have been preoccupied with the desire to discover formulae that, with respect to the concentration of the power of governance in the Roman Pontiff and the bishops, were compatible with the specialization or separation of the scope of the competencies attributed to the different dicasteries of the Roman Curia and the diverse offices of the diocesan curiae.

As Lombardía wrote while the *CIC*/1917 was still in force, and in spite of the fact that that *Codex* already mentioned the distinction of powers in the aforementioned canon, "the doctrine of the division of powers is not applicable to canon law, not even with the nuances with which it is used nowadays by some sectors of the juridical doctrine. Hence the impossibility of identifying the *administrative act* as an exercise of the administrative power in the Church. Nevertheless, as Souto has emphasized, for the study of the juridical regimen of administrative activity in the Church, it is not a matter of asking whether there is a division of powers in the Church, but simply of bearing in mind the fact that there is an ecclesiastical administration, since 'where there is an administration, there obviously will be an Administrative law'; that is, a regimen of the juridical relationships in which the ecclesiastical Administration is involved."[4]

Under the assumption that there was no division of powers in the Church, canonical science—confronted by the obvious reality of the existence of legislative, executive, and judicial powers—contrived technical formulae like the one offered, for example, by Maldonado, who attempts to reconcile the two positions, the one denying the division of powers and the other confirming the reality of the differentiation of functions: "The governance of the ecclesiastical community requires distinct classes of activities in the exercise of the public power, the power of governance, exercised by authority. In contrast to civil law, one cannot imagine here a division of powers, since that power is unitary and held by the same basic officers for its diverse aspects, and in addition, the guarantee which is sought in the political order by means of this division is not necessary in the Church; on the other hand, it is indeed possible to distinguish some different functions that suppose distinct manners of acting in their respective exercise. These are the legislative, administrative, and judicial functions,

3. "In current canon Law, it is difficult to distinguish the law from the administrative actnorm, which generates remarkable deficiencies of formalization, with the consequent juridical uncertainty" (P. LOMBARDÍA, "Estructura del ordenamiento…," cit., p. 217).

4. P. LOMBARDÍA, "Estructura del ordenamiento…," cit., p. 215.

which summarize the manners in which the activity of governance is manifested."[5]

It is true that all efforts to reconcile these positions were directed more toward solving specific problems as they arose over time than they were toward constructing an approach based on the clear delineation of the distinct functions characteristic of ecclesiastical governance. Accordingly, in order to evaluate the extent of the reform which—without much success—was meant to be introduced in title III of book I, we must review the antecedents of the theme and the juridical and doctrinal *process* of the new norms.

In promulgating the *CIC,* the new doctrine affirmed that "this title, completely new as regards the *CIC*/1917, is one of the most important achievements of the revision work and is intended to fulfill the objective, expressed in the *Guiding Principles,* of helping to distinguish the different functions in Church governance. Indeed, cc. 29–34 attempt to establish a demarcation between the law and normative administrative acts or general provisions issued by authorities with executive power."[6] Lombardía—the author of the words just quoted—is referring to the *Guiding Principles* prepared by the Code Commission and approved by the 1967 Synod of Bishops.[7] The criterion adopted—in the seventh of these *Principles*—was that "the diverse functions of ecclesiastical power, namely: legislative, administrative, and judicial, shall be clearly distinguished."[8]

Clearly, there is some distance separating these *Principles* from the thesis set forth only a short time later by the doctrine (Maldonado, Lombardía, etc.) mentioned previously. An interesting point of view comes from Bernárdez, who, in analyzing c. 135 and its division of the power of governance into legislative, executive, and judicial power, comments that "the distinction of these three powers does not mean that the principle of the division of powers prevails in canonical law. On the contrary, what prevails is the principle of the plenitude of the power of governance (*plenitudo potestatis*), since this is a unitary concept that encompasses any social or juridical power which is exercised in the Church so that its members may attain their ends within a just social order."[9]

What is important is not that the authors demonstrated that the division of powers was not acknowledged in the Church, but rather that the doctrine maintained that it was not even necessary, and that the juridical guarantees supported by this division were unnecessary. In stark contrast to this thesis, the doctrine itself shifted to defending the necessity of the

5. J. MALDONADO, *Curso de Derecho Canónico para juristas civiles* (Madrid 1967), p. 100.
6. P. LOMBARDÍA, commentary on tit. III of book I, in *Pamplona Com.*
7. Cf. P. LOMBARDÍA, commentary on tit. I of book I, in *Pamplona Com.*
8. Cf. *Comm.* 1 (1969), p. 83.
9. A. BERNÁRDEZ, *Parte general de Derecho canónico* (Madrid 1990), p. 103.

distinction—expounded in different ways—precisely with a view to obtaining just conditions of sufficient juridical certainty.[10]

Such a distinction is not easy in canon law. The power of ecclesiastical governance, as the doctrine has emphasized, is "one and indivisible; however, it is susceptible to a material or substantive classification in relation to its object"; thus "the following can be distinguished: a) a legislative function ...; b) a jurisdictional function (strictly speaking) ...; c) an administrative function, which is often given less appropriate names, such as 'executive function'."[11] This classic distinction, proposed by Montesquieu and universally accepted, has certainly proven useful within the context of the Church with regard to the delineation of functions in the power of governance. Indeed, not only is it likely to be accepted, its acceptance is quite appropriate for many reasons, which the doctrine has had no choice but to acknowledge.[12]

The distinction appears for the first time in the first *Schema de Constitutione Ecclesiae* of the First Vatican Council. Subsequently, it was used by Leo XIII in the encyclicals *Immortale Dei* and *Satis cognitum*.[13] It also appeared in a legal provision in the *CIC*/1917 (c. 335 § 1), which used it in describing the power that bishops possess in their dioceses.[14]

Yet, even if the division of powers has not only proven very useful in the context of civil society, but has also been the object of a relatively easy institutional embodiment, the situation of the Church needs to be treated differently. In the Church, all the powers are concentrated in the Supreme Pontiff and in the bishops; the distinction of legislative, executive, and judicial functions can only be achieved by means of a distinction in the material object of the exercise of each of the jurisdictional activities performed by the bodies that possess them by divine law. It is not possible to effect a distinction of bodies analogous to the parliaments, governments, and tribunals that are found in the modern state. In that sense, the

10. Cf., for all, P. LOMBARDÍA, commentary on tit. I of book I, in *Pamplona Com.* Tit. III is "a short title, composed of 6 canons, but it is juridically very important because it attempts to solve a long-standing problem which has posed a serious risk to juridical certainty in the Church" (M.J. CIÁURRIZ, "Las disposiciones generales de la Administración eclesiástica," in *Le nouveau Code de Droit Canonique. Actes du Vᵉ Congrès international de droit canonique* (Ottawa 1986), p. 213).

11. V. DEL GIUDICE, *Nociones de Derecho Canónico*, (Spanish translation and notes by P. Lombardía) (Pamplona 1955), p. 74.

12. Cf. J.I. ARRIETA, "El Pueblo de Dios," in *Manual de Derecho Canónico* (Pamplona 1988), pp. 138–139, and A. VIANA, "El Reglamento general de la Curia Romana (February 4, 1992). Aspectos generales y regulación de las aprobaciones pontificias en forma específica," in *Ius Canonicum* 64 (1992), pp. 512–513.

13. Respectively, December 1, 1885, in *AAS* 16 (1885–86), pp. 162ff; June 29, 1896, in *AAS* 28 (1895–96), pp. 709ff.

14. *CIC*/1917, c. 335 § 1: "Ius ipsis et officium est gubernandi dioecesim tum in spiritualibus tum in temporalibus cum potestate legislativa, iudiciaria, coactiva ad normam sacrorum canonum exercenda."

pope holds the supreme power in the Church—legislative, administrative, and judicial powers—and it is not possible for him, by means of any form or formula, to divest himself of any of them such that they are assumed by another body or person in his stead. He can indeed delegate the exercise of any of them,[15] but always under his control, to the extent and for the cases that he desires, and without depriving himself of the power that he may have delegated regularly or for a specific case.[16] The problem that title III of book I attempts to resolve is rooted precisely in this situation.

The distinction of these functions, even though it has not been able to affect the fact that all of them are held by the Roman Pontiff, has given rise to a model of organization of the Church in which the different bodies that work together with the pope—or with the bishops at the diocesan level—receive powers that are necessarily administrative or judicial in nature. The legislative power is reserved to those who, by divine law, possess the status of legislators in the Church. Thus, in what concerns the Supreme Pontiff, the Roman Curia—which directly assists him in the exercise of the supreme functions of governance—is divided into administrative bodies (essentially the so-called congregations) and judicial bodies (the tribunals). For his part, the pope is, together with the College of Bishops,[17] the supreme legislator for the whole Church.

Until the sixteenth century, the functions of governance of the Roman Pontiffs were exercised through different bodies that worked *de facto* in the diverse jurisdictional areas in the manner of papal secretariats. The reform of the ecclesiastical administration carried out by Sixtus V[18] marks the beginning in its modern form of what we call the Roman Curia, "a group of bodies of which the Pope ordinarily makes use for the exercise of his primatial function, that of Pastor of the whole Church, which by divine law rests with him,"[19] or in the words of c. 360 *CIC*, through which "the Roman Pontiff usually conducts the business of the universal Church," and which "acts in his name and with his authority."

Civil administrative doctrine has recognized that the reorganization of the central government of the Church carried out by Sixtus V constitutes a precedent of the administrative organization of the modern state, the Holy See having been the first to substitute a functional structure that

15. "It is true that the Roman Pontiff has normative faculties for the whole Church. But the exercise of this function does not necessarily have to be carried out by him. Decentralization is possible. Even reserving to the Pope the promulgation of fundamental legislation and the sanction of ordinary laws, there are still bits of normative activity that can be attributed to different organs" (G. DELGADO, *La Curia Romana...*, cit., p. 46).

16. Cf. J. HERVADA, *Elementos de Derecho Constitucional Canónico* (Pamplona 1987), p. 277.

17. Cf. J.L. GUTIÉRREZ, "Organización jerárquica de la Iglesia," in *Manual de Derecho Canónico*, cit., pp. 296–304; J. HERVADA, *Elementos de Derecho...*, cit., p. 283.

18. Through the Const. *Immensa Aeterni Dei*, of January 22, 1588.

19. J. L. GUTIÉRREZ, "Organización jerárquica de la Iglesia," cit., p. 311.

was nimble and efficient for a system of governance that until then had been typical both of the Church and of the medieval monarchies.

The devolution of functions on the Roman Curia carried out by Sixtus V did not, of course, suppose either the granting of the exercise of the legislative power, or the *renunciation of the personal involvement* of the Pontiff in the resolution of the gravest questions committed to the curial bodies.[20] As the doctrine has recalled, the Constitution "established the personal involvement of the Pope in the *most important* matters handled by the Roman Congregations."[21] This precept did not suppose mere administrative control of the curial decisions by the Pontiff; it meant that the pope, through his personal involvement, could grant *normative* value to a decision that was of itself merely administrative, thus lending his legislative power to the curial decision and altering the former law through the approval of a derogating norm.

The problem, then, of describing the power of the congregations did not arise in cases of pontifical approval of their decisions but would inevitably come up eventually—centuries later, after the *distinction* of powers came about at the beginning of the eighteenth century—once the decentralization of functions began to appear in the twentieth century in the area of Church governance.

The lack of precision regarding the distinction of powers and functions gave rise to countless conflicts among the different curial bodies during the centuries between Sixtus V and St. Pius X.[22] Indeed, even the executive and judicial powers appeared to be confused; the congregations acted as true tribunals, and the delineation of competencies was very far from reaching—even among the congregations themselves—a *minimal* level of clarity, just as neither was there a real hierarchy of norms.[23]

As a result of this confusion, the reform of Sixtus V raised the question, among others, of what powers belonged *de facto* and *de iure* to the different curial bodies, and whether the Roman congregations were capable of legislating—thereby altering—the previous law, and of resolving contentious processes through jurisdictional procedure.

The new reform of the Roman Curia carried out by St. Pius X through the Constitution *Sapienti consilio*[24] *intended to clarify the competence of the different dicasteries by attributing exclusively administrative*

20. Cf. A. ALONSO LOBO, "De la Curia Romana," in M. CABREROS DE ANTA-A. ALONSO LOBO-S. ALONSO MORÁN, *Comentarios al Código de Derecho Canónico*, I (Madrid 1963), pp. 577–580.
21. A. VIANA, "El Reglamento General de la Curia Romana...," cit., p. 510.
22. Cf. M.J. CIÁURRIZ, "Las disposiciones generales...," cit., pp. 214–220.
23. Cf. M.J. CIÁURRIZ, "Las disposiciones generales...," cit., p. 215, as well as the bibliography cited therein, especially N. DEL RE, *La Curia Romana: lineamenti storico-giuridici* (Rome 1970), pp. 6 and 38; M. FALCO, *Introduzione allo studio del 'Codex Iuris Canonici'* (Turin 1925), pp. 77–79.
24. June 29, 1908, in *AAS* 1 (1909), pp. 7–19.

functions to the congregations,[25] but it did not resolve the problem that stemmed from direct pontifical involvement in the decisions of the dicasteries on the most important matters decided by them. The new Constitution does aim at introducing in the law of the Church the technique of the distinction *of functions*, at least to an extent sufficient to encourage the doctrine to search for criteria by which to differentiate them, starting from their concentration in the pope and his delegations in favor of the different bodies—congregations, offices, and tribunals—of the Curia.

Consequently, even though the doctrine also did not raise the issue directly, the theme of the participation of the congregations in the legislative power survives, over and above the attribution to them of administrative functions only.

The promulgation of the *CIC*/1917 did not assume in itself an innovation in this regard. No prescription of that supreme legal corpus determined what would appear later in title III of book I of the *CIc*. On September 15, 1917, however, Benedict XV promulgated the first text that was to incorporate into the canonical system the beginnings of a sensitivity to the issue of the extension of the functions of the curial dicasteries beyond their administrative competencies. We are referring to the *Motu proprio Cum iuris canonici,* by which a commission for the authentic interpretation of the new Code was instituted.[26] With this *Motu proprio*, "Benedict XV meant to assure the stability of the legal corpus by regulating the possible normative activity *contra Codicem* of the congregations."[27] To this end, the pope established that the congregations were not to issue new general decrees unless grave needs of the universal Church required it. On the contrary, the charge of the congregations was to see that the Code was observed religiously, and likewise to issue *instrucciones* that gave greater light and efficacy to the precepts of the Code, and to constitute clarifications and complements to the content of the canons themselves.[28]

Apart from these *instrucciones*, the congregations certainly can issue general decrees when the needs of the Church require it, as mentioned previously. In this case, no. III of the *Motu proprio* indicated the series of requisites that had to be fulfilled, thus establishing the following complicated procedure: if the general decrees do not conflict with the precepts of the Code, there is not a problem; if they do conflict, the pope must be advised of this fact, so that he may give his approval to the innovative decree. Once papal approval has been obtained, and assuming that

25. Only the SCHO retained the possibility of resolving contentious processes, given the special nature of its competencies: cf. N. DEL RE, *La Curia Romana...*, cit. (Rome 1970), p. 6.
26. In *AAS* 9 (1971), pp. 483–484. The mp was inserted in the official edition of the *CIC*/1917: cf. *Codex Iuris canonici Pii X Pontificis Maximi iussu digestus Benedicti Papae XV auctoritate promulgatus* (Rome 1917), pp. XL–XLI.
27. A. VIANA, "El reglamento general de la Curia Romana...," cit., p. 511.
28. MP *Cum iuris canonici*, cit., no. II.

a modification of the *Codex* is in fact necessary, there is a complex system for modifying the contradicted (derogated) canon or canons or for inserting into the Code the new canons that have been made necessary.[29]

These complications demonstrate that the *Motu proprio* was in actuality establishing a system of modification for the Code based on the initiative of a dicastery, but decided by the supreme legislator who is the author of the corpus of the Code itself.

In summary, the initiative of introducing any modification into the *Codex* can come either from the Pontiff himself or from the Roman Curia, but in either case, the decision rests with the pope, who expresses that decision himself through a law proper or through the general decree issued with his approval by the dicastery. This procedure does give rise to the question of the type of power with which the dicastery acts in the case contemplated in the *Motu proprio*.

This issue did not cause serious doctrinal disquiet at the time, above all because the system established by Benedict XV lacked efficacy in practice. The congregations issued not general decrees, but simple instructions that contravened the norms of the Code; they did not observe the precepts of the aforementioned *Motu proprio* for general decrees. These documents attained validity and efficacy opposite the *CIC*/1917, thereby derogating some of its precepts *de facto*.[30] It is indisputable that the popes knew this and permitted it; thereby obviating the legal procedure established so that a Congregation could modify the *Codex*. Thus the congregations exercised legislative power with the consent of the Pontiff. A crisis was then created by the distinction of functions, a distinction that Benedict XV had cautiously wished to affirm, not in the Code where perhaps it might have attained its objective, but in a lesser document that was systematically ignored by the Holy See itself and interpreted in a confused manner by the doctrine.[31]

With this history in mind, it becomes legitimate to doubt the will of the supreme ecclesiastical authority and the Roman Curia to accept so completely the distinction and decentralization of functions in the canonical system: limiting the faculties of the congregations to the administrative sphere and the tribunals to the judicial while reserving the legislative power over the universal Church to the supreme legislator. "In posing the problem thus," affirms Rincón-Pérez, "it seems to be taken for granted

29. Pursuant to no. III of the mp *Cum Iuris canonici*—which contains the procedure referenced above—A. VIANA, "El Reglamento general…," cit., p. 511.

30. Cf. M.J. CIÁURRIZ, "Las disposiciones generales…," cit., pp. 216–218; A. VIANA, "El Reglamento general…," cit., pp. 510–511.

31. Cf. P. CIPROTTI, "Le nuove norme per i processi di nullità," in *Rasegna di morale e diritto* 2 (1937), p. 44; F. CAPPELLO, *Tractatus canonico-moralis de sacramentis*, V (Turin 1961), p. 806; G. TORRE, *Processus matrimonialis* (Naples 1956), pp. 3–4; M. GORINO-CAUSA, *Sui regolamenti in diritto canonico* (Turin 1954), pp. 103–106.

that the principle of juridical certainty is sometimes violated in the Church, when it comes to making norms ... One oft-repeated fact is that of the promulgation of dispositions of a secondary nature, or which in theory have a rank inferior to the law, in that they are issued by hierarchically inferior organs, but which *de facto* have the force of ordinary law, and hence can be derogated. This fact inevitably entails uncertainty, although there has been an attempt to mitigate it by the expedient of considering these dispositions as pontifical, because they are approved *in forma specifica* by the Pope."[32]

This crisis of canon law, which through an obvious error of interpretation of the pontifical will and of ecclesial needs was extended throughout the Church as a result of the announcement of the revision of the *CIC*/1917 made by John XXIII and the meeting of the Second Vatican Council, aggravated this situation. The error arose from reflecting that a Code in the process of being revised was without value. The documents conflicting with the supreme legal corpus had increased in frequency in the Curia itself, entering into force by means of formulae of pontifical approval that were as imprecise as they were habitual.[33] What cannot be doubted is the pontifical acquiescence in this acquisition of normative efficacy on the part of numerous precepts *contra Codicem* issued by the Roman congregations.

It is obvious that the pope can modify the norms of the Code and innovate to whatever extent he deems opportune the universal system of the Church. What we are identifying as a problem is not the underlying issue, but the formal one, the imprecision of the procedures for making norms and the disorder that to a certain extent characterized legislative activity in the period between 1917 and 1983, especially between 1959—the year of the summons to Vatican II and the announcement of the revision of the *CIC*/1917—and the promulgation of the *CIC* in January of 1983.

The efficacious instrument of this disorder was precisely the legislative activity of the congregations and the other curial bodies. They were based "in practice which became habitual" on the papal approval of their decisions, without keeping in mind the level of the decisions or a regular procedure for obtaining that approval and manifesting it.

The need to bring this state of affairs to an end was made clear to the Holy See itself and to the universal Church when the Second Vatican Council requested an efficacious structural reform of the Roman Curia.[34]

32. T. RINCÓN-PÉREZ, "Actos normativos de carácter administrativo," in *La Norma en el Derecho Canónico. Actas del III^er Congreso Internacional de Derecho Canónico* (Pamplona 1979), pp. 960–961.

33. Cf. M.J. CIÁURRIZ, "Las disposiciones generales...," cit., p. 218; J. OTADUY, *Un exponente de la legislación postconciliar; los directorios de la Santa Sede* (Pamplona 1980), pp. 176–179.

34. Particularly in *CD*, analyzed in this respect by J.A. SOUTO, "La reforma de la Curia romana," in *Ius Canonicum* 8 (1968), pp. 548–549.

Also, in 1967, the Synod of Bishops approved certain guiding principles that were to inspire the reform of the *CIC*/1917; among them was no. 7, which requested a clear distinction of the diverse functions—legislative, administrative, and judicial—of the ecclesiastical power, in which the bodies charged with exercising each one of them were to be clearly defined.[35] As the doctrine has stated, it was already "urgent to move toward canonical formulae that distinguished properly between the pontifical legislative power and the administrative power of the congregations, with the aim of achieving a central governance that was more ordered and more sensitive to the situations of the addressees of the norms. In short, what was proposed was a suitable formulation of the principle of distinction (not separation) of powers in the exercise of the central governance."[36] In the final analysis, what was at stake was the principle of juridical certainty, to which the Church could not appear insensitive, especially in the changed circumstances of the times.

Although both the Synod of Bishops and the Code Commission[37] expressed a will that was favorable to the definition of the functions of the congregations, the content of the Constitution *Regimini Ecclesiae Universae*, issued by Paul VI on August 15, 1967,[38] was simultaneously working in the opposite direction. The new legal text regulated the functioning of the Roman Curia and introduced an important innovation in the canonical system: the peculiar establishment of the judicial control of administrative acts, entrusted to the Apostolic Signatura. This innovation signified a surprising step backward for the definition of the functions of the administrative bodies of the Roman Curia.[39] Instead of attempting to secure what had not been achieved in the 1917 *Motu proprio Cum Iuris Canonici*, along lines that both the Synod of Bishops and the Secretary of the Code Commission had clearly pointed, the new Constitution increased the number of cases of pontifical involvement in the approval of the decisions of the dicasteries. Paul VI "expressed with a clause of broad formulation the need for the decisions of the dicasteries to be approved by the Pope, without distinguishing the relative importance of the matters: 'insuper decisiones quaevis pontificia approbatione indigent', indicated art. 136 of the Constitution. The only exceptions contemplated in this article had already been established by the const. *Sapienti consilio* ... namely, the decisions adopted by the Heads of the Dicasteries with a special mandate and the judgments of the pontifical Tribunals."[40]

35. Cf. *Comm.* 1 (1969), p. 83.
36. A. VIANA, "El Reglamento general...," cit., p. 513.
37. On the statements of the Secretary of the Code Commission in this regard, cf. A. VIANA, "El Reglamento general...," cit., p. 513.
38. There is an exhaustive study of the reform of the Curia by Paul VI in G. DELGADO, *La Curia Romana...*, cit., *passim*.
39. Cf. J.A. SOUTO, "La reforma de la Curia romana," cit., pp. 547–568.
40. A. VIANA, "El Reglamento general...," cit., p. 514.

It is true that the papal approval had been present *de facto* in the curial documents, and so in actuality the aforementioned article 136 did not modify the habitual practice; but there can be no doubt that it reinforced it rather than attempting to correct it by adding the force of a requisite established by a normative text to its *de facto* frequency.

Taking into account the situation prior to 1983, the validity of the aforementioned thesis—that title III of book I supposes a notable innovation in the regimen of attribution of powers in the canonical system to the dicasteries of the Roman Curia—becomes clear.[41] Its content points to a clear definition of functions, leaving the executive power reserved to the congregations and bodies of the Curia—apart from the tribunals, which hold the judicial power—while "there is no basis in the *CIC* for the ordinary legislative power of the Roman Curia."[42]

Such is the situation that follows from the strict content of the *CIC*, starting from cc. 29–34 together with canons 135 and 360.

Canon 135 also constitutes an important innovation that responds to the need—demonstrated, as we have seen, by the Synod of Bishops—for the legislative, judicial, and administrative functions in the Church to be distinguished. To that end, c. 135 § 1 declares that "The power of governance is divided into legislative, executive, and judicial power." Paragraph 2 of the same canon establishes precisely that the legislative power cannot be delegated, a precept that naturally cannot affect—and this is deduced directly from the text of the canon—the supreme legislator.[43]

Although the capacity of the pope to delegate in relation to his legislative power is obvious, the presence in the *CIC* of this c. 135 now supposes a clear will to distribute the functions within the power of governance. As the doctrine has not ceased to point out, "the regulation of the normative capacity of the dicasteries of the Roman Curia in the *CIC* is contained first and foremost in the principle of the distinction of powers formulated in a general manner in c. 135 § 1."[44]

Nevertheless, while framing the canons contained in title III of book I, it is necessary to refer also to c. 360. This canon definitively remits the reorganization of the Curia and the distribution of competencies in it to a special law still to come (which has now been promulgated) that was to develop the principles contained in the *CIc*. In the same vein, it is interesting to observe that the *CIC*—distinguishing itself in this regard from the

41. "Title III of book I of the new Code of Canon Law constitutes an innovation as regards the legal corpus of 1917. Its content is an application of the principle of the distinction of functions" (P. LOMBARDÍA, *Lecciones de Derecho Canónico* (Madrid 1984), p. 161).
42. A. VIANA, "El Reglamento general...," cit., p. 514.
43. Cf. J.I. ARRIETA, commentary on c. 135, in *Pamplona Com.*
44. A. VIANA, "El Reglamento general...," cit., p. 514.

CIC/1917, whose c. 242 was limited to pointing out that the Roman Curia was composed of congregations, tribunals, and offices—indicates in c. 360 that it is through the Roman Curia that the Supreme Pontiff "usually conducts the business of the universal Church," and that the Curia "acts in his name and with his authority."[45]

The presupposition of the *CIC* is that the unitary power of governance in the Church is divided into three powers: the legislative power, which the pope can delegate; the executive power of the congregations, which is received through a pontifical delegation of legislative power; and the judicial power, which is also delegated to the tribunals by the pope. This possibility is foreseen and is to be governed by the provisions of the canons that comprise title III of book I; and the matter was to be regulated with *greater specificity in the special* law of the Roman Curia that was to follow later.

This whole construction, doctrinal and technical at once, was going to depend, by virtue of c. 360, on the sensitivity shown by the subsequent special law of the Curia, announced in the *CIC*, to the effort of the legislator in cc. 29–34 to limit the competence of the congregations to the administrative sphere. With sharp intuition, Lombardía sensed the need "to point out that these canons [he is referring to those contained in title III of book I] would lose much of their effectiveness in practice if the authorities with legislative power were to countersign the general executive provisions of the administrative organs. In order to avoid situations which have, in the past, given rise to serious breaches of juridical certainty, it would have been advisable, in norms regarding the Roman Curia, to establish a principle according to which dicasteries would assume full responsibility for the provisions they issue, and would be expressly prohibited from submitting them to the Roman Pontiff for approval."[46]

The author of this quote was personally involved as a consulter in the preparation of cc. 29–34 of the *CIC*; the foregoing words read like a defense of the legislative line indicated in those canons. The problem lies in knowing whether there was true knowledge of what these canons assumed and required and, at the same time, a true will to take up the line indicated by them, so that the promised future legislation—the present Apostolic Constitution *Pastor Bonus*—would become consistent with the innovation in the canonical system.

No previous text had discussed defining the executive character of the decisions of the dicasteries in such a decisive form; the *Motu proprio Cum Iuris Canonici* of Benedict XV constitutes the only precedent. The

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45. "The Roman Curia, then, is a group of bodies of which the Pope ordinarily makes use for the exercise of his primatial function, that of Pastor of the whole Church" (J.L. GUTIÉRREZ, "Organización jerárquica...," cit., p. 311).

46. P. LOMBARDÍA, commentary on tit. III of book I, in *Pamplona Com.*

unlucky career of this text will repeat itself in the case of cc. 29–34 of the *CIC* if the special law of the Curia should later demonstrate the same insensitivity to the problem highlighted by Lombardía as has hitherto been demonstrated by the different bodies of the central governance of the Church (see on this issue, the commentary on each of the relevant canons).

29 **Decreta generalia, quibus a legislatore competenti pro communitate legis recipiendae capaci communia feruntur praescripta, proprie sunt leges et reguntur praescriptis canonum de legibus.**

General decrees, by which common provisions for a community capable of receiving a law are made by a competent legislator, are true laws and are regulated by the provisions of the canons on laws.

SOURCES: BENEDICTUS pp. XV, m. p. *Cum iuris canonici*, 15 sep. 1917, II–III (*AAS* 9 [1917] 484)

CROSS REFERENCES: cc. 7–22

COMMENTARY

María José Ciáurriz

As Labandeira notes, "Canons 7 through 22 and 29 discuss the formal legislative norms."[1] It has always seemed strange that in the systematic arrangement of book I, the legislator did not gather under the same title—title I, "Ecclesiastical Laws"—all of the canons relating to the laws, but left one of them under a different title. Moreover, it is c. 29, separate from the other canons that discuss the laws (cc. 7–22), which describes the proper elements of the notion of law—elements that title I does not describe because it is expressly intended, by its name and content, to regulate formal legislative norms.[2]

There is, of course, a reason for this. The content of title III is, to a certain extent, not very well described by its heading: "General Decrees and Instructions." The true content of such a title is the normative activity of the administrative bodies. After the legislator has regulated laws and customs—the norms that generally have the force of law as long as they fulfill all the requisites found in the *CIC*—then the legislator contemplates the case of the norms issued by administrative bodies in order to develop the content of the laws and to facilitate their observance. Such norms are called either general executory decrees—"decrees which define more

1. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd revised ed. (Pamplona 1993), p. 247.

2. Cf. A. BERNÁRDEZ, *Parte General de Canon Law* (Madrid 1990), p. 109; P. LOMBARDÍA, *Lecciones de Canon Law* (Madrid 1984), pp. 154–155.

precisely the manner of applying a law, or which urge the observance of laws" (c. 31 § 1)—or instructions "which set out the provisions of a law and develop the manner in which it is to be put into effect" (c. 34 § 1). These norms are regulated by cc. 31–34, where the absolute and indispensable requirements of such norms are established in terms of the laws of the service in which they are encountered.[3]

There exist, however, other general decrees that are not executory decrees, in other words, that are not subordinate norms for the execution, explanation, development, or better fulfillment of a law. These other general decrees *are true laws that are distinguished from the rest of the laws solely by their name*. They are laws and therefore can only be issued by legislative bodies; technically speaking, they were supposed to be contained within the title "Ecclesiastical Laws" (title I). However, the fact of their name has led the *CIC* to classify them with the rest of the general decrees—the executory decrees—under the same title and the same heading, although doing so gives cause for possible error in studying this subject.

For this same reason, the argument surrounding the name is not enough to remove such general decrees from the title on "Ecclesiastical Laws," in which, due to their nature, they would be better placed. But there is a second issue: the administrative bodies, which cannot formally issue laws as such, can indeed issue general decrees that have the same nature as laws and produce equal effects, provided that certain requisites are fulfilled. The purpose of c. 30 is to establish this legislative power of administrative bodies, its existence and the requirements for its exercise. Accordingly, cc. 29 and 30 are both included in title III, the former declaring that legislative bodies can legislate both through laws (considered in title I) and through general decrees, the latter granting administrative bodies the power to give laws under the name of general decrees.

Perhaps it was not desired that the administrative bodies enjoy such legislative power; the question is one for debate. *Undoubtedly, the matter* would have been remarkably better understood in these terms; the distinctions between the power to legislate, the power to administer, and the power to judge would be more specific; and juridical certainty would be notably strengthened.[4] The redactors of book I—and the legislator as well—did not want to deprive the Roman Curia of that normative possibility; they were looking to the tradition of so many centuries and legal bodies. The precautions that were taken to prevent the actual conversion of

3. Cf. P. LOMBARDÍA, *Lecciones...*, cit., p. 162.

4. "These facts clearly demonstrate the deficiencies in the mechanism for the production of norms and the resulting juridical uncertainty that arose. Today, far from the problem having been illuminated, I think it has become more acute." (T. RINCÓN-PÉREZ, "Actos normativos de carácter administrativo," in *La Norma en el Canon Law. Actas del III[er] Congreso Internacional de Canon Law* (Pamplona 1979), p. 962).

the Curia into a legislative organization will be analyzed when we comment on c. 30, where we will see that the efficacy of the canon is doubtful, if not nonexistent.

On the other hand, the legislator, who normally does not define the technical concepts he deals with, also does not offer definitions regarding law in the title on "Ecclesiastical Laws." Canon 7, which opens title I, takes for granted the concept of law when it proclaims that "the law comes into being when it is promulgated." Notwithstanding this assumption, c. 29, in dealing with general decrees, to a certain extent defines the concept of a canonical law to the point that it is necessary to appeal to this canon if we want to analyze the formal notion of law in canon law.[5]

In effect, the doctrine studied by the *CIC*/1917, which lacked a canon like the current c. 29, quite appropriately made clear that "for a norm to be able to be considered as true legislation, it is enough if it improves on and derogates the previous legislation."[6] That doctrine applied to the law one definition among the many that were considered classical, such as "iussum legitimi principis propter bonum subditorum, commune, perpetuum, sufficienter promulgatum."[7] Since the promulgation of the *CIC*, the doctrine appeals to c. 29 to define the characteristic signs of the law: "According to the previously-quoted c. 29, with reference to the general legislative decrees, the legislative norms are characterized by the following signs:

"1) They are general autonomous prescriptions, in other words, they are not instruments of, complementary to, or dependent on any other law;

"2) They have the force of law and they can, therefore, derogate a previous law (c. 20).

"3) They are directed to a community capable of being a passive subject of a law, both for the characteristics which are common to its members, as well as for its stability, which is guaranteed as a proper function of law;

"4) Their author is and must be the competent legislator (or authority expressly designated by him)."[8]

In short, it will not do to assume that the presence of c. 29 in title III of book I supposes that the general legislative decrees regulated in it are equivalent to the decree-laws that exist in a state under a civil law legal system (decree-laws are conceptually similar to "executive orders" in the

5. Cf. P. LOMBARDÍA, *Lecciones...*, cit., p. 156; M.J. CIÁURRIZ, "Las disposiciones generales de la Administración eclesiástica," in *Le nouveau Code de Droit Canonique. Actes du Ve Congrès international de droit canonique* (Ottawa 1986), pp. 225–226.

6. V. DEL GIUDICE, *Nociones de Canon Law*, (Spanish translation and notes by P. Lombardía) (Pamplona 1955), p. 77.

7. V. DEL GIUDICE, *Nociones de Canon Law*, cit., p. 76.

8. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., pp. 248–249.

U.S.A. and "orders-in-council" in the Commonwealth). Quite apart from the debatable question of whether they exist within the Church,[9] decree-laws are emergency legislative norms issued by administrative authorities, while c. 29 deals with the decrees issued by the legislator. Canon 30, meanwhile, deals with decrees issued by administrative bodies.

9. The matter is discussed in E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., p. 250.

30 **Qui potestate exsecutiva tantum gaudet, decretum generale, de quo in can. 29, ferre non valet, nisi in casibus particularibus ad normam iuris id ipsi a legislatore competenti expresse fuerit concessum et servatis condicionibus in actu concessionis statutis.**

One who has only executive power cannot make a general decree, as in can. 29, unless in particular cases this has been expressly authorized by the competent legislator in accordance with the law, and provided the conditions prescribed in the act of authorization are observed.

SOURCES: —

CROSS REFERENCES: cc. 7–22

COMMENTARY

María José Ciáurriz

The provision contained in c. 30 is not particularly complex *per se*. The canon only applies to what the doctrine calls "delegated legislative power: the transfer by the legislator of the power to legislate on a subject, in specific cases, to bodies endowed with executive authority." This phenomenon has been "widely studied in contemporary public law."[1]

"The principles on which the regulation of delegated legislative power is based are as follows:

a) competence must be granted by means of an express act of delegation, in which are precisely determined the subject on which the administrative body is entitled to legislate and the conditions under which this legislative activity may be exercised; all legislative acts exercised outside this area by an executive body would be null;

b) all provisions issued using this delegated power are legislative in nature and therefore subject in all respects to cc. 7–22."[2]

These principles would suffice as a commentary on c. 30, were it not for the existing relationship between this theme and the problem of the acquisition of legislative power by the administrative bodies, especially

1. P. LOMBARDÍA, commentary on c. 30, in *Pamplona Com*; idem, *Lecciones de Canon Law* (Madrid 1984), p. 154.
2. P. LOMBARDÍA, commentary on c. 30, in *Pamplona Com*; idem, *Lecciones...*, cit., p. 155.

the Roman dicasteries, from the time of the promulgation of the special law on the Curia mentioned in c. 360.

It has already been mentioned, regarding the current title, that, according to doctrine "in the *CIC* there is no ground for ordinary legislative power of the Roman Curia."[3] This means, according to the *CIC*—taking into account not only c. 30 but also c. 360—that the Curia also does not possess vicarious legislative power since that vicarious power is also ordinary power in every instance. This affirmation comes from a conjunction of the two canons. Indeed, c. 360 states that the Curia "conducts the business of the universal Church in his [the pope's] name and with his authority." This is an ambiguous phrase that could signify either an ordinary vicarious power or a delegated power.[4] Given that the ecclesiastical organization of the Curia is presented here as a group of offices ("an ecclesiastical office is any post which by divine or ecclesiastical disposition is established in a stable manner to further a spiritual purpose"(c. 145 § 1)[5]) rather than as a group of delegations given to persons because of their personal qualities and not because of their office (see c. 131 § 1), the power contemplated in c. 360 is vicarious power. Moreover, that this power is merely executive, rather than legislative, is made clear by the very presence of c. 30 in the *CIc*. It would not make sense for the Curia to receive delegated legislative power in order to dictate general legislative decrees if it possessed vicarious legislative power by virtue of c. 360. Of course, c. 30 does not mention the Curia, but its content is general, and if such an important exception were to be made, it would have been expressly stated. In short, c. 30 foresees that the Curia may legislate by virtue of a pontifical delegation to that effect.[6] The Curia cannot legislate with ordinary power, and therefore the power mentioned in c. 360, which is undeniably vicarious, is of an exclusively executive nature. Viana shows himself to be in agreement with this thesis when he writes: "In the system of the Code the intervention of the dicasteries of the Curia (and more specifically, of the congregations) in legislation is only possible through an express concession of legislative power for specific and unique cases from the supreme legislator, according to the law and fulfilling the conditions listed in the act of concession,"[7] an expression taken from the very text of c. 30.

3. A. VIANA, "El Reglamento general de la Curia romana (February 4, 1992). "Aspectos generales y regulación de las aprobaciones pontificias en forma específica," in *Ius Canonicum* 64 (1992), p. 514.

4. For precise description of the characteristics of each, cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd revised ed. (Pamplona 1993), pp. 121ff and 130ff.

5. Cf. J.A. SOUTO, *La noción canónica de oficio* (Pamplona 1971), *passim*.

6. P. LOMBARDÍA notes the exception which c. 30 supposes, namely that it permits the delegation of the legislative power, in contrast to the general principle, which forbids it (*Lecciones...*, cit., pp. 154–155).

7. A. VIANA, "El Reglamento general...," cit. pp. 514–515.

In itself, the discussion of the exercise of legislative power by the Curia would end here if not for the possibility pointed out by Lombardía in a note to c. 30,which states that the congregations might obtain pontifical approval for their decisions *contra legem*—general executory decrees, instructions, etc.—thus rendering pointless the limitation of their legislative faculties established by the *CIC*: "Canon 135 § 2, by establishing the general prohibition of delegating legislative power, except by the supreme legislator, i.e., the College of Bishops and the Roman Pontiff. From this these supreme legislative bodies derive the option of delegating their legislative power without being subject to the limits expressed in c. 30. Clearly, however, a delegation in favor of the dicasteries of the Roman Curia, made with no regard to what is established in c. 30, would imply a divergence of questionable intent from the principles of juridical order that the new Code intends to introduce."[8]

If the line drawn by the *CIC* is to be maintained, Lombardía further points out the necessity of prohibiting the dicasteries from obtaining pontifical approval for their executive decisions.[9] Such a mission certainly falls to the special law of the Curia that the *CIC* mentions in Canon 360. Viana alludes to this when he says that "the doctrine just before the promulgation of the *CIC*, referring to the special law on the Roman Curia as yet not promulgated, underlined the progress made in the new canons and expressed the desire for regulation of the pontifical approvals that would be compatible, both with the standardizing effort of book I of the *CIC* and with the proper consequences of the principle of distinction of powers in canon law."[10]

The special law of the Roman Curia, announced in c. 360, was promulgated through the Apostolic Constitution *Pastor bonus* on June 28, 1988.[11] In article 37, this constitution made reference to a future *General Regulations of the Roman Curia*, which was promulgated *ad quinquenium* on February 4, 1992 and on April 30, 1999 was replaced by a new version.[12]

Both norms together improve the line established by c. 30, not because they modify it, but because they open new paths for the exercise of the legislative power by the Roman dicasteries, in open contradiction to the idea that the exercise of such a power[13] is limited and restricted solely

8. P. LOMBARDÍA, *Lecciones*..., cit., p. 155.
9. Cf. P. LOMBARDÍA, commentary on tit. III of book I, in *Pamplona Com.*
10. A. VIANA, "El Reglamento general...," cit. p. 515.
11. *AAS* 80 (1988), pp. 841–912.
12. *AAS* 84 (1992), pp. 201–267.
13. Cf. J.I. ARRIETA, "La reforma de la Curia romana (Comentario a la Constitución Apostólica 'Pastor Bonus')," in *Ius Canonicum* 29 (1989), pp. 185–204, and "Principios informadores de la Constitución Apostólica 'Pastor Bonus,'" in *Ius Canonicum* 30 (1990), pp. 59–81; A. VIANA, "La potestad de los Dicasterios de la Curia romana," in *Ius Canonicum* 30 (1990), pp. 83–114.

to the scope of c. 30. In effect, *Pastor bonus* 18 regulates this matter as follows:

"Decisions of major importance are to be submitted for the approval of the Supreme Pontiff, except decisions for which special faculties have been granted to the moderators of the dicasteries as well as the sentences of the Tribunal of the Roman Rota and the Supreme Tribunal of the Apostolic Signatura within the limits of their proper competence.

"The dicasteries cannot issue laws or general decrees having the force of law or derogate from the prescriptions of current universal law, unless *in individual cases* and with the specific approval of the Supreme Pontiff.

"It is of the utmost importance that nothing grave and extraordinary be transacted unless the Supreme Pontiff be previously informed by the moderators of the dicasteries."

For its part, the *Regolamento generale della Curia Romana (RGCR)* in article 125 establishes that:

"§ 1. The dicasteries, within the purview of their own competence, can issue executive general decrees and instructions, by virtue of cc. 31 to 34 of the *Code of Canon Law* and art. 156 of the Apostolic Constitution *Pastor Bonus*.

"§ 2. The dicasteries cannot issue the laws and general decrees mentioned in c. 29 of the *Code of Canon Law, nor can they derogate the provisions* of the law promulgated by the Supreme Pontiff, without his specific approval. They can, on the other hand, grant dispensations in singular cases, according to the norms of the law."

The combined reading of both norms, especially the second paragraph of *Pastor bonus* 18 and *RGCR* 125 § 2, shows clearly that the limits set by c. 30 have been violated, thereby confirming just what Lombardía feared when he stated that the dicasteries, and in particular the congregations and some offices with competence in this matter, had acquired the option of seeking and obtaining pontifical approval for their decisions *contra legem*, outside the specific limits outlined by c. 30 in this regard. Lombardía pointed out the irrationality of this decision: "The supreme legislative power—excluding that of the Ecumenical Council—is habitually the province of the Roman Pontiff, assisted or not by consultative bodies. With respect to its eventual delegation to bodies with executive power, it would be most sensible, by means of an express norm or a constitutional custom, always to act within the limits established in c. 30."[14]

14. P. LOMBARDÍA, *Lecciones*..., cit., p. 155.

It is true that one doctrinal faction disagrees with this interpretation and maintains that *Pastor bonus* 18b[15] is limited to elaborating c. 30 within the limits outlined by it.[16] It is sufficient to note that c. 30 deals with the delegation of pontifical legislative power in favor of an executive body, and that any delegation supposes *a prius*, an act issued by the delegating authority prior to the act of the delegating body. On the other hand, what is foreseen in article 18b is an approval *a posteriori* of the decision taken by the dicastery. If such a decision had been authorized by virtue of a delegation given previously, it would not have needed approval after the fact.

Referring to canonical doctrine for a more profound analysis of the topic,[17] it is sufficient to note that the dicasteries, and in particular the congregations and offices, can renew a universal norm of the Church through legislative activity that consists of securing pontifical approval for their decisions *contra legem*. The *RGCR*, in article 125 § 2, facilitates still more what had been foreseen in article 18b of *Pastor bonus*, in its suppression of even the mention that this procedure of the dicasteries is limited to specific cases.[18] This observation does not add much, since every case in which the universal norm of the *CIC* is derogated by a dicastery will be specific at first,[19] but it does indicate the wish of the legislator to facilitate pontifical approval of the decisions of the administrative bodies taken outside the procedure of c. 30.

It is quite another thing to express one's opinion regarding the aptness of such a measure. The doctrine, as we saw, pointed out the requirements for juridical certainty, as well as consistency with c. 135 and the division of powers and functions within the Church,[20] in order to elicit a

15. Although *PB* 18 is not demarcated by paragraphs or numbers, it does consist of three paragraphs, distinct and separated as such. The doctrine, to refer to said article and to be able to cite it more easily, utilizes the system which we employ en our text; art. 18b, then, is obviously the second paragraph of this article.

16. See especially A. MARZOA, "Protección penal del sacramento de la penitencia y de los derechos de los fieles (Decreto general de la Congregación para la doctrina de la Fe, September 23, 1988)," in *Ius Canonicum* 30 (1990), p. 168; F.J. URRUTIA, *Quandonam habeatur approbatio 'in forma specifica'*, in *Periodica* 80 (1991), pp. 10–13, and "...atque de specifica approbatione Summi Pontificis (Ap. Const. 'Pastor Bonus', art. 18)," in *Revista Española de Canon Law* 47 (1990), pp. 553–55; J.B. D'ONORIO, *Le pape et le Gouvernement de l'Eglise* (Paris 1992), p. 117. There is an excellent analysis of the doctrinal discussion in A. VIANA, "El Reglamento general...," cit., pp. 517ff.

17. Most importantly, to the study of A. VIANA cit. in the previous note.

18. "Art. 109 [currently 125] § 2 of the Reglamento omits an important limit established for these suppositions by art. 18b of the const. *Pastor Bonus*. It discusses the limit to the peculiarity of the cases." (A. VIANA, "El Reglamento general...," cit., p. 526).

19. "In practice, this omission will not engender special problems, because the approval *in forma specifica*, precisely due to its singular character, cannot be granted for general cases (in contrast to delegation)" (A. VIANA, "El Reglamento general...," cit., p. 526).

20. Along with his own outline of the subject, A. BERNÁRDEZ (*Parte General de Canon Law* (Madrid 1990), p. 103) writes that "the applicability of the principle of the plenitude of power, as distinct from the principle of separation of powers, explains that different authorities can display powers of different juridical significance."

strict interpretation of any legislative act on the part of administrative bodies.[21]

Obviously, this strict interpretation is not in line with the opinion of the legislator, who, in contrast, tries to facilitate to the greatest extent the exercise of the vicarious power of the Curia, using it as a common instrument for the exercise of the papal powers, including legislative powers. In fact, this view does not refer to the fact that the Roman dicasteries acquire legislative power by virtue of *Pastor bonus*, but rather that the initiative to modify the law in force is assumed directly by the pope or, alternatively, given by him to the dicasteries, although he reserves for himself the final authority; in other words, the true legislative act.[22] The congregations are seen both as instruments of drafting and of initiative in the legislative decision-making process. However, only the Roman Pontiff can make those decisions that originate from the initiative of the Curia or of the pope. Put another way, it is the Roman Pontiff who has the final authority to give these initiatives the force of law.

21. The established schema for the legislative activity of the Curia by arts. 109 and 110 of the previous RGCR (currently arts 125 and 126) is studied by VIANA in his piece of work, repeatedly cited ("El Reglamento general…," pp. 527–529), which points out very clearly the contrast between the solutions adopted by the Holy See in this respect and the doctrine which in Lombardía expounds regarding the demands of c. 30 (p. 529, note 80).

22. "One can sketch a hierarchy of legislative bodies, but whether executive or judicial, one must always preserve their ties with and dependence on those offices which by their very nature are endowed with the fullness of jurisdictional power" (A. BERNÁRDEZ, *Parte general…*, cit., p. 103).

31 **§ 1. Decreta generalia exsecutoria, quibus nempe pressius determinantur modi in lege applicanda servandi aut legum observantia urgetur, ferre valent, intra fines suae competentiae, qui potestate gaudent exsecutiva.**

§ 2. Ad decretorum promulgationem et vacationem quod attinet, de quibus in § 1, serventur praescripta can. 8.

§ 1. Within the limits of their competence, those who have executive power can issue general executory decrees, that is, decrees which define more precisely the manner of applying a law, or which urge the observance of laws.

§ 2. The provisions of can. 8 are to be observed in regard to the promulgation, and to the interval before the coming into effect, of the decrees mentioned in § 1.

SOURCES: § 1: BENEDICTUS pp. XV, m. P. *Cum iuris canonici,* 15 sep. 1917, II (*AAS* 9 [1917] 484); PAULUS Pp. VI, m. *P. Munus Apostolicum,* 10 iun. 1966 (*AAS* 58 [1966] 465–466)

32 **Decreta generalia exsecutoria eos obligant qui tenentur legibus, quarum eadem decreta modos applicationis determinant aut observantiam urgent.**

General executory decrees which define the manner of application or urge the observance of laws, bind those who are bound by the laws.

SOURCES: —

33 **§ 1. Decreta generalia exsecutoria, etiamsi edantur in directoriis aliusve nominis documentis, non derogant legibus, et eorum praescripta quae legibus sint contraria omni vi carent.**

§ 2. Eadem vim habere desinunt revocatione explicita aut implicita ab auctoritate competenti facta, necnon cessante lege ad cuius exsecutionem data sunt; non autem cessant resoluto iure statuentis nisi contrarium expresse caveatur.

§ 1. General executory decrees, even if published in directories or other such documents, do not derogate from the law, and any of their provisions which are contrary to the law have no force.

§ 2. These decrees cease to have force by explicit or implicit revocation by the competent authority, and by the cessation of the law for whose execution they were issued. They do not cease on the expiry of the authority of the person who issued them, unless the contrary is expressly provided.

SOURCES: —

CROSS REFERENCES: c. 8

COMMENTARY

María José Ciáurriz

These canons, like c. 34 that follows, do not refer to the legislative competencies of Church administration. Rather, they regulate the juridical dispositions of a general character issued by the executive power; these enjoy a force subordinate to that of law. In short, canons 31 to 33 regulate the so-called general executory decrees.[1]

The general executory decrees are created to fulfill two basic purposes: to define more clearly the manner of applying a law and to urge its observance if this is necessary (see c. 31 § 2).[2] "Their purpose indicates the auxiliary or accessory character that they have with respect to a specific law, either in its entirety or in any of its prescriptions."[3] These dispositions oblige the same subjects bound by the laws, "whose manner of application those same decrees determine, or whose observance they urge" (see c. 32).

The "intrinsic dependency" of such decrees in relation to the law is evident.[4] "These norms are subject to the principle of legality and are inferior to the law."[5] Accordingly, they cannot derogate from laws nor do any prescriptions contained in them that are contrary to laws have any validity (see c. 33 § 1). In spite of this restriction, their administrative nature is not, since they apply the relative canons to the laws in certain aspects, an obstacle to the canons regarding laws to be applied to them. Canon 31 § 2

1. Cf. in this regard the general treatment of E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd revised edition (Pamplona 1993), pp. 251–254.
2. Cf. A. BERNÁRDEZ, *Parte General de Derecho Canónico* (Madrid 1990), pp. 110–111.
3. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., p. 251.
4. A. BERNÁRDEZ , *Parte General...*, cit., p. 111.
5. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., p. 251.

considers two such aspects: the promulgation and *vacatio*. Before the laws come into effect, both matters are governed by what has been stated in c. 8: "these decrees are administrative act-norms, because the declaration of ecclesiastical administration, which constitutes the act, 'contemplates, in an abstract way, a plurality of non-determined and non-determinable persons or cases'. They are issued as part of the exercise of the executive power (see c. 31 § 1), and are also subject—independent of what name they are given—to the principle of legality. That is why they cannot derogate laws and, if they are contrary to these laws, they do not have any force (see c. 33 § 1). Therefore, only cc. 7–22 are applicable to them, insofar as they are compatible with their nature. In short, according to c. 31 § 2, they are subject to c. 8, in everything pertaining to the promulgation or *vacatio*."[6]

Although these decrees may be valid initially, according to c. 33 § 2 "they lose their force if revoked explicitly or implicitly by the competent authority." An implicit revocation occurs when norms are promulgated—whether legal or regulatory—that replace the decree or contradict it. Also, they lose their force "by the cessation of the law for whose execution they were issued" (c. 33 § 2).

The fact that the *CIC* makes provision for their revocation or loss of force implies that, so long as such circumstances of derogation do not arise, the decree will continue in force. Hence, the doctrine logically maintains that, in principle, the decrees are perpetual, just as is the law itself.[7] The *CIC* clearly establishes that "they do not cease on the expiry of the authority of the person who issued them, unless the contrary is expressly provided" (c. 33 § 2).[8]

An important question already analyzed by the doctrine[9] asks who can issue these executory decrees and under what conditions? As far as c. 32 is concerned, it seems that the general executory decrees are to be issued by an executive authority with the same purview as the legislator who promulgated the law that the decree intends to develop or enforce. Thus, as Lombardía pointed out, "only the Dicasteries of the Roman Curia would be entitled to issue decrees developing or urging laws of the Roman Pontiff, while the vicars general or episcopal vicars would be concerned with laws of the bishop, etc."[10] However, as this author himself points out, this reading hardly coincides with c. 31 § 1, which establishes that such decrees can be issued by those who have executive power "within the limits of their competence."[11] Therefore, according to this norm, the adminis-

6. P. LOMBARDÍA, *Lecciones de Derecho Canónico* (Madrid 1984), p. 162.
7. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., p. 252.
8. Cf. A. BERNÁRDEZ , *Parte General...*, cit., p. 111.
9. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., pp. 252–253.
10. P. LOMBARDÍA, commentary on cc. 31–33, in *Pamplona Com.*
11. P. LOMBARDÍA, commentary on cc. 31–33, in *Pamplona Com*; cf. also E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., pp. 252–254.

trative authorities can issue executory decrees concerning laws that deal with matters within their executive competence, as well as those which are binding on their subjects. Evidently, it is possible for the law to have a universal reach and for the executory decree to have a more limited scope. In other instances, the scope of both dispositions can coincide.[12]

Labandeira has also made clear that, along with the executory decrees already mentioned and issued in virtue of a general empowerment, there are also those that fall within the competence of bishops' conferences and individual bishops. These are special competencies established in favor of authorities that cumulate legislative and executive power. The remaining question to be addressed is what criteria can be used to differentiate legislative and executive norms. "Although sometimes it is not easy to perceive the distinction, our standard is the following: if the norm is independent of other laws, it is a legislative decree, since its author has legislative power; however, when the norm is accessory and executory of the law, we consider it to be an administrative executory decree, because its author also has executive power."[13] The doctrine mentions cc. 277 § 3, 755 § 2, 1253, 1284 § 3, 1304 § 2, etc.[14] as examples of such suppositions.

In any case, it does not seem as if the general executory decrees or the instructions (dealt with in c. 34) will pose the same problems that the regulated dispositions posed in relation to cc. 29 and 30. In addition to the clarity of cc. 31–33 and 34, we must keep in mind the precision with which this topic is regulated in *Pastor bonus* 156. It is from these normative texts that the administrative nature of these general norms and their subordination to the principle of legality originate.

12. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., p. 252.
13. Ibid.
14. Cf. .ibid., pp. 252–253.

34 **§ 1. Instructiones, quae nempe legum praescripta declarant atque rationes in iisdem exsequendis servandas evolvunt et determinant, ad usum eorum dantur quorum est curare ut leges executioni mandentur, eosque in legum exsecutione obligant; eas legitime edunt, intra fines suae competentiae, qui potestate exsecutiva gaudent.**

§ 2. Instructionum ordinationes legibus non derogant, et si quae cum legum praescriptis componi nequeant, omni vi carent.

§ 3. Vim habere desinunt instructiones non tantum revocatione explicita aut implicita auctoritatis competentis, quae eas edidit, eiusve superioris, sed etiam cessante lege ad quam declarandam vel exsecutioni mandandam datae sunt.

§ 1. Instructions, namely, which set out the provisions of a law and develop the manner in which it is to be put into effect, are given for the benefit of those whose duty it is to execute the law, and they bind them in executing the law. Those who have executive power may, within the limits of their competence, lawfully publish such instructions.

§ 2. The regulations of an instruction do not derogate from the law, and if there are any which cannot be reconciled with the provisions of the law, they have no force.

§ 3. Instructions cease to have force not only by explicit or implicit revocation by the competent authority who published them or by that authority's superior, but also by the cessation of the law which they were designed to set out and execute.

SOURCES: § 1: BENEDICTUS Pp. XV, m. P. *Cum iuris canonici*, 15 sep. 1917, II (*AAS* 9 [1917] 484); SCDS Instr. *Questa Sacra Congregazione*, 20 iun. 1919; SCPF Instr. *Cum a pluribus*, 25 iul. 1920 (*AAS* 12 [1920] 331–333); SCR Instr. *Doceatur*, 25 mar. 1922 (*AAS* 14 [1922] 278)

CROSS REFERENCES: cc. 7–22

COMMENTARY

María José Ciáurriz

Canon 34 closes title III of book I of the *CIC* by regulating the last type of act-norm of ecclesiastical administration: the instructions.

The instructions are general internal provisions of the ecclesiastical organization that are directed to those authorities or officeholders whose responsibility it is to ensure the execution of the laws. "The most remarkable difference between the one form and the other [general executory decrees and instructions] lies in their respective scopes of application, since instructions are identified with norms of internal regulation directed to those 'whose duty it is to execute the law, and they bind them in executing the law' (c. 34 § 1). On the other hand, general executory decrees which define the manner of application or urge the observance of laws, bind those who are bound by the laws (c. 32). This difference explains why provision is made for general executory decrees to be promulgated according to the general prescriptions (c. 31 § 2), while the question of promulgation of instructions is not addressed, which, in our opinion, means that the instructions are to be communicated according to the provisions for administrative acts (cc. 54 and 56)."[1]

Indeed, the intention of instructions is to clarify the content of the laws and to determine the manner and procedure of their execution.[2] Accordingly, instructions cannot derogate from the laws that they purport to clarify and execute. Any element of instruction that is contrary to law is null and void. Moreover, instructions lose their legal force not only through revocation by the authority who issued them or its superior, but also through the cessation of the law for whose execution they were issued. Because of their internal nature, they are not subject to the requisite of publication.[3]

In fact, the intention of c. 34 is to establish a general empowerment to issue instructions in favor of the administrative body within the ecclesiastical organization. This preference does not preclude the fulfillment of this intention to entrust the issuance of instructions to two other sources: a) the promulgation by the legislator of instructions or similar norms intended for the authorities with responsibility for applying the laws,

1. A. BERNÁRDEZ , *Parte General de Canon Law* (Madrid 1990), p. 111.
2. Cf., for a general overview of the topic of the Instructions, E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd revised edition (Pamplona 1993), p. 254.
3. Cf. E. LABANDEIRA, "Normas y actos jurídicos," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), p. 324.

whether in order to clarify the prescriptions of the law or to determine the form of their execution; b) the special empowerment to issue instructions that the law might contain, over and above the general capacity given in c. 34. In this last sense, the doctrine points to the instances foreseen in cc. 1276 § 2 and 473 § 2.[4]

4. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., p. 254; idem, "Normas y actos jurídicos," cit., p. 324.

TITULUS IV
De actibus administrativis singularibus

TITLE IV
Singular Administrative Acts

INTRODUCTION

Jorge Miras

1. *The formal category of singular administrative acts*

This title collects for the first time in canon law the technical category of "singular administrative act." It is a decisive innovation directed toward the distinction of functions demanded by the principles guiding the reform of the Code[1] and constitutes an undeniable advance in the technical construction of canonical administrative law. A technical option of this kind allows the weight of the juridical regulation of the acts that make up this category to be markedly displaced toward their common elements—subjects, power, competence, form, procedure, challenge, etc.—instead of gravitating primarily toward the various possible contents of the various acts, which would simply add characteristics or specific requirements here and there to the norms common to all of them. By avoiding the dispersal and heterogeneity that are unnecessary in the juridical regimen of these acts, this categorization contributes to a clearer and more rigorous regulation of the exercise of ecclesiastical power, which redounds to greater juridical certainty and security and, in short, to the good of the life of the Church and of the faithful.[2]

Chapter I, which is devoted to the "common norms," consecrates the notion of the singular administrative act, which includes two types: singular decrees and rescripts (see commentary on c. 35), which are regulated in consecutive chapters. The juridical nature and regulation of the various types of administrative acts have been consciously adapted to this generic

1. Cf. *Principles*, 7: "potestatis ecclesiasticae clare distinguantur diversae functiones, videlicet legislativa, administrativa et iudicialis, atque apte definiatur a quibusdam organis singulae functiones exerceantur."

2. Cf. ibid.: "Proclamare idcirco oportet in iure canonico principium tutelae iuridicae aequo modo applicari superioribus et subditis, ita ut quaelibet arbitrarietatis suspicio in administratione ecclesiastica penitus evanescat."

concept, which constitutes the common nucleus to which are then added the specific characteristics of each act. This brief introduction will focus on this chapter, since its position and meaning are especially important for the interpretation of the content of chapters II–V.

Since those "common norms" form the framework for the harmonious interpretation of the specific norms on each type of act, it would not be logical, once the legislator has achieved this technical option, to dispense with it and realize a discordant interpretation of the norms, which would echo the old uncertainties and doctrinal confusion that stemmed from the previous law.[3] Such a discordant interpretation would also render inoperable the advantages of a unitary system—still inchoate—of administrative law. On the contrary, in our view, one must begin from the common norms in order to interpret harmoniously in the light of these norms those aspects that may have been left somewhat obscure in the comprehensive juridical regulation (see, for this purpose also, the commentary on c. 35). It is precisely the possibility of constituting a basis for a consistent doctrine, as well as a jurisprudence that is in the process of constructing a certain and efficacious system of administrative law in the Church, that is one of the most encouraging potentialities of this new regulation.

Notwithstanding this overall positive appraisal[4] of the technical option on which we are commenting, it does not forbid us, in making a detailed analysis of the general regulation of administrative acts, to point out some deficient and unsatisfactory aspects.

In particular, we must point out that the content of chapter I is rather meager and incomplete. It could be said that, even if all the norms contained in it are common, it still does not contain all the common norms, at least not all those that could have been included. In addition, it reveals a clear imbalance in composition, and a careful reading reveals some important lacunae. For example, it is out of all proportion that six of the thirteen canons of the chapter concern the execution of administrative acts (cc. 40–45), while there is not a single general norm properly dedicated to the procedure for the issuance of administrative acts (a lacuna which, moreover, is also not satisfactorily filled in the specific norms on decrees and on rescripts, which are very spare in this regard [see commentary on c. 50]).

Attention should also be drawn to the fact that most of the common norms come from the old canons *De rescriptis*. The regulation of rescripts has always been heavily influenced by the gracious nature of the principal contents—dispensations and privileges—and by their character as replies to a *preces* in which the petitioner himself adduces the motivation. Chapter I incorporated those norms on rescripts that seemed adaptable to all

3. One can see an explanation of that intention in the work of revision of the *CIC*/1917. Cf. *Comm.* 3 (1971), pp. 88–90; cf. also *Comm.* 9 (1977), p. 233.

4. Cf., in this regard, Z. GROCHOLEWSKI, "Atti e ricorsi amministrativi," in *Il nuovo codice di diritto canonico. Novità, motivazione e significato* (Rome 1983), pp. 502–522.

administrative acts and has dispensed with those that were not applicable to decrees; however, the resulting lacunae have not been filled with the necessary new common norms (the innovations in this regard have been introduced in the chapter on singular decrees rather than among the common norms).

Nevertheless, the rescript is not the paradigm of the singular administrative act, just as the granting of favors does not reflect the most important function of governance in the Church. Accordingly, certain norms that were adapted from the canons *De rescriptis* are not the most suitable for decrees or for a general discipline of administrative acts, which is thereby regulated in an excessively schematic manner. It has been correctly pointed out that certain "common norms" ought to permit the elaboration of a general theory of administrative acts beginning from those norms, but this is not possible in this case.[5] To outline a general theory of administrative acts, or at least to give a definition based on their principal characteristics, it is necessary to turn to the collection of canons contained in title IV and to one that regulates the hierarchical recourse, specifically c. 1732 § 1.

2. *Definition of singular administrative act*

Labandeira has given a brief definition of an administrative act as a formal category and independent of its specific contents: "a unilateral, singular and extrajudicial juridical act of an executive authority."[6] Let us briefly examine these characteristics.

a) It is a *juridical act*, a notion that excludes purely material acts as well as the management of the ecclesiastical administration. Further, it is a dispositive juridical act, that is, an act of will that is directed precisely to the production of determined juridical effects. It can be said that in canon law, acts that are merely declarative and acts of procedure are excluded from this notion. It includes only those juridical acts that can be directly challenged. Moreover, administrative acts are specifically for the external forum (cf. cc. 37 and 130); those for the internal forum have their own distinctive juridical efficacy and a special regimen concerning their publicity. Furthermore, the Code declares that they may be challenged by the procedures laid down for the other administrative acts (see commentary on c. 1732).

b) It is an *act of an executive authority.* (For a full commentary on this characteristic, which is essential and therefore strictly common to every administrative act, see commentary on c. 35.). The most obvious

5. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 293.
6. E. LABANDEIRA, *Tratado...*, cit., pp. 293–294.

consequence of this characteristic of administrative acts is their submission to the principle of legality, which *also occurs in every case*. That does not mean that there cannot be administrative acts *contra legem* (cf., e.g., cc. 36 § 1, 38, 85–93), or *praeter legem* (cf., e.g., cc. 49, 76–84). They can occur in the cases and with the requirements that the law establishes. They, too, fulfill the principle of legality, which does not have to be understood as if it assigned to administrative acts a function that was merely duplicative or determinative of the dispositions already contained in the general norms. The function proper to executive power is much broader, precisely because its legality establishes it so.

c) That the administrative act is *singular* means that it does not constitute in any case a general, abstract norm that supposes an innovation in the juridical order. On the contrary, every administrative act possesses a specific "efficacy": it affects a precise situation, a determined person or persons, and is not to be extended to other cases apart from those that it directly contemplates (cf. the expressions of cc. 48, 49, 52, 36 § 2, 59).

d) A *unilateral* nature is characteristic of acts of authority; they produce their juridical effects without the need for the concurrence of any will other than that of the competent authority in order to complete the act. An efficacious administrative act produces its effects independent of the opposition or approval of the person concerned. Another question altogether is the lawfulness of the act or the causes of inefficacy or invalidity that may occur in specific cases.

e) *Extrajudiciality* (cf. cc. 1342, 1363, 1718, 1720, and 1732) is also a defining characteristic of administrative acts. For our purposes, it will suffice to say that this characteristic signals that they occur outside the judicial process, through the channels proper to the exercise of executive power. Therefore, there are extrajudicial acts that cannot be classed as administrative acts, but there are no administrative acts that are not extrajudicial. Accordingly, the regimen of challenge proper to administrative acts is applicable solely to extrajudicial acts (c. 1732).

These brief observations should sufficiently illustrate the concept of an administrative act underlying all the norms that comprise title IV.

CAPUT I
Normae communes

CHAPTER I
Common Norms

35 **Actus administrativus singularis, sive est decretum aut praeceptum sive est rescriptum, elici potest, intra fines suae competentiae, ab eo qui potestate exsecutiva gaudet, firmo praescripto can. 76, § 1.**

Within the limits of his or her competence, one who has executive power can issue a singular administrative act, either by decree or precept, or by rescript, without prejudice to can. 76 § 1.

SOURCES: —

CROSS REFERENCES: cc. 49, 59 § 1, 76, 85, 135–144

COMMENTARY

Jorge Miras

1. *The concept of the "common norm"*

Canon 35 heads the first chapter, "Common Norms," of the title that the *CIC* devotes to singular administrative acts. It is, therefore, the first of the common norms that affect the administrative acts. It seems appropriate, then, to begin this commentary by pointing out the importance of the concept of *common norm* because, although not obvious, it continues to have a special relevance to the work of interpretation.

When the legislator establishes common norms along with the norms proper to each of the species that compose a juridical genus, he is intending to establish—with greater or lesser success—essential elements that can be verified in every hypothesis. This means that, in principle, the aspects regulated by the common norms will be applied in most cases. In

brief, the norms proper to the genus: a) constitute the most basic juridical characteristics common to the various species; b) integrate the species within the genus to establish the elements that unite them even though their different elements are an obstacle; and c) provide the model for the harmonious and coherent interpretation of the specific norms applicable in each case, which are to be understood in such a way that they are not contradictory to the general norms, but rather complement them and agree with them. This last statement is logically valid, especially for what refers to the essential characteristics of the genus.

Regarding the matter at hand, chapter I establishes a series of norms that are valid for each singular administrative act, regardless of the kind. Thus we can obtain a certain uniformity in the juridical regime of a whole series of acts proper to ecclesiastical authority, a uniformity that will allow for a coherent treatment of many of their hypotheses, requisites, effects, and consequences, and in this way will also facilitate a desirable normative economy.

2. *Typology of singular administrative acts*

Canon 35 is meant to be applied in a general way, and the legislator expressly proclaims this intention in distinguishing the common concept of the singular administrative act by the expression "either by decree or precept, or by rescript." This refers to an absolute *bipartition*, since every one of the singular administrative acts regulated by the *CIC* takes the form of one of the following two basic categories around which the entire discipline has been constructed: singular decrees and rescripts. As a matter of fact, the singular precept is nothing more than a type of decree (cf. c. 49). The privileges and dispensations—whose specific norms constitute the content of chapters IV and V of this title—are not truly administrative acts, but favors granted through a rescript. In other words, they constitute the proper and peculiar content of an administrative act (cf. cc. 59 § 1; 76 and 85).

Therefore, the introduction of c. 35 requires the following reading: "every singular administrative act, regardless of its species." At the greatest extent of this boundary lies the proper content of the norm, which fixes the power of a general nature required to be the legitimate author of a valid administrative act. In other words, this wording refers to the minimum requisites that the author should fulfill, to which should be added, as necessary, other specific requisites, depending on the type of administrative act at stake. These requirements are in addition to the conditions required by the case itself (e.g., by the matter at hand, the persons concerned, and the circumstances of the situation).

3. *Essential requisite for the author: executive power*

"One who has executive power can issue a singular administrative act." The enunciation of this general principle prompts at least three different and complementary observations:

a) *The administrative act is an act of authority; in other words, a juridical act of an ecclesiastical authority that acts as such, with public power.* Not every act of ecclesiastical authority is an administrative act. For instance, the non-juridical acts or the private acts (in which the holder of an office acts as private person) are not administrative acts. The juridical acts carried out by virtue of a public power that is not executive are also not administrative acts. As we will later see, this requirement is not the only requisite; it is, however, indispensable. We say this because the executive power is the essential element, and without it administrative acts cannot exist.

b) *The administrative act is properly the act of an executive authority.* The *CIC*, which has adopted the distinction of power of governance in legislative, judicial and executive matters (c. 135), favors in c. 35 a clearer, more uniform and more coherent concept of administrative acts by excluding from this concept all the acts that come from the legislative and judicial powers. These acts possess their own set of rules. So the norms of the Code that directly affect the determination of the author of the singular administrative acts are exclusively the ones that refer to executive power (cf. especially, cc. 134 and 136–144). In other words, they are the norms necessary to determine who is, in each case, the "executive authority."

In the life of the Church there are also acts of governance that do not properly originate in ecclesiastical power; this occurs in the case of the institutes of consecrated life, whose superiors do not possess such power (cf. c. 596 § 1). In our opinion, besides the specific norms established by the constitutions, the norms set forth by the *CIC* regarding singular administrative acts can also be applied, in fact, to those acts—*congrua congruis referendo*—as long as one applies the norms on executive power to the power of these superiors, even though it is not executive (cf. c. 596 § 3).

c) *Every administrative act is issued by virtue of executive power, yet not every juridical act of executive power is a singular administrative act.* There are acts proper to executive power that have a normative character since they contain prescriptions of a general character. In other words, they are general norms distinct from, and of a lower status than the laws (cf., for instance, cc. 31–34). If we want to adopt a clear terminology consistent with the Code's prescriptions, it seems profitable—not to mention necessary—to imagine two types of acts of executive power: singular administrative acts (or, simply, administrative acts) and administrative norms (general norms), rather than applying the denomination of *acts* to the general norms, or the denomination of *singular norms* to the administrative acts.

4. *The condition for the exercise of executive power: competence*

Executive power, as we have said, is a necessary condition, but not a sufficient one, for authentically issuing an administrative act. One who has executive power must, in addition, be able to execute it in the case in question. In other words, the person has to be, in each case, not simply an "executive authority," but rather a "competent executive authority" (cf., for the use of that expression, cc. 48 and 59 § 1).

Competence must be determined on a case-by-case basis by examining the criteria established by the law. It is important to consider *simultaneously,* according to the circumstances, the subject and type of act at issue (material competence); the scope (territorial competence); and the persons concerned (cf., e.g., c. 476) in light of the legal criteria regarding the scope of exercise of executive power (cf. c. 136); as well as the possible intervention of hierarchically superior executive authorities (functional competence: cf. c. 139), including by reservation (cf., e.g., c. 479 § 1).

The norms that determine competence can contain general clauses that grant competence (such as the norms that describe the power established in the various ecclesiastical offices [cf., for instance, cc. 381 and 479]), or at least specific abilities for specific cases (cf., e.g., c. 504). In addition to these norms, we also must consider those norms that regulate the possibility of delegation of executive power (cf. cc. 131–133 and 137–142).

5. *A special competence required for rescripts that contain privileges: c. 76 § 1*

The last clause of c. 35 contains an important reminder about which it behooves us to comment on specifically: "*firmo praescripto* c. 76 § 1." The first paragraph of c. 76 states that a privilege can be granted "by the legislator" or "by an executive authority to whom the legislator has given this power." Does this mean that, in the case of the privileges, the canon violates the general principle according to which every administrative act is given by virtue of the executive power? Such an interpretation would not be appropriate since it would not properly take into account the fact that c. 35 has the nature of a *common norm,* and because it would exclude privileges from the concept of administrative act, thereby destroying the unity of the juridical regime that the legislator meant to establish.

In light of this discussion, can the absolute character of c. 35 be reconciled with the prescription of c. 76 § 1? In our opinion, these two norms are complementary, not contradictory. As a matter of fact, c. 35 affirms that every administrative act, *whether decree or rescript,* can be issued by one who has executive power, within the limits of his competence. On the other hand, c. 59, when regulating the rescripts—acts that are vehicles for privileges, among other favors—states that they are given by "a competent

authority." Canon 75 adds that if the rescript contains a privilege or a dispensation, "the provision of the following canons [not *of the previous canons*] are also to be observed."

Among those "provisions of the following canons," the first one is c. 76, which does not void the previous norm since it does not affirm that the privileges are to be given *by virtue of legislative power*—that would be a contradictory and inconsistent statement in the context of the juridical construct of administrative acts—rather, it affirms that the ones *that can give them are the legislators*. In other words, it states that when the rescript contains a privilege, the "competent executive authority" to which c. 59 refers is precisely *the legislator*. The most important offices in the Church (Roman Pontiff, College of Bishops, and bishops) simultaneously possess the three parts of the power of governance (cf. c. 135), so that these most important offices are superior to the lower authorities, which only have one of the properties of the power of governance, either executive or judicial, and have no legislative power, which is reserved solely to the most important offices. Therefore, when we refer to the legislator in this context, we are referring to the *supreme executive authority* in the scope of his competence, who is the only one that has the competence to grant privileges or to delegate such power (the term *legislator* is used in the same sense, though with respect to dispensations in c. 90, which also must be interpreted so that no contradiction occurs with cc. 35, 59 and 85).[1]

We must recognize, then, that we are confronted with a reservation of competence in favor of the supreme executive authority at each level (universal Church or a particular church). In other words, c. 76 § 1 does not establish a new requirement for power, but rather a specific requirement of competence for the exercise of executive power in certain cases. Therefore, the last incidental clause of c. 35 does not contradict, but rather complements, the universal applicability of its most important clause: every administrative act, regardless of its species, is issued by virtue of executive power.

1. Cf., for a detailed treatment of this entire subject, E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 328ff.

36 **§ 1. Actus administrativus intellegendus est secundum propriam verborum significationem et communem loquendi usum; in dubio, qui ad lites referuntur aut ad poenas comminandas infligendasve attinent aut personae iura coarctant aut iura aliis quaesita laedunt aut adversantur legi incommodum privatorum, strictae subsunt interpretationi; ceteri omnes, latae.**

§ 2. Actus administrativus non debet ad alios casus praeter expressos extendi.

§ 1. An administrative act is to be understood according to the proper meaning of the words and the common manner of speaking. In doubt, a strict interpretation is to be given to those administrative acts which concern litigation or threaten or inflict penalties, or restrict the rights of persons, or harm the acquired rights of others, or run counter to a law in favour of private persons; all other administrative acts are to be widely interpreted.

§ 2. Administrative acts must not be extended to cases other than those expressly stated.

SOURCES: § 1: cc. 49, 50; SCHO Resp., 6 dec. 1966
§ 2: c. 49

CROSS REFERENCES: cc. 16 § 3, 17, 18, 19, 38, 57 § 1, 124 § 2, 1319, 1342, 1400 § 2, 1734, 1739

COMMENTARY

Jorge Miras

The first paragraph contains the common rules of interpretation of singular administrative acts. These norms determine the criteria to be used in establishing the precise meaning of an administrative act, which because of its literal content lends itself to various interpretations.

1. *General rule: the administrative act means what it says*

An administrative act expressed in unequivocal terms will not require interpretation. Hence, the legislator, using a criterion analogous to that expressed regarding laws in c. 17, imposes as a general rule what is already stated in c. 49, *De rescriptis*, of the *CIC*/1917: literal understanding of the administrative acts, which is not properly *interpretation*, but merely the

result of reading. Hence also, the legislator limits possible manipulative intentions or obscure distortions of the literal meaning by warning that the words are to be understood in their intended sense and in accordance with the common manner of speaking. Thus, it will not be presumed that the authority is using words hyperbolically or in a metaphorical sense, or that the authority is conferring the most unusual meanings on his expressions. To the contrary, the basic presumption is that the authority really means just what is stated, and therefore the principle that states that his will is to be understood directly from the terms by which he manifests it is elevated to the status of a norm.

This norm, then, implicitly exhorts the public administration to express its will clearly and accurately when it issues administrative acts. Nevertheless, we must emphasize that the reference to the "common manner of speaking" does not mean that common language is to be used in the administrative acts. Indeed, that stipulation does not exclude the use of technical expressions that contain precise meanings in juridical language, or of formulas well-established in the *stylus Curiae*. One has only to think of the stylistic clauses typically used in rescripts that reply to petitions, which have a meaning well-established by usage and custom, although they are all but impenetrable to the uninitiated. Therefore, we must conclude that this canon refers to the common manner of speaking in the context in which those expressions are accustomed to be used; these expressions encompass equally juridical language, if dealing with technical expressions; common parlance, if ordinary language is being used; and even technical language, when terms proper to a scientific field or specialized discipline are being used.

The use of the appropriate expression in each particular case is precisely what allows administrative acts to be understood according to the proper meanings of the words themselves, without the necessity of interpretation.

2. *Interpretation of administrative acts of uncertain meaning*

It is conceivable that doubts will still remain regarding different aspects of an administrative act, because its content is not precisely expressed, because it does not mention some important or characteristic facet of the case it purports to discuss, or because of other reasons. We must remember that the norm of c. 36 does not directly affect cases in which the validity of the act itself is in doubt. In those instances, in the first place, general validity is presumed, as with any juridical act, provided that the act has been put into effect properly with regard to its external elements (c. 124 § 2); in the second place, we are obligated to appeal to the authority that issued it when the validity of the rescript is in doubt (c. 67 § 3).

Canon 36 is concerned with the situation that results when, after reading the literal content of an administrative act that is considered valid, doubts arise regarding its exact sense or its scope. For such cases, the Code includes rules that essentially have been present for centuries in canonical tradition,[1] and establishes two contrasting criteria, depending on the content of the acts that are to be interpreted.

The general rule is that the ambiguous administrative acts, in regard to their literal meaning, are to be broadly interpreted. In other words, their scope should not be thought to be limited by any restriction that has not been expressly included in the act itself, or at least generally provided for by the juridical order. Although c. 36 does not expressly point this out, this broad interpretation will fundamentally affect the administrative acts whose content could be labeled with the classic expression of *favorable*. So, for instance, a *favorable* interpretation is expressly required for privileges, which are to be interpreted literally but always in such a way that the beneficiary does obtain some profit or advantage (c. 77).

On the other hand, strict interpretation is required for a series of administrative acts whose content has traditionally been labeled *odious*. Here is exemplified the true meaning of the old saying *favorabilia amplianda, odiosa restringenda.* This principle, together with the preceding one, had already been accepted by the *CIC*/1917 in regard to rescripts (cf. c. 50 *CIC*/1917). Here, though, the formula is stated in a general way for all administrative acts. Let us consider the following scenarios foreseen by the canon:

a) *Acts that refer to litigation as well as to threat or imposition of penalties.* We can mention as examples of administrative acts related to the threat or imposition of penalties, the penal precepts of c. 1319 (see commentary on c. 49) and the decrees imposing penalties through administrative procedure (c. 1342). And as an example of acts referring to litigation, we can mention the decree that decides about the *supplicatio* or *remonstratio* before hierarchical recourse, or the one that decides about the recourse itself (cf. cc. 1734–1735 and 1739). We could also mention every administrative act related to any of the controversies mentioned in c. 1400 § 2.

b) *Acts that restrict the rights of persons.* Included here are those administrative acts that prevent, suspend, or limit the enjoyment of rights. Examples include acts that make it more difficult to exercise a right, acts that impose new obligations or add to existing ones (cf., for instance, c. 49), and acts that restrict faculties or abilities, etc.

1. Cf. *Reg. Iur.* XV, in VI: "Odia restringi et favores convenit ampliare"; *Reg. Iur.* XXX, in VI: "In obscuris, minimum est sequendum"; *Reg. Iur.* XLIX, in VI: "In poenis benignior interpretatio est facienda."

c) *Acts that harm the acquired rights of others.* These could be, for instance, the administrative acts pertaining to removal from office or appointment of new officeholders (cf. c. 192), dispensation from vows (c. 1196), or assignment of the temporal goods of a juridically extinguished person (cf. c. 326) (regarding the concept of acquired right, see commentary on cc. 4 and 9).

d) *Acts contrary to a law in favor of private persons.* In this category fit neatly the concepts of privilege and dispensation, which by their nature are acts contrary to a law—precisely because the law foresees and permits them, with certain conditions (note that this does not refer to acts contrary to the law, meaning unlawful acts).[2] The specific norms regarding these acts require a strict interpretation (cf. commentary on cc. 77 and 92).

The requirement for a strict interpretation in cases c) and d) is rigorous, since it answers to two principles that are as important as those of respect for the law and for acquired rights.[3] Indeed, in accordance with c. 38, the administrative acts mentioned can only affect acquired rights or prevent the application of a law in a specific case provided that its author, through the use of the so-called "express derogatory clause," expressly states that he intends to secure precisely that result; otherwise, those acts are without effect (regarding the nature of the express derogatory clause, see commentary on c. 38).

3. *Prohibition of the analogical extension of singular administrative acts*

The norm contained in paragraph 2 breaks the analogy that could be imagined at first glance between the first paragraph of this canon and the norms of interpretation of the law (cc. 17–18). It describes precisely the different natures of the two types of acts in expressly prohibiting that the provision of c. 19 regarding *lacunae legis* be applied to administrative acts, even to "favorable" ones. The same norm is specifically reiterated for the singular decrees in c. 52 (see commentary). This refers to a principle that was already present in c. 49, *De rescriptis*, of the *CIC*/1917, which corresponds to the content of the *Regula iuris* LXXIV of the *Liber Sextus*: "Quod alicui gratiose conceditur, trahi non debet ab aliis in exemplum."

The literal tenor of that *regula iuris*, in basing the prohibition of analogous extension exclusively on the gracious character of the favor—undeserved, legally speaking—made it applicable especially to rescripts, which

2. On the juridical nature of privileges and dispensations, in the light of the current law, cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2[nd] ed. (Pamplona 1993), pp. 319ff.

3. On the tradition of respect for acquired rights in the canonical system, cf., e.g., *VI* I, 3, 7 and 10; *VI* III, 7, 8.

are the administrative acts by which graces or favors are granted (cf. c. 59 § 1). However, the desire on the part of the legislator to extend this prohibition to all administrative acts is consistent and logical, not because they refer to acts of grace or favor—a characteristic not shared by most administrative acts—but because they are *singular* acts. As a matter of fact, in issuing an administrative act, the executive authority is not proposing a general norm, but making a decision that takes into account the peculiar conditions of the situation that will be juridically affected (cf., for instance, c. 50), conditions that necessarily cannot be extrapolated to other situations. Since the decision depends on a coincidence of variable factors (so that it might be completely different in other similar circumstances), it is the essential characteristic of singular administrative acts that they do not offer specific and valid solutions beyond the case they purport to consider. While similar previous cases can serve as models or give direction, a new *ad hoc* decision will always be necessary, with no room for interpreting or presuming that the will of an ecclesiastical authority will turn out to be the same as it was in past instances, when different conditions obtained.

In short, we could say that paragraph 2 prohibits an administrative act from being interpreted broadly (cf. § 1) when that which is in doubt —meaning, that which is to be *interpreted*—is precisely the case or the persons to which it refers.

37 **Actus administrativus, qui forum externum respicit, scripto est consignandus; item, si fit in forma commissoria, actus huius exsecutionis.**

An administrative act which concerns the external forum is to be effected in writing; likewise, if it requires an executor, the act of execution is to be in writing.

SOURCES: c. 56; SCCS, Decr. *Ne ob diuturnum*, 3 apr. 1970 (*AAS* 62 [1970] 554–555)

CROSS REFERENCES: cc. 10; 36 § 2; 51; 54; 57; 58 § 2; 59; 62; 74; 124 § 1; 130

COMMENTARY

Jorge Miras

1. *Form of issuance of administrative acts: general norm*

This canon—which extends to all administrative acts a norm that the *CIC*/1917 (c. 56) addressed solely to rescripts—marks the beginning of the regulation of some of the requirements concerning the form of issuance or the *extrinsic form* of the administrative acts, which a majority of the doctrine distinguishes from the *intrinsic form* or procedure of formation of the act.

The first formal requisite that the common norms impose is the *written form*, which is required of administrative authority for the issuance of every act that affects the external forum; in other words, for the acts that constitute the general rule among those that proceed from the power of governance (cf. c. 130). Therefore, only the acts intended to produce effects exclusively in the internal forum are excluded from the general requirement that they be written since their effects are not felt in the external forum (cf. c. 130). However, if they are to have any effect in the external forum—due to the circumstances or due to the very nature of the act in question (for example, in the case of absolution of censures that have been declared)—it seems logical that the written form also be required. Accordingly, favors granted orally (c. 59 § 1) can be used freely in the internal forum, but they must be proven anew on each occasion if they are intended for use in the external forum (c. 74). The *CIC* also considers the possibility that authority can oblige someone by means of an oral precept, but that precept only obliges the recipient for as long as the authority

of the person who issued it continues in effect (c. 58 § 2). It is possible and reasonable to doubt its juridical efficacy in the external forum, as we will later see (see commentary on c. 54 § 2).

2. *The importance of the written form*

The written form intends to guarantee the certainty and security of juridical situations (cf., for example, c. 36 § 2), making possible their documentary proof, which is of great importance, as shown by age-old juridical experience. This is why the *CIC* explicitly requires the written form in the specific regulation of many acts issued by authority, in addition to establishing it in this canon as a common norm for all the administrative acts in the external forum. This requirement is expressed, for example, in c. 156 for the provision of any ecclesiastical office; in c. 267 for the excardination and consecutive incardination of a priest that is transferred from one particular church to another; and in c. 382 for the appointment of a diocesan bishop, etc.

3. *Consequences of the absence of the written form*

The text of this general norm only affirms that the administrative act that is to have effect in the external forum "*scripto est consignandus.*" Clearly, this requirement is binding on administrative authority. But what precise juridical consequences will the infraction of that norm have?

At the outset, we should note that the sanction of invalidity is not imposed generally on administrative acts that are not effected in writing. Indeed, according to c. 10, for a norm to have nullifying force, it must expressly state that an act is null and void; c. 37 does not contain such language.

Therefore, to determine the precise consequences of the omission of the written form, we have to examine the specific regulation of each type of administrative act and also the norms applicable to the very contents of the act in question. As for the regulation of the two basic types of administrative acts, c. 59 § 1 points out that the written form is an essential element of the rescript; therefore an unwritten rescript is, by nature, like a nonexistent rescript (cf. c. 124 § 1). This does not mean that the graces or favors that normally constitute the content of a rescript cannot be granted orally (c. 59 § 2). Nevertheless, one must always remember the consequences of the omission of the written form listed in c. 74, as we have mentioned previously. By contrast, c. 51 reiterates the requirement of the written form for singular decrees, although it does not expressly establish a general sanction of invalidity by reason of its omission. Such a hypothesis, then, is not tenable unless the decree contains a precept, as we have

already seen (on the consequences of the omission of written form, see especially the commentaries to cc. 51, 54, 55, and 58).

As far as the norms applicable to the contents that the diverse forms of administrative act can adopt, we have already pointed out that the Code requires the written form in many cases (cf., for example, cc. 179, 186, 190, 193, 268 § 1, 312 § 2, 973, etc.). We would have to analyze each one of them separately to determine the consequences of the absence of the written form according to the literal content of the norm. For example, c. 474 expressly affirms that those acts of the diocesan curia that are meant to produce juridical effects—among which are the administrative acts—must be signed (and, therefore, they must first be written) by the ordinary from which they originate, "as a requirement for their validity." In this instance, the act is equally invalid if the act is written but lacks the signature of the ordinary, as if it is not written, and so cannot be signed. Thus, the written form indirectly constitutes one of the requisites for the validity of these acts.

4. *Administrative acts effected through an executor*

Canon 37 also requires the written form for the acts of execution of the administrative acts "*in forma commissoria*" (i.e., that require an executor). The efficacy of administrative acts "*in forma commissoria*" is said to be suspended until they are "applied" or "executed" by a person other than their author (the executor) to whom this mission is entrusted (*committitur*). For singular decrees, then, the *CIC* establishes that they come into force as of the date of their execution if they have been given *in forma commissoria*, or from the time of their communication to the person concerned if not so given (c. 54 § 1). As for rescripts, an analogous norm is established, with the difference that if they have not been given *in forma commissoria*, they go into effect from the date of issuance (c. 62). Therefore, every act given *in forma commissoria*, must be issued by the competent authority and must be accompanied by a subsequent act, or group of acts, of execution, which are regulated by the common norms of cc. 40–45, in order to be considered valid. So long as the execution is not yet accomplished, the act is said to be *perfect*—meaning that it is suitable in itself to produce effects—but *ineffective*. Therefore, c. 37 also establishes the imperative to state in writing that the execution has been carried out, so that there is juridical certitude about the moment at which the act in question has come into force.

Will an act whose execution has not yet been made in writing produce effects? There is only a general sanction of nullity when the omitted written form is part of the "substantial form of procedure" (cf. c. 42). In practice, with respect to the validity of an execution not reported in writing, we think it necessary to resolve the matter in accordance with the

same criteria mentioned in each case for the principal act. Notwithstanding this method of resolution, since the executor must give an account of his acts to the authority who entrusted him with the execution, the possibility of omission of the written form in the act of execution will occur less often than it will for the principal administrative acts, in whose formulation the author is, to a certain extent, sovereign, and not likely to give an account of his decisions to a superior authority.

38 **Actus administrativus, etiam si agatur de rescripto *Motu proprio* dato, effectu caret quatenus ius alteri quaesitum laedit aut legi consuetudinive probatae contrarius est, nisi auctoritas competens expresse clausulam derogatoriam addiderit.**

An administrative act, even if there is question of a rescript given *Motu proprio*, has no effect in so far as it harms the acquired right of another, or is contrary to a law or approved custom, unless the competent authority has expressly added a derogatory clause.

SOURCES: c. 46

CROSS REFERENCES: cc. 35, 36 §2, 50, 1732–1739

COMMENTARY

Jorge Miras

1. *Determination of the case affected by the norm*

The elements involved in the case to which this canon refers are the following:

a) *A singular administrative act.* What is not in question here is a law (for conflicts of laws, cf. cc. 20–21), or other general norm inferior to the law (cf. cc. 33 § 1 and 34 § 2). The canon rather refers to a singular act which, in addition, is apt to contradict a law or an approved custom, or to violate an acquired right. First we will examine the problem of the acts contrary to a law or custom. Obviously such a state cannot consist of the failure to fulfill the norms that regulate the essential elements of that act, or the norms that regulate competence and procedure. Then we would simply have an unlawful administrative act—illegal, i.e., contrary to *the law*, not to *a law*—and therefore, null or annullable (cf., in general, c. 124 § 1 and c. 86). The possibility that an administrative act (which is always the act of an executive authority [cf. c. 35]) may contradict a law cannot arise anywhere but in another law. So there is the possibility—in a general way, or through specific provisions for certain acts—that certain acts under certain conditions will lawfully establish juridical situations that, if they were not effected through those acts, would be unlawful. Therefore, the conflict is one between the general regimen established by a law or custom and the regimen created by a singular administrative act for the particular circumstance to which it refers. Such an act does not affect the

law, nor does it modify the juridical system, for it does not have that potential. Rather, it creates a subjective juridical situation, leaving the juridical system intact, which continues to govern all other cases not directly included in the singular act (cf. c. 36 § 2). The acts of executive power that typically possess these characteristics or that have the potential recognized by the law, to lawfully contradict a law in a specific case, are fundamentally the privilege *contra legem* (cf. cc. 76ff) and the dispensation (cc. 85ff), both of which are usually granted through a rescript (c. 59).

b) *A law or an approved custom.* The *CIC*/1917 (cf. c. 46) only required the express derogatory clause in the case of a rescript contrary to a *particular custom* or *to particular norms,* because it presumed that authority knew the universal law adequately and, therefore, could take it into account in making decisions. On the other hand, knowledge of the particular or special norm was not presumed.

Canon 38 extends this norm to all administrative acts instead of only to rescripts, although it is certainly difficult to conceive of a decree that is lawfully contrary to a law or an approved custom, seeing that the acts that possess the necessary legal support for those effects are in fact the rescripts that contain privileges or dispensations. Of course, there are decrees that can legitimately be contrary to acquired rights (see below).

The new Code has also removed at this point a restriction found in the former Code in the sense that the norm of this canon is to be applied to administrative acts whose content is contrary to a norm of law, whether universal or particular, common or special, general or specific, provided that it is merely ecclesiastical. This, in our judgment, is a proper change, since juridical certainty makes it reasonable to require identical guarantees of certainty in order to place an act contrary to a valid norm, regardless of its scope.

c) *An acquired right of a third party.* The prejudicial effect of the administrative act in question toward the acquired right of a third party (for the technical concept of the acquired right, see commentary on cc. 4 and 9) can also be contrary to a law or an approved custom (for example, in a privilege that is indirectly prejudicial to another in the exercise of a faculty), or it can be harmful without being contrary to a law or custom, for instance in an act whose intent is not to establish particular situations contrary to a general norm in force.

It seems clear that the expression "*alteri*" should be interpreted broadly, so that it may also include the proper addressee of the administrative act.[1] Indeed, while that norm in the *CIC*/1917 only referred to rescripts, it was proper and sufficient to interpret the expression *alteri* as referring principally to a subject other than the addressee, because by def-

1. Cf., along these lines, E. Labandeira, "Gli atti giuridici dell'Amministrazione ecclesiastica," in *Ius Ecclesiae* 2 (1990), pp. 225–260 (*ad* c. 38).

inition privileges and dispensations are given in favor of their beneficiaries. Thus, they do not violate acquired rights of the beneficiaries, but rather the rights of others. As soon as it is applied to decrees, however, it is entirely possible to conceive of an administrative act that could be considered prejudicial to the acquired rights of the addressee himself (for example, a decree of removal or transfer).

2. *Competent authority*

Executive authority is competent for these types of acts, in accordance with the norms common to all administrative acts (cf. c. 35). When it is a question of a privilege, the competent executive authority is the legislator or the one authorized by the legislator (c. 76; for the technical meaning of the expression *the legislator*, see commentary on c. 35). If it is a dispensation, the lower executive authorities are also competent (cf. c. 85) within their own area of competence (cf., in general, cc. 87–89). For the decrees that can affect acquired rights, the competent authority will have to take into account c. 50, whose observance further guarantees that the authority's decision has been adequately evaluated.

3. *The clause that expressly derogates*

The principle of respect for the laws and juridical situations upheld by the norms in force and for the other acquired rights, justifies the requirement that the authority expressly manifest its intention to affect them when issuing an administrative act. Put more traditionally, this refers to *bad faith* that cannot—and is not meant to be—presumed. This formal requirement ensures that those effects will not be produced unless the competent authority has provided for and intended them, and has manifestly expressed that intention. The clause "*etiam si agatur de rescripto Motu proprio dato*" has the same meaning, which affirms the traditional doctrine in this regard.[2] It is understood that the liberal intention of an authority who grants a favor of his own volition—with or without a previous request—and in doing so adds the clause *Motu proprio* to the rescript, is enough to correct for the possible error of subreption that a petitioner might have committed (cf. c. 45 *CIC*/1917; c. 63 § 1 *CIC*). However, that clause cannot be interpreted to mean that the liberality extends so far as to place itself in opposition to a contrary norm or to affect an acquired right; such an intention must be expressly stated.

2. Cf. A. van Hove, *De rescriptis* (*Commentarium Lovaniense in CIC*, I/4) (Malines-Rome 1936), pp. 165–167, 170.

When referring to a "derogatory clause," c. 38 reproduces the intention of its precursor in the *CIC*/1917 (c. 46, *De rescriptis*), using a term that is vague or can give rise to confusion. As a matter of fact, this phrase does not properly refer to derogation in the case of the law. Perhaps the use of that phrase would have been justified in the previous *CIC* by the influence of the classic notion of dispensation as *casualis derogatio* of a law. As we have already pointed out, however, a singular administrative act never directly affects the law or the custom, which continues intact and in force; it simply prevents its normal effects from obtaining in a specific case. In the case of the clause contrary to an acquired right, it does directly affect the law at issue, insofar as the effectiveness of the administrative act is incompatible with it. Yet even still, this does not refer to the derogation of the objective law, but to the modification, of greater or lesser extent, of a juridical situation unique to the one (or ones) affected.

The nature and effectiveness of that clause can be appreciated in the content of the example that a commentator of the previous *CIC* provides: "Huiuscemodi *clausula* est v. g. clausula 'non obstante quacumque consuetudine vel statuto vel iure alteri quaesito.'"[3] As can be seen, this example does not have any intention of derogating, properly speaking. Accordingly, such a derogating clause can be used by virtue of executive power, which is the *competent authority* for every administrative act, even though the executive authority who uses it may turn out to be the legislator. Juridical public acts are accomplished by the power that their own nature requires, and in the case under discussion, no derogation occurs—this would necessarily require the legislative power—but rather an effect that the Code considers typical of executive power. The possible circumstance in which the author of a singular administrative act may also enjoy legislative power, in any area, does not in any way reduce the requirements established by the law regarding his singular administrative acts (unless the law expressly provides otherwise [cf. for instance, c. 90 § 1]).

Another question altogether is whether a derogating clause as generic as the one we have quoted by way of example will be sufficient in every case. We think that the requirement of this canon is not to be reduced to a mere formality. A mere formulaic clause that foresees the possibility of a violation of acquired rights and thereby justifies a procedure that was negligent on the part of the author of the act, should not be sufficient to conform to the intention of the legislator. To support this claim and to understand the importance of the requirement for the *express* derogatory clause in these new norms, it will suffice to consider the disposition of c. 50 (see commentary).

3. H. JONE, *Commentarium in Codicem Iuris Canonici*, 2nd ed., I (Paderborn 1950), *ad* c. 46.

4. *The consequence of omitting the expressed derogating clause*

The juridical consequence of omitting the expressed clause, in the context of c. 38 is that the administrative act "*effectu caret*" (the former c. 46 read "*non sustinetur*"). Of course, this does not refer to the extreme sanction of invalidity.[4] Rather, it refers to a greater or lesser degree of ineffectiveness, insofar as the content of the act (*quatenus*), or part of it, is contrary to a law or to a custom or to an acquired right (in this last case, the strict interpretation is imposed by the law [cf. c. 36]). Moreover, this ineffectiveness is not automatic (cf. c. 124 § 2). Rather, it will be declared upon the request of one of the parties (cf. cc. 1732–1739; *PB* 123) so that, if there is no opposition, the administrative act would then enter into effect.

4. Cf. A. VAN HOVE, *De rescriptis*, cit., p. 169–170; E. LABANDEIRA, *Gli atti giuridici...*, cit.

39 **Condiciones in actu administrativo tunc tantum ad validitatem censentur adiectae, cum per particulas *si, nisi, dummodo* exprimuntur.**

Conditions attached to an administrative act are considered to concern validity only when they are expressed by the particles 'if', 'unless', 'provided that'.

SOURCES: c. 39; SCSO Resp., 14 ian. 1960

CROSS REFERENCES: cc. 10, 36, 124 § 1

COMMENTARY

Jorge Miras

1. *The condition in administrative acts*

A condition is one of the possible *eventual contents* of an administrative act. For our present purposes, it can be defined as any uncertain or ignored circumstance upon which the validity of a juridical act is expressly made to depend, to a greater or lesser extent (this canon does not affect the case of implicit conditions).

The Code here refers to conditions *ad validitatem*, but this is an imprecise expression. Strictly speaking, that which is conditioned is not the validity of the administrative act, since that depends on whether it contains its essential elements, was issued by the authority within the limits of his competence, and fulfills the basic requirements established by the law for that type of act (cf. c. 124 § 1). If these requisites are met, the act is valid, but its effects will not be produced if the condition is not met. As Labandeira has written quite cogently, "in reality, the conditions do not affect the validity of the act, but its effectiveness: if the conditioned act were not valid, the condition would not be so either, and then it would not produce effects."[1]

1. E. Labandeira, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 355. For a detailled treatment of the perfection, validity and efficacy of the administrative acts, cf. ibid., pp. 368–405.

2. *The scope of the taxative character of the disposition*

The *CIC*/1917 established that conditions added to rescripts were only considered essential if they were expressed with the particles *si*, *dummodo, vel aliam eiusdem significationis* (c. 39). The current Code has eliminated the possibility of using equivalent formulas, which in the end turned out to be a source of uncertainty liable to dilute the effect intended by the norm. Therefore, the list of particles included in c. 39 is exhaustive. Nevertheless, how effective is the taxative character of the listing practically speaking? We think some questions can be formulated to help clarify the meaning of this norm.

a) *Are we supposed to infer from the mere appearance of any of these particles in the text of an administrative act, that the intention is to introduce a condition for the effectiveness of the act?* Just by reading the text, we can see that this is not exactly what it says. On the other hand, past doctrine on the parallel norm of the *CIC*/1917 held that it was possible to express through any of these formulas a condition already required under another title only to determine the legality of the act. In this case, "the force of such a condition ordinarily was not modified."[2] We do not think that the current version of the canon has substantially changed that possibility.

b) *Would it be possible, in light of this canon, to introduce conditions essential for the effectiveness of the act through an unequivocal formula that would not permit doubt about its scope, but which does not use previously indicated particles?* We believe so. Otherwise we would be led to excessive conclusions, if only because the official text of the *CIC* is in Latin, while administrative acts are generally not written in Latin, and those issued by the Roman Curia are not always written in Latin either (cf. *PB* 16; *RGCR*, 144 § 1). We should remember that not all languages have exact equivalents for the translation of these particles.

Thus we can say—at least hypothetically—*that the presence of these particles does not always indicate the existence of an essential condition, and that not every essential condition need be introduced by one of these particles.*

To better understand this claim, which seems to contradict the letter of the canon, we may note that the original wording, built around the verb *censeo* (as it was in the *CIC*/1917 [cf. c. 39]) seems to indicate that this does not refer here to a norm that establishes a form necessary for certain acts (*essence* [c. 124 § 1]), but rather to a *legal criterion for the interpre-*

2. Commentary on c. 39, in L. MIGUÉLEZ-S. ALONSO-M. CABREROS, *Código de Derecho Canónico and legislación complementaria. Texto latino and castellano con jurisprudencia and comentarios*, 8th ed. (Madrid 1974).

tation of the conditioned administrative acts or, if you will, of the juridical potentiality of the conditions added to the administrative act.

3. *Canon 39 understood as a rule of interpretation*

If we understand this canon as a norm for interpretation, one notices that the legislator here does not prejudge the importance that the author of an act could grant, in practice, to the condition that he imposes, nor the objective importance of a circumstance that might act like a condition. The legislator simply establishes a formal rule by which whoever intends to make conditional the effectiveness of an administrative act, must certify that intention by using an utterly unequivocal formula that guarantees certainty in those juridical situations affected by the conditional act. Otherwise, restrictive interpretation would be applied to that condition (along the lines that it sets forth regarding the laws in c. 10, and regarding acts that weaken the laws in c. 36), and it would then be considered—in terms of the classic doctrine—not essential but accidental.

Yet, if we are considering a norm of interpretation, it will be applicable only to the cases that require it. The general norm does not stipulate that the acts be interpreted, but rather that they be taken literally (see commentary on c. 36). Therefore, if the literal tenor of the act, using other formulae, states in an unequivocal way that its effectiveness is being made conditional, no interpretation need be made. On the other hand, if the literal tenor of the act, despite the use of these particles, makes it unmistakably clear that it is not making the effectiveness of the act conditional, then those conditions will have no real meaning.

We think that this norm will principally affect that act which contains conditions stated in terms that do not make clear *per se* the extension that they are intended to have. In those cases, if the author has used the indicated particles, we must infer that the conditions are essential, without it being necessary to emphasize through other means the extension he intended to give to the condition.

40 **Exsecutor alicuius actus administrativi invalide suo munere fungitur, antequam litteras receperit earumque authenticitatem et integritatem recognoverit, nisi praevia earundem notitia ad ipsum auctoritate eundem actum edentis transmissa fuerit.**

The executor of any administrative act cannot validly carry out this office before receiving the relevant document and establishing its authenticity and integrity, unless prior notice of this document has been conveyed to the executor on the authority of the person who issued the administrative act.

SOURCES: c. 53; SCR Ind., 2 maii 1955

CROSS REFERENCES: cc. 10, 37, 41, 42, 54 § 1, 62, 124 § 2, 129 § 2, 131 § 3, 133–142, 144

COMMENTARY

Jorge Miras

1. *Condition of validity for the executor to carry out his mandate*

The administrative acts that are not supposed to produce their effects immediately and directly (cf. cc. 54 § 1 and 62) must be executed either by the author himself or through another person called the executor. In this last case, the acts are carried out *in forma commissoria* (see commentary on c. 37 § 4). Canons 40–45 adapt the basic norms of the *CIC*/1917 on rescripts given *in forma commissoria* (cc. 52–59 *CIC*/1917), thus constituting a group of common norms for the execution of any administrative act. In addition to these common norms, and since the execution of an administrative act represents a true delegation, the norms on delegated power are applicable to these cases as supplementary norms, especially those contained in cc. 131 § 3, 133–142 and 144.[1]

Canon 40 establishes the first condition of validity (the other conditions are contained in c. 42) for the executor to carry out his mandate: the executor must have received the legitimate mandate or *commissio* in

1. Cf. E. LABANDEIRA, *Los actos jurídicos de la Administración eclesiástica*, in idem, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1993), p. 441.

order to execute the administrative act since the execution constitutes a public juridical activity, which requires that the subject possess power and competence, and to have been informed of it prior to executing the act.

The subject can be unequivocally assured of the reliability of the mandate of execution only when in possession of the order in which he or she is appointed executor and can verify its authenticity and integrity. One can reasonably assume the authenticity of a mandate in written form received through ordinary channels without it being necessary to request confirmation from the one who granted the mandate, unless some circumstance or aspect of the text gives cause for doubt or confusion. Regarding the integrity of the document, the executor must verify that all the pages have arrived, along with any appendices mentioned in the text, and that, outwardly at least, there are no omissions or emendations that have been left out, so that the executor may undertake the execution with knowledge of the scope of execution as it has been entrusted (cf., on the different types of execution, cc. 41–42).

Yet c. 40 also considers the execution to be valid when, even without having received the commissory documents, the executor has been informed by authority of the one granting the mandate (that is, by a true official act of authority, not through merely unofficial information), of such assignment. In this second scenario, the executor is exempt from the obligation to wait for the receipt of the authentic mandate, and consequently, is exempt from verifying its authenticity and integrity. Notwithstanding this freedom, the executor is supposed to be reasonably sure of the legitimacy of the communication and, depending on the type of execution asked for (cf. c. 41), not just of the existence of the assignment, but also of all of the things necessary to carry out the execution (cf. c. 42).

The contrast between the rigor of the first requirement and the flexibility of this second alternative can only be explained by looking to the urgency of the case mentioned in the mandate of execution. We should not suppose that these are two equivalent means of accomplishing a valid execution; the first part of the canon would be useless if that were the case. It is more appropriate to call it a general norm that admits of an exception ("*nisi...*"). In fact, during the revising of the *CIC*/1917, it was proposed in a draft of this norm virtually identical to the final version to require the effective receipt of the mandate in all cases, for reasons of certainty and security: "Exc.mus primus consultor animadvertit melius esse si exsecutor semper agat post litterarum receptionem ut fundamentum et probationem suae legitimae activitatis habeat.

"Rev.mus nonus consultor, tamquam agens precum in Curia plurium dioecesium, tenet omnino necessarium esse ut textus servetur uti est; nam, hodie saepe saepius agitur secundum alteram canonis partem.

"Rev.mus quartus consultor proponit ut adiungatur 'in casu necessitatis.'

"Respondet Rev.mus Secretarius Ad. rem per se patere.

"Placet canon."[2]

2. *The executor*

Execution is a juridical activity carried out with executive power. Moreover, the very nature of the act being executed—above all in the case of acts for the internal forum—can require the framework proper for the exercise of sacred orders. In these cases it is clear that the executor must have already received the relevant order. Otherwise, it is common practice to assign the execution of administrative acts to the ordinary or to clerics who have some power by virtue of their office.

The doctrine has discussed the question of whether a layperson can be an executor in cases which do not require that the subject possess sacred orders. Based on the current prescriptions concerning the possibility of lay participation, in accordance with the law, in the exercise of the power of jurisdiction (cf. cc. 129 § 2 and 228 § 1), there appears to be nothing to prevent laypersons from being entrusted with the execution of specific administrative acts. This opinion is shared by a number of authors.[3]

Here we still need to address a critical question concerning the receipt of the mandate of execution of an administrative act. According to commonly accepted doctrine, the validity of the act of delegation of power does not require the acceptance of the individual delegated. Likewise, we could say that the mandate of execution of an administrative act does not require, for its validity, acceptance on the part of the individual commissioned. Now then, is the designated executor, in every case, obligated to accept the commission and execute it? This is no idle question, because execution of an administrative act may entail some duties (cf. cc. 41–42) that the executor may not be in a position to accept, as is implicitly admitted, for example, by cc. 43–44. In addressing this question, some authors distinguish two cases: if the designated executor is subject to the authority of the one who commissions the execution, his acceptance is not necessary for him to be bound by the assignment; however, if the one who assigns the execution does not have the authority to bind juridically the executor, then the executor is not obligated to discharge the commission,

2. *Comm.* 23 (1991), p. 30.
3. Cf., e.g., E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 376; J.M. PIÑERO CARRIÓN, *La Ley de la Iglesia*, I (Madrid 1985), p. 187.

so long as he has not compromised himself by accepting it.[4] Notwithstanding this technical question of the existence of a strict juridical obligation to accept the duties of execution, it is vital to keep in mind the necessity of fostering a spirit of cooperation in order to work together in all that pertains to the common good of the Church and the rest of the faithful as much as possible.

3. *The consequence of execution without legitimate mandate or official notice*

If we begin with the assumption that the act of execution is merely accessory or complementary to the main administrative act, which is the act being executed (cf. c. 37, which distinguishes the administrative act and its act of execution), then we clearly see that c. 40 conditions precisely the validity of the actions of the executor: "exsecutor invalide munere suo fungitur." Indeed, full understanding of the case requires us to consider three things: on the one hand, the invalidity of the act of execution, established by the norm; on the other, the appearance of validity of an execution carried out correctly to all appearances, though invalid; and finally, the consequences of the invalidity of the act of execution for the efficacy of the principal act, whose validity is not in question.

An act of execution carried out correctly as regards its external elements, but which does not meet the conditions prescribed by this canon, is invalid by express disposition of the law (cf. c. 10). However, it enjoys a presumption of validity (cf. c. 124 § 2) that only ceases when the competent authority declares—at the request of a concerned individual or *ex officio*—that the execution was invalid. Moreover, the main administrative act remains valid; its effectiveness is simply suspended until the moment of its execution (cf. cc. 54 and 62). Thus, a seemingly correct execution, though invalid, can set in motion the effects of the act that has been executed, which begin to appear and do not cease so long as the validity of the act of execution is not in question. The competent authority, in certain cases, might consider it more convenient, in light of the particular situation, to assume as valid the execution that has been performed without having received the mandate, and then rectifying the error *a posteriori*, provided no further reasons counsel or require a declaration of nullity. The competent authority could also simply allow, if this is the case, the situation to be governed by c. 144 § 1, so that the lack of authority in the actions of the executor might be supplied. For his part, the addressee of the improperly executed act—yet valid as far as its content is concerned—

4. Cf. A. BERNÁRDEZ CANTÓN, "La delegación de la potestad eclesiástica," in *Trabajos de la VII Semana de Derecho Canónico* (Salamanca 1960), pp. 232 ff; E. LABANDEIRA, *Tratado*..., cit., pp. 134–135, 377.

could also choose to challenge the act of execution, depending on the circumstances. If we should reach the point of a declaration of nullity, there would be an obligation regarding the effects produced under the guise of the validity of the execution, to repair the damage caused in each case, according to cc. 57 and 128.

In practice, then, the "invalidity" sanctioned by this norm translates into the possibility of challenging the act of execution. As long as the nullity of the act is not declared by decree or judgment, the execution that has been performed with the appearance of validity protects the beginning of the effectiveness of the executed act and opens the possibility of a rich casuistry on the link between acts and juridical effects that eventually follow this defective effectiveness. This is why, excepting cases of urgency and necessity, the norm seeks to guarantee the consistency of the mandate of execution as securely as possible.

41 **Exsecutor actus administrativi cui committitur merum exsecutionis ministerium, exsecutionem huius actus denegare non potest, nisi manifesto appareat eundem actum esse nullum aut alia ex gravi causa sustineri non posse aut condiciones in ipso actu administrativo appositas non esse adimpletas; si tamen actus administrativi exsecutio adiunctorum personae aut loci ratione videatur inopportuna, exsecutor exsecutionem intermittat; quibus in casibus statim certiorem faciat auctoritatem quae actum edidit.**

The executor of an administrative act to whom the task of execution only is entrusted, cannot refuse to execute it, unless it is quite clear that the act itself is null, or that it cannot for some other grave reason be sustained, or that the conditions attached to the administrative act itself have not been fulfilled. If, however, the execution of the administrative act would appear to be inopportune, by reason of the circumstances of person or place, the executor is to desist from the execution, and immediately inform the person who issued the act.

SOURCES: c. 54 § 1

CROSS REFERENCES: cc. 38, 39, 63, 70, 124 § 1, 1739

COMMENTARY

Jorge Miras

1. *Types of execution*

Taking its lead from what has been established by the Code (as well as by the *CIC*/1917), the doctrine distinguishes—by using terminology that is perhaps not very precise—between obligatory or necessary execution and free or voluntary execution,[1] depending on the extent of the powers granted to the executor. Thus, the mandate that consists of simply executing the administrative act in a regulated manner is distinguished *from* the mandate by which a person is entrusted with the execution at his own discretion (cf. c. 70), and therefore, with the faculties to verify the necessary content and then either carry out the execution *or not*, as he deems fit.

1. Cf., for a discussion of these terms, G. MICHIELS, *Normae generales Juris Canonici*, II (Paris-Tournai-Rome 1949), pp. 448–452; E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 379–380.

Canon 41 considers the case of the simple executor; that is, the case of the mandate of regulated execution (the so-called "necessary" or "obligatory" execution) of an act whose content has already been completely determined by its author such that the executor receives no power other than that of mere execution (*"merum exsecutionis ministerium"*), which, in principle, cannot be refused.

Nevertheless, the execution—like any other act of authority—is a human act. Therefore it does not consist of an automatic reply to the received mandate. If it did, it would be pointless to issue an administrative act *in forma commissoria*, since automatic efficacy would be produced more quickly through an act issued in simple form. Accordingly, c. 41 anticipates some reasons that permit the obligatory executor—precisely by virtue of immediacy to the persons and circumstances affected by the administrative act—to refuse the execution or suspend it in order to inform the author of the act, who will, in turn, have to make some provision on his own authority.

Actually, it can be said that this disposition, more than underlining the obligatory nature of the execution, emphasizes that the-obligatory execution is also an intelligent activity of service. The executor must not permit the public good (or the particular good, as the case may be) to be harmed through the execution of an administrative act that is merely passive and mechanical. The norm can then be read with this slant: once the executor has sufficiently verified that the act is valid and that there is no reason that suggests refusal or delay of the execution and informing the author of the act, then it cannot be refused without cause, nor must it be delayed unnecessarily. But if there are well-founded doubts about the propriety of the execution, the executor should not proceed to it rashly.

At the heart of this clause, as of administrative law, appears the characteristic *modus operandi* of public ecclesiastical administration, which must at all costs endeavor to safeguard the public good while harmonizing it as best it can with the particular good. In order for this delicate balance not to suffer unnecessarily, *immediacy*, that is, *proximity*, in the execution of the governmental measures—in this case, of administrative acts—must be a fundamental feature of administration. This immediacy is promoted when sensitivity to a particular case, with the aid of a suitable margin for discretion and the juridical security and certainty conferred by the rules for the exercise of authority, are appropriately articulated at each instance and level of government.

2. *Reasons for refusal of the execution*

The three reasons that *oblige* the executor to refuse the execution of an act have one characteristic in common: they must be "quite clear." In effect, the text—which we have modified for greater clarity by means of sub-

categories—reads thus: "exsecutionem huius actus denegare non potest, nisi manifesto appareat:

a) eundem actum esse nullum

b) aut alia ex gravi causa sustineri non posse

c) aut condiciones in ipso actu administrativo appositas non esse adimpletas."

Let us analyze these three cases in turn:

a) *Manifestly null acts*

The possibility that execution may be refused was conceived above all as a security measure, lest the semblance of validity be granted through the execution of an act that is manifestly null, along with the consequent realization that its effects and actual consequences would have to be repaired afterwards. An act is considered to be manifestly null when, for example, it lacks an essential element, when it has been issued by a subject manifestly incompetent for the matter, when it does not fulfill the essential formalities as established by the law for that specific type of act (cf. c. 124 § 1), when it is based on subreption or obreption (cf. c. 63), etc.

b) *Grave reasons that manifestly prevent the permanence of the act*

The execution of the act can also be refused when the act, though valid—or at least not manifestly invalid—must not be maintained for grave reason. It may be that such a reason was revealed in the interval of time between the issuance of the administrative act and the reception of the mandate of execution. Or again it may be that it already existed when the act was issued, but was unknown to its author. For example, the author of the act may not have taken into account the fact that the act harmed the acquired rights of third parties (see the commentary on c. 38), and so may not have attached the derogatory clause required by c. 38. (As a matter of fact, c. 46 *CIC*/1917, the precursor of the current c. 38, instead of using the expression "*effectu caret*," which is now used by c. 38, said that the acts included among those cases mentioned there "*non sustinentur*," a formula parallel to that of c. 41: "*sustineri non posse*.")

We must now turn to the grave reason—importance comparable to the nullity of the previous case—that the revocation of the act requires to be quite clear ("manifeste constet... alia ex gravi causa sustineri non posse"), so that the executor is obliged to refuse its execution. If the reason should be less grave or less clear, on account of which, in the judgment of the executor, execution of the act seems unsuitable at that time or in those circumstances, then the proper course of action would be, not refusal, but suspension (*vide infra*).

c) *Manifest non-fulfillment of the conditions indicated in the administrative act*

If the administrative act is expressly conditional, the executor must verify that the established conditions are fulfilled before proceeding to the

execution. In this case, since an *odious* norm is concerned, the disposition—which speaks of manifest non-fulfillment and "*conditiones appositae*"—must be interpreted strictly. Therefore, the execution of an administrative act cannot be refused in case of doubt about the fulfillment of a condition, or about the sufficiency of the fulfillment of the conditions; nor can the execution be refused when, in the judgment of the executor, conditions that must be considered implicit in the administrative act are unfulfilled. Such cases would instead constitute grounds for suspending the execution (see below).

The text, however, does not distinguish between the conditions for validity and those for legality. Even when the unfulfilled conditions affect only the legality, the act is not to be executed, since the executor must not knowingly execute an act whose efficacy could have illicit repercussions[2] (on the scope and efficacy of conditions attached to administrative acts, see the commentary on c. 39).

3. *Reasons for suspension of the execution*

In contrast to refusal, suspension is provisional by its very nature. It is not based on a manifest reason that prevents the execution, but rather on a judgment of its expedience by the executor, who transmits an opinion to the author of the act so that the author may reconsider the decision with a better understanding of the reason (on the concept of administrative expedience, see the commentary on c. 1739: 1, b).

Immediacy, which we mentioned previously, now acquires an important role. It could be said that the law trusts the discretion of the executor and remits to the executor's proximate understanding the circumstances and persons affected in the case as a guarantee that the author of the act, who is more removed than the designated executor, will not adopt a decision that could turn out to be unsuitable or inexpedient. Instead of the general reference to the inexpedience currently in force, Canon 54 § 1 *CIC*/1917, the forerunner to the current c. 41, established: "aut qui rescriptum impetravit adeo, iudicio exsecutoris, videatur indignus ut aliorum offensione futura sit gratiae concessio." It is clearly a supposition of expedience, as when, for example, the prudent foresight that discerns when an act will be useless, will result in scandal or division, will turn out to be disproportionately grave for the party concerned or for the faithful, will disappoint legitimate and valid expectations (all judgments made by the executor) of persons or institutions that were unable to be officially represented in the proceedings, or simply ignores precedents that are especially important in that place, etc. It is understood that this discernment

2. Cf. E. LABANDEIRA, *Tratado...*, cit., p. 380.

holds, provided that the author of the act has not already anticipated these secondary effects of his decision and informed the executor accordingly.

4. *Informing the author of the act*

Whether the executor refuses the execution or decides to suspend it (“*quibus in casibus*”), the executor must “*statim*” inform the author of the act, remitting to him the necessary information so that he may provide accordingly.

On this point it must be remembered that the execution we have been discussing is not a favor, even when that which is executed constitutes a favor. The concession has already been granted by the competent authority, and that concession generates an expectation of justice in the person or persons concerned. That is why the norm states: “*exsecutionem denegare non potest.*” This characterization of the act of execution leads us to point out the possibility of reaction from the individual or individuals concerned—to the extent that they understand the intricacies of the execution of the act that concerns them—against the decision to refuse the execution, and even against the mere suspension of it. Depending on the case, that reaction could take the form of a recourse properly so-called, or of a simple denunciation, appeal, instance, or presentation of claims to the competent authority.

42 **Exsecutor actus administrativi procedere debet ad mandati normam; si autem condiciones essentiales in litteris appositas non impleverit ac substantialem procedendi formam non servaverit, irrita est exsecutio.**

The executor of an administrative act must proceed in accordance with the mandate. If, however, the executor has not fulfilled the essential conditions attached to the document, or has not observed the substantial form of procedure, the execution is invalid.

SOURCES: c. 55

CROSS REFERENCES: cc. 10, 40, 45, 124 § 2, 133, 138

COMMENTARY

Jorge Miras

1. *The mandate as the norm for valid execution*

The fundamental norm by which the execution must be governed is the mandate received by the executor. This constitutes a specific application of the general rule established in c. 133 § 1 for acts performed through delegation: "A delegate who exceeds the limits of the mandate, with regard either to things or to persons, performs no act at all."

The content of the mandate of execution will determine the parameters of valid action by the executor. The mandate, however, need not be explicit with regard to each action—preparatory (cf. c. 43), material, and juridical—that the execution of an administrative act may require. In this case, therefore, the rule of c. 138 must be applied, according to which delegation for one case alone must be interpreted strictly, but always with the understanding that "delegation of power to a person is understood to include everything necessary for the exercise of that power." Otherwise, an insufficiently explicit mandate would make execution practically impossible.

Therefore, only those limits that are expressly established as such in the mandate are to be considered essential *limits* for the execution. Canon 42 mentions two possible limitations of this type, which necessarily bind the executor under sanction of nullity of his actions:

a) *The essential conditions established in the mandate*

The text refers to the essential conditions "*in litteris appositis.*" This case must be clearly distinguished from that which refers to the execution of a conditional administrative act. When the conditions expressed

in the act to be executed have not been fulfilled, then we find ourselves facing one of the suppositions of c. 41, by virtue of which the execution is to be refused. By contrast, we are concerned here with conditions imposed for *the validity of the execution*. These conditions are found in the text through which the mandate is entrusted to the executor. It is the executor—not the designee of the act that is being executed—who must fulfill those conditions, regardless of whether the act that is being executed also includes conditions of its own.

Since an invalidating law is concerned, the reference to "essential" conditions must be interpreted strictly. They must be stated so clearly that there is no possibility of doubt about their intention to condition the validity of the execution (see the commentary on c. 39).

b) *Omission of the substantial form of procedure*

The substantial form of procedure is in each case that which the law has established as *necessary for the efficacy* of the act at issue. For specific cases, we could also call *substantial form* that which has been imposed by the author of the act as a requirement for the validity of the execution. Thus, c. 133 § 2, which also applies to this case, makes clear that the delegate does not exceed the limits of the mandate (and therefore does not act invalidly [c. 133 § 1]) if he simply performs the entrusted acts in a manner other than that determined in the mandate, "unless the manner was prescribed for validity by the delegating authority," thereby elevating such form to substantial form of procedure.

2. *The sanction of invalidity*

If the executor does not fulfill the conditions established as essential, or does not observe the substantial form of procedure, the execution is null ("*irrita est exsecutio*"). In addition, if the executor otherwise exceeds the limits of his mandate with regard either to things or to persons, his actions are null ("*nihil agit*" [c. 133 § 1]).

What do these sanctions mean in practice? Since they are certainly express sanctions of nullity (cf. c. 10), they truly nullify the act of execution. However, the paralysis of the efficacy of the executed act is generally not produced automatically. The act of execution, despite being invalid, if it has been performed correctly with respect to its external elements, enjoys a presumption of validity that is destroyed only by proof to the contrary (c. 124 § 2). For this reason, depending upon the degree of external importance of the elements that are unfulfilled in the execution, it is certainly possible that such nullity will have to be made effective through a declaration by the competent authority by means of a decree or a judgment (see commentary on c. 40, 3). Otherwise, if the executor learns in good time that the execution is null, he can repeat it, as is established in c. 45.

43 **Actus administrativi exsecutor potest alium pro suo prudenti arbitrio sibi substituere, nisi substitutio prohibita fuerit, aut electa industria personae, aut substituti persona praefinita; hisce autem in casibus exsecutori licet alteri committere actus praeparatorios.**

The executor of an administrative act may in his prudent judgment substitute another for himself, unless substitution has been forbidden, or he has been deliberately chosen as the only person to be executor, or a specific person has been designated as substitute; however, in these cases the executor may commit the preparatory acts to another.

SOURCES: c. 57

44 **Actus administrativus exsecutioni mandari potest etiam ab exsecutoris successore in officio, nisi fuerit electa industria personae.**

An administrative act can also be executed by the executor's successor in office, unless the first had been chosen deliberately as the only person to be executor.

SOURCES: c. 58

CROSS REFERENCES: cc. 40, 41, 124 § 1, 137, 145 § 1

COMMENTARY

Jorge Miras

1. *Substitution*

These canons present two different scenarios for the transmission of the obligatory burden and the power to execute the administrative act: substitution and succession. The general rule established in c. 43 states that the person who has been designated to execute an administrative act may substitute another personally, in accordance with prudential judgment. Included among the matters left to the "prudent judgment" of the executor is, of course, the verification that the substitute he intends to

designate possesses the conditions necessary to carry out the commission validly, legally, and competently.

A simple comparison will suffice to show that this possibility extends beyond the faculty of sub-delegation (cf. c. 137 §§ 2-3) and might be called the category to which the faculty of designating substitutes belongs. Perhaps the reason lies in the very specificity of the supposition: delegated power in general—which could give rise to a wide range of juridical phenomena—is not what is meant here. Rather, it refers only to the mandate of execution of an administrative act whose fulfillment is not to be delayed without cause (cf. c. 41). Generally, the commission of *execution is entrusted to* persons who hold offices or positions, or who already exercise some other function, and who, therefore, may well encounter difficulties in having to add that commission to their habitual obligations. The possibilities of absence, sickness, or commitments that cannot be postponed, together with lack of time and other eventualities, generally favor fullness in the faculty of substitution, which better ensures the promptness and diligence desirable in the execution, without the need to return to the mandator to inform him of those circumstances.

Nevertheless, c. 43 establishes three cases in which this possibility is excluded:

a) *When substitution is prohibited.* This clause must refer to an express prohibition, either of a general nature as established by the law for the specific act that is to be performed, or as established by the author of the act in the *litterae* in which the executor is designated.

b) *When the executor has been deliberately chosen for his personal characteristics.* Obviously, it must somehow be made known to the executor that he or she has been chosen precisely for certain personal characteristics, since the executor is the one who must refrain from substituting another. Therefore, if an executor is thus designated, the mandate must state this circumstance—which is equivalent to an indirect prohibition of substitution—or at the least, the designated person must be duly informed of it (cf. c. 40). If it is his intention to exclude it (*vide infra*), the author of the act must also clearly state such a circumstance, lest the disposition of c. 44 automatically come into effect (if applicable).

c) *When there already exists a designated substitute.* If the mandate has anticipated the eventuality that the person designated as executor in the first place cannot execute the commission and has established who must be the substitute, then the executor (unless an automatic mechanism of substitution has been provided) can still choose a substitute "according to his prudent judgment"—unlike in the first two cases—but the substitute must be and can be the designated person only.

Canon 43 makes no special provision for a case of substitution for the substitute. Normally, the relationship between the executor and the substitute is much closer and more responsive than that between the executor and the author of the act, such that, if it proves impossible to desig-

nate the originally intended substitute, the executor will be able to designate another in good time. When the faculty to designate a substitute is limited by any of these circumstances, the author of the mandate will have to make provision anew.

In the absence of an express disposition, we are to understand that c. 137 § 4 applies here, such that, unless it was expressly granted in the mandate by the author of the act, the substitute cannot in turn choose a substitute.

2. *Succession*

Canon 44 regulates what could be considered a special case of automatic substitution: succession. This situation generally takes place when the mandate of execution is granted to the holder of an ecclesiastical office (cf. c. 145 § 1), precisely because he holds an office—sometimes the executor is even designated by office and not by name, such as the ordinary, the parish priest, the penitentiary, etc.—without any special regard for their personal characteristics.

In such cases, the person who succeeds the executor in office succeeds him in the execution as well, if the execution has not yet been carried out. In contrast to the cases of substitution properly so-called, in which the executor could himself carry out the execution but entrusts the commission to a substitute, in succession, the obligation and the power of execution automatically pass to the successor, such that the person who left office ceases to be competent to carry out the execution.

When the holder of an office has been designated as executor because of personal characteristics—provided there is evidence of them—this succession does not take place, nor, as we have seen, is it possible to freely designate a substitute.[1] The result is that, if a person leaves office without having carried out the execution, the author of the act will have to make provision anew.

3. *Consequences of the improper designation of a substitute*

What consequences would be incurred by the designation of a substitute in violation of the limitations established in c. 43?

The appointment of a substitute in contravention of an express prohibition would be, in principle, null (cf. c. 42). It would give rise to an equally null execution if it were carried out, since this would amount to an example of an act performed by an incapable person (cf. c. 124 § 1). The

1. Cf., for the doctrine subsequent to the *CIC*/17, G. MICHIELS, *Normae generales Juris Canonici* (Paris-Tournai-Rome 1949), p. 464.

same consequence would be attributed to the designation of a substitute other than the one established as necessary by the mandator.

Regarding the designation of a substitute by an executor who knows that he has been designated precisely for personal characteristics, we would likewise have to conclude that such a designation is null, since the expression of that circumstance is equivalent to an indirect prohibition. On the other hand, if that point has not been stated sufficiently clearly, and was therefore unknown to the executor, the substitution and the performance of the executor would be valid—the same could be said of succession—unless the precise characteristic desired in the executor can be considered essential for the validity of the act of execution and is lacking in the substitute (cf. c. 124 § 1).

Even in those cases in which the faculty of substitution is limited or excluded, the executor can always commit to another the preparatory acts of the execution, properly so-called. Examples include the possible interrogation of witnesses, the verification of the fulfillment of required conditions, the gathering of specific information, certain previous formalities, material acts, etc.

45 **Exsecutori fas est, si quoquo modo in actus administrativi exsecutione erraverit, eundem actum iterum exsecutioni mandare.**

If there has been any error in the execution of an administrative act, the executor may execute it again.

SOURCES: c. 59 § 1

CROSS REFERENCES: cc. 42, 66, 126, 1616

COMMENTARY

Jorge Miras

1. *Types of errors included in the norm*

The group of norms concerning the execution of administrative acts in general comes to an end with this canon. This last norm considers the possibility that the executor has committed errors in the course of executing the act. Since the canon does not make distinctions, this norm should be interpreted broadly because it seeks to simplify administrative activity—it is, in other words, a *favorable* norm. Therefore, the canon embraces all types of errors: material, accidental, and substantial.

A logical interpretation can only be obtained by achieving proportionality between the faculty granted by the norm and the type of error at issue. It is essential to note that the intention here is not to prescribe a procedure for the simple correction of errors, material or otherwise, but rather to grant the executor the faculty *to perform the execution again* ("eundem actum iterum exsecutioni mandari"). This concession is necessary because the executor is not the authority competent over the matter. His competence is limited to the execution and once carried out, it would, in principle, be exhausted; he would then lack any power to act again in the case. Yet if he realized, after the execution, that he had made an error, and this norm did not exist, the executor would have to notify the author—the competent authority—of the act to the effect that an error had been made, so that he may convalidate, as appropriate, the faulty execution, or so that the executor may receive a mandate to execute again. Naturally, the concerned individuals would suffer prolonged uncertainty because of this delay.

2. *Use of the faculty to repeat the execution*

Once this perspective has been adopted, in which cases would it be fitting to use the faculty of repeating the execution? Doubtless, it could be used in case of purely accidental errors, or even solely material errors ("si quoquo modo in exsecutione actus administrativi erraverit"), but such action would be disproportionate—or even inopportune—in many cases.

In practice, there are errors that void the execution or that turn them into uncertain and doubtful executions. Others, however, do not affect the validity of the execution at all because, after its execution, the act undoubtedly begins to produce its effects. Should the execution be repeated in these cases, uncertainty and confusion about the effectiveness of an act whose execution has certainly been valid would be introduced.

When is the act of execution certainly valid? For example, in the case of rescripts, c. 66 establishes a principle according to which accidental errors do not void their validity, "provided that in the judgment of the ordinary there is no doubt about the person or the matter in question."The same criteria should be applied to the act of execution of the rescript. In general, however, c. 126 stipulates for any juridical act—and therefore, for administrative acts as well, in the absence of other specific norms applicable to the case in question—the principle that, in the absence of a disposition to the contrary, only those errors related to the substance of the act or any other condition *sine qua non* affect the validity of the execution (cf., for the execution of administrative acts, c. 42).

It appears that the legislator is inclined to minimize the importance of errors that do not affect validity. Indeed, as we have already seen, it has not even been thought necessary to issue a norm for the simple correction of errors (cf., for judicial judgments, c. 1616). Perhaps we can articulate the following *practical principle of behavior* for the executor: when an act of execution is valid, if the error does not harm anyone and the effectiveness of the executed act will not be subject to possible challenges, it is better to let it take effect without creating unnecessary burdens. It is the responsibility of the competent authority to adopt the act of execution and to repair the possible accidental errors, or to note, as the case may be, that the error goes beyond the accidental and to provide for the consequences. Thus will healthy economy in procedure be promoted, which will redound to the benefit of souls and to efficiency in governance.

In our opinion, the case in which this faculty would have to be used would arise when the executor has made errors that affect the validity, or that at least make the act of execution doubtful or susceptible to challenge. In those cases:

a) If the error is identified before remitting the records of execution to the author of the act, the execution can and *should* be repeated. Otherwise, the mandate received would be *negligently* unfulfilled since the law

grants to the executor the necessary faculty so that the issue does not need to be returned to the author of the act unresolved.

b) If, on the other hand, an error of this nature has gone unnoticed, and the executor remits the records of execution to the superior, we will be before a case of invalidity of the execution (see commentary on c. 42). In this case c. 45 would not be relevant, because the executor believes he has carried out his commission correctly, and the possibility of using this faculty does not arise. If, however, he realizes the error that has been made after the records of execution have been sent, he must communicate this to the superior using the quickest means possible and stating his willingness to repeat the execution, failing any indication to the contrary.

The faculty granted by this canon to the executor is to be understood also to be granted, for the same reasons, to his substitute and successor (cf. cc. 43–44). In other words, it is to be granted to any person who lawfully acts as an *executor* of an administrative act.

46 Actus administrativus non cessat resoluto iure statuentis, nisi aliud iure expresse caveatur.

An administrative act does not cease on the expiry of the authority of the person issuing it, unless the law expressly provides otherwise.

SOURCES: c. 61

CROSS REFERENCES: cc. 58 § 2, 81

COMMENTARY

Jorge Miras

1. *The general rule and its "rationale"*

The issuance of singular administrative acts forms part of the exercise of the function or ministry of governance. It represents a use of public authority by the competent executive authority, who exercises the function of discerning in each particular case the requirements of the public good—the purpose of the Church, in short—and makes the decision most appropriate for that purpose. Such an act, then, is not a private act confined to the personal juridical sphere of its author, as if it were an arbitrary or capricious decision that depended exclusively on the will or disposition of the person issuing it. Rather, it must be remembered that administrative acts, like the administrative function as a whole, are governed by their own rationale, which binds the author even in those cases where the widest discretion is allowed in the exercise of authority. In fact, however broad the scope for discretion may be in each case, administrative acts are always subject to at least two aspects of the exercise of public authority: the purpose of the act and the notion of competence.[1] Therefore, an administrative act, once it has been lawfully issued, becomes *independent* of its author—who cannot revoke it without just cause—and acquires a life of its own in the public-juridical world, creating, altering, or extinguishing a wide variety of juridical situations.

The general principle established by the *CIC* is the permanence of the effects of a lawful administrative act, independent of the continuance of its author in the exercise of the authority by virtue of which it was issued. If he possessed power and competence at the time of issuance and acted

1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 192–197; 357–365.

lawfully, then the requirements for the permanence of the act's effects have been fulfilled. Otherwise, such an important good as the certainty and security of juridical situations would disappear from Church life, to be replaced by a kind of fundamental precariousness of all decisions of governance, which would then be subject to sudden changes of persons.

On the contrary, the general norm is that lawful administrative acts—provided they do not have a fixed date of expiry and their efficacy has not lapsed in one way or another—cease by revocation. In other words, they cease by a new act from the competent authority, motivated by considerations of expedience or good governance. Put another way, they cease as the result of a new evaluation of the requirements of the public good in relation to the circumstances of persons, times, and places, carried out by the competent authority of the moment, who can be that very same author of the previous act or his successor, or his superior (see the commentary on c. 47).

2. *Exceptional cessation of an administrative act upon the cessation of the authority of its author*

Canon 46 recognizes that the law has expressly provided for the possibility that, in certain cases, the administrative act ceases upon the expiry of the authority of the person who issued it. Such is the case with c. 58 § 2, which makes the following disposition regarding singular precepts that have not been imposed by a lawful document: upon the expiry of the authority of their author, the basis for upholding the certainty of the juridical situations dependent on these decrees disappears as well. If we should also apply to these cases the general norm that acts are permanent, we would thereby bestow continuity on juridical situations whose basis is uncertain, which would contradict the very *rationale* of that general norm. Moreover, the author of such decrees can ensure quite easily that they will remain in force after his authority expires; he need only record them in a lawful document (see the commentary on c. 58).

Canon 81—applicable also to dispensations capable of successive applications, along the lines of c. 93—exceptionally allows for the cessation in this case of privileges granted with certain clauses that make them precisely dependent throughout the period of their validity on their author's continued will to grant them.

There can be many motivations for possible exceptions established by the law to the general principle enshrined in c. 46. One must analyze in each case the exact motive for the legislator—or as the case may be, the author of the act, although that is not the case contemplated here—to manifest expressly his will to limit the duration of the efficacy of an administrative act to the time in which its author holds office or possesses the use of authority.

The fact that there are exceptions to this norm does not harm the interest in protecting the stability and certainty of juridical situations since the exception must be stated *expressly*. This requirement ensures that it will be known to all interested parties from the very moment of issuance of an administrative act subject to such a limitation, and it prevents the creation of false expectations or conflicts with acquired rights.

47 Revocatio actus administrativi per alium actum administrativum auctoritatis competentis effectum tantummodo obtinet a momento, quo legitime notificatur personae pro qua datus est.

The revocation of an administrative act by another administrative act of the competent authority takes effect only from the moment at which the person to whom it was issued is lawfully notified.

SOURCES: c. 60 § 1

CROSS REFERENCES: cc. 36 § 1, 54–56, 58, 73, 79, 93

COMMENTARY

Jorge Miras

1. *Revocation*

This canon concludes the common norms that the *CIC* devotes to singular administrative acts, and they do so by establishing that the lawful notification of the person directly affected by the new act ("*pro qua datus est*") determines the moment when the effects of the revocation begin.

Here it is implicitly stated that the usual manner of cessation for those administrative acts that are of indeterminate duration or do not contain a (resolutory) condition or a predetermined provision for passing out of effect, is precisely revocation through a new administrative act originating with the competent authority (cf. c. 58 § 1 for singular decrees, c. 73 for rescripts, c. 79 for privileges, and c. 93 for dispensations).

The revocation is always effected by means of a new administrative act proceeding from the competent authority, which supposes that said authority has completed a reevaluation of the matter, taking into account the personal, local, and temporary circumstances that it includes, and has made a new decision that is considered more opportune, suitable, wise, or beneficial than the previous one.

The competent authority can be the author of the act being revoked (cf. cc. 1734–1735), the hierarchical superior of the author (cf. c. 1739), or the author's successor in office. The revocation can be made *Motu proprio* or at the request of an interested party. The revocation can be explicit (cf. cc. 1734, 1739) or implicit if express mention of the act being revoked is not made, but in either case, it is rendered totally without effect (cf., for example, c. 53 *in fine*). To define adequately the scope of the cases of im-

plicit revocation, we must take into consideration, if that is the case, the rules established in c. 36 (cf. also c. 38).

2. *Lawful notification*

Technically speaking, it is necessary to distinguish revocation, which is an ordinary measure of governance used for reasons of opportuneness, from other cases that are based in the nullity or the voidability of the act, or from the possible amendments or corrections that essentially keep the same act in effect (see commentary on c. 1739). In any case, the moment at which these decisions take effect will always be the date of the notification (the retroactivity of the effectiveness is an entirely different matter).

Locating the effectiveness of the acts precisely in the lawful notification does not mar the notion of administrative acts as unilateral acts of authority, nor does it reveal an alleged similarity to the nature of transactions, which require the acceptance of the recipient. It is simply a norm conducive to juridical certainty, in virtue of which the position of the interested party and the acts that he carries out in the interval between the date of revocation and that of notification are still governed by the act being revoked, so that there is no period of juridical uncertainty.

Surprisingly enough, the common norms for administrative acts do not establish any rule regarding lawful notification. However, c. 47 seems to favor the interpretation that an administrative act by which a previous one is being revoked is indeed a singular decree since the norm under consideration here is absolutely equivalent to the one established in c. 54 § 2 for decrees (although for rescripts, cf. c. 62). Therefore, we can apply the norms of cc. 54–56 to the notification of the decree effecting a revocation (regarding the different cases of notification, see commentary on cc. 54–56).

CAPUT II
De decretis et praeceptis singularibus

CHAPTER II
Singular Decrees and Precepts

48 **Decretum singulare intellegitur actus administrativus a competenti auctoritate exsecutiva editus, quo secundum iuris normas pro casu particulari datur decisio aut fit provisio, quae natura sua petitionem ab aliquo factam non supponunt.**

A singular decree is an administrative act issued by a competent executive authority, whereby in accordance with the norms of law a decision is given or a provision made for a particular case; of its nature this decision or provision does not presuppose that a petition has been made by anyone.

SOURCES: —

CROSS REFERENCES: cc. 35–47, 49–58, 59, 1732–1739

COMMENTARY
Jorge Miras

1. *Singular decrees: a category of administrative acts*

After stating the general norms, the Code turns in succession to the specific norms for the two categories of administrative acts: singular decrees and rescripts.

It could be said that c. 48, to a certain extent, defines the notion of singular decree—although a more precise technical definition must take into account other elements that follow from cc. 48–58; but what it actually achieves, which is perhaps greater than a definition, is the incorporation of a whole series of heterogeneous juridical acts of ecclesiastical

authority in the category of singular decrees. Indeed, the most important function of c. 48 is not *to define* with scientific precision, but rather *to declare* that those singular acts of authority which are not to be given through a rescript (cf. c. 59) must be understood to be decrees and to possess a definite juridical regimen, established by the general norms and canons that follow. The Code has intended to include all administrative acts of ecclesiastical authority in one of these two formal categories for practical reasons: it is simpler and more economical in terms of normative policy and more secure to give norms for one category of acts, in which a great number of cases is included, than to establish special norms for each type of act now included in that category. Establishing such special norms would undoubtedly give rise to annoying redundancies, and worse, lacunae and uncertainties.

2. *Characteristics enumerated by c. 48*

What characteristics are to bring together the various juridical acts understood to be included under the term "singular decrees"? Canon 48 lists some that merit extended treatment.

a) *Administrative act*

In actuality, since it has adopted this technical expression, which has already been used in the general norms, c. 48 could have omitted the rest of the characteristics common to every administrative act, limiting itself to stating those characteristics that are different for rescripts. The affirmation that the administrative act as conceived here is given by competent executive authority in accordance with the norms of the law and for a particular case, does nothing to distinguish singular decrees from the rest of administrative acts; the same could be said of rescripts: "rescriptum intelligitur actus administrativus a competenti auctoritate exsecutiva editus quo secundum iuris normas pro casu particulari .... " It still remains to add the distinct characteristics of singular decrees to this express inclusion of them in the class of singular administrative acts.

Nevertheless, it cannot be said that this provision is entirely superfluous, since it does differentiate singular decrees from other decrees that are, properly speaking, general norms, and are also given by competent executive authority (cf. cc. 31–33). Thus the similarity in terms does not lead to error regarding the nature and juridical regimen of the acts discussed in these canons.

b) *The content of singular decrees*

Content is the first specific difference cited by c. 48 for characterizing singular decrees; through a decree "a decision is given or a provision made for a particular case." Obviously, the terms *provision* and *decision* are inexact and generic, suitable for designating a wide range of specific measures of governance (appointments, decisions, provisions, dismissals,

establishments, extinctions, resolutions, confirmations, revocations, substitutions, etc.). Decisions may concern conflicts (cf., e.g., cc. 51, 1734 § 3, 2°, 1735), but not necessarily. Provisions may concern ecclesiastical offices (cf., e.g., cc. 146–156), but they need not refer only to these cases. In actuality, any specific disposition of governance that concerns a particular case can be included under these headings, except for grants of favors at the request of concerned parties, which constitute the specific content of rescripts. Therefore, it can be said that the administrative act par excellence, in canon law, is the singular decree, since every administrative act that does not have to take the form of a rescript will take the form of a singular decree.[1] The Code itself confirms as much in regulating the recourse against administrative acts under the rubric: "De recursu adversus decreta administrativa" (also, see the commentary on c. 1734).

c) *The initiative in singular decrees*

The text of c. 48 adds a further nuance that in a way defines the breadth of the notions of *decision* and *provision*: it speaks of decisions or provisions that "of their nature do not presuppose that a petition has been made by anyone" ("petitionem ab aliquo factam non supponunt").

That expression is not meant to establish that the issuance of a decree cannot be preceded—or even forced—by the petition of a concerned party; to the contrary, that is precisely what happens in many cases, and accordingly it has been foreseen in c. 57 (see commentary on c. 57). What it does intend to establish is that the decision or provision at issue be adopted in a preeminent manner by the competent authority through the use of his power of governance. He makes use of his own assessment of the facts, circumstances, and needs of those conceivably presented by the potential petitioner, but also of others, and his own appreciation of what is most just, expedient, or appropriate in the case for the public good (cf. c. 50). For the sake of the public good, all administrative decisions and provisions must be created "by their very nature," even if the involvement of authority has been requested through a petition.

This is not what happens in the case of rescripts. In the granting of favors, authority basically acts at the request of the person concerned and considers the motivating reasons expounded by the petitioner in the *preces* (hence the special relevance of defects such as subreption and obreption, and the need for at least one of the alleged motivating reasons to be true [cf. c. 63]), evaluating their sufficiency as well as the absence of obstacles to granting whatever has been requested.

Perhaps the key to interpreting this expression can be found in one of the differences between decrees and rescripts expounded by Labandeira: "The immediate and principal purpose of a decree is normally the

1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 306ff.

public good, which does not prevent it from having a specific designee who can be favored or injured by it (cc. 50 and 52). On the other hand, even when the ultimate purpose of a rescript is the public good, the immediate purpose is to favor one or several specific persons, granting them a grace, a favor, or a privilege (cc. 59, 61, 71, 77, and 80), or even establishing something contrary to a norm, in favor of particular individuals (c. 36)."[2]

3. *Other characteristics*

In addition to those enumerated in c. 48, there are other fundamental characteristics of singular decrees. The collection of canons in this second chapter makes it possible to say that the legislator intended to give unity of juridical regimen to the whole heterogeneous group of singular decisions of governance that cannot be embraced in the granting of favors. He does this by means of the category of the singular decree, which appears to be characterized as a formal act of disposition with a long reach. Here we find ourselves before the form of administrative act par excellence: under this form, authority makes decisions capable of creating, altering, or unilaterally extinguishing the broadest range of juridical situations on its own initiative while being protected by a presumption of legality and capable of immediately impinging on the juridical state of the faithful and the public good.

For this reason, the general norms on singular decrees constitute a juridical regimen characterized by the special presence of guarantees. Along these lines—in addition to the necessary guarantees presupposed by the requirements established by the substantive norms applicable to the situations affected by the possible decrees—the following can be identified as especially important in administrative acts:

a) the method of proceeding, and in particular, the hearing of the interested parties (cf. c. 50);

b) the obligation of the administration to reply to lawful petitions of the faithful and to adopt the expedient decisions or provisions within the ambit of its competence. Here the introduction of the discipline on administrative silence in the Church is extraordinarily important (cf. c. 57 § 1–2);

c) the written form and the explanation of decisions (cf. cc. 51 and 58 § 2);

d) the lawful notification of the individual concerned (cf. cc. 54–56);

e) and the responsibility of the ecclesiastical public administration for damages caused (cf. c. 57 § 2).

2. Cf. ibid., p. 305.

Furthermore, it has been generally established in the Code that one who believes he has been injured by a decree can have recourse to the hierarchical superior of the one who issued the decree. This constitutes a fresh guarantee of the just exercise of the function of governance apparent in administrative acts (see the commentary on cc. 1732–1739; also, cf. cc. 1400 § 2, 1445 § 2 and *PB* 123).

49 **Praeceptum singulare est decretum quo personae aut personis determinatis aliquid faciendum aut omittendum directe et legitime imponitur, praesertim ad legis observantiam urgendam.**

A singular precept is a decree by which an obligation is directly and lawfully imposed on a specific person or persons to do or to omit something, especially in order to urge the observance of a law.

SOURCES: —

CROSS REFERENCES: cc. 35–58, 136, 1319

COMMENTARY

Jorge Miras

1. *A singular decree whose content consists of a direct order*

In this canon the name of *singular precept* is given to a decree characterized by its content, which consists of a direct order given to one or a number of specific persons.

The reason for this specificity—it is the only type of decree to make use of it—is to be found in the very nature of the singular precept, which directly and immediately binds the behavior of the faithful affected by it, imposing an obligation on them. As is evident, the details found in the Code on this type of decree are not meant to establish a set of special norms for precepts, but rather to regulate the precepts by subjecting them to the same guarantees established for the other singular decrees. In fact, the only special norm given for precepts constitutes precisely a reinforcement of these common guarantees: a precept that has not been imposed through a lawful document ceases upon the expiry of the authority of the person who issued it (see commentary on c. 58 § 2).

2. *Characteristics of the singular precept*

The precept is expressly configured as an administrative act in order to overcome former uncertainties caused by the figure of "praecepta singulis data" (the object of c. 24 *CIC*/1917), which led one part of the doctrine prior to the Code to consider it a legislative act. In fact, the Code is only concerned here with precepts given by competent ecclesiastical authority

by virtue of executive power, to the exclusion of other related figures. It says, in effect, that the precept is a decree; that is to say, "actus administrativus a competenti auctoritate exsecutiva editus." Therefore, its characteristics are those common to all administrative acts plus those proper to singular decrees, and including one specific characteristic: it is an administrative act (cf. cc. 35ff) that contains a decision made for a particular case (cf. c. 48). The elements of this additional characteristic can be explicated as follows:

a) That decision consists of imposing on one or several determined persons a mandate (an order to do something) or a prohibition (an order to abstain from something);

b) It refers to an order from the "competent executive authority," and therefore its addressee is someone who is subject by reason of some concept to the authority of the one who issues the precept (cf. cc. 35, 48, and 136);

c) It is to be imposed "lawfully," that is, "secundum iuris normas" (c. 48), such that, in addition to the norms applicable to the situation to which the precept in question refers, the norms on competence, procedure (cf. c. 50), form (cc. 51 and 58 § 2), and notification (cc. 54–56) must also be strictly observed;

d) Once lawfully imposed, it obliges the addressee or addressees everywhere, unless it is expressly established otherwise (c. 52).

3. *Principal types of singular precept*

Leaving aside for now the other distinctions that could be made by considering the content of precepts, the manner by which they instruct, or the ways in which their obliging effectiveness is expressed, we will cite two that seem to us to be of special interest:

a) *The simple precept and the penal precept*

The obligation to do or to omit something, which essentially constitutes the content of a precept, can simply be imposed or it can also contain the threat of a penalty in case of non-fulfillment. In these cases one speaks precisely of a *penal precept* (cf. cc. 1314ff), a figure whose regimen has been simplified in the Code, which assigns to it the characteristics and regimen of the administrative acts. Canon 1319 establishes that, to the extent to which someone can by virtue of his power of governance, impose precepts in the external forum (that is, to the extent to which it is the "competent executive authority" [cf. cc. 48–49]), that authority can also by precept threaten determined penalties, with the exception of perpetual expiatory penalties. Therefore, the executive authority can reinforce the lawful precept with a threat of punishment, which aggravates the consequences of possible non-fulfillment, or which, to put it positively, makes the mandate

more urgent and effective. The legislator is not to adopt this measure, whose extension is expressly limited, unless the matter has been very carefully considered (cf. c. 1319 § 2).

In these cases, in addition to the guarantees proper to every precept, the specific guarantees regarding penalties are also applicable, including the one that assumes the strict interpretation imposed by c. 36 § 1 of those acts that refer to "the threat or imposition of penalties."[1]

b) *Precepts that urge a preexisting legal obligation and precepts that impose obligations* praeter legem

In the course of the revision of the *CIC*/1917, the singular precept appeared for a time to have been conceived as a simple means to urge the observance of preexistent obligations, as stated in c. 48: "Praeceptum singulare intelligitur decretum quo directe alicuius normae canonicae aut decreti observantia urgetur contra invitos."[2] The final wording of the canon, however, admits of other possibilities—in accordance with the concept of administrative act—by establishing that the singular precept is imposed "praesertim ad legis observantiam urgendam."

Urging the observance of the law is not the sole possible function of the precept, but that is its principal function.[3] Executive authority, within the scope of its competence, can also impose certain obligations that have not been established previously by the law, which does not mean that in such cases the precept is legislative in nature, or that it violates the principle of legality. The legality characteristic of acts of executive power—or, in general, of the administrative function—is not to be understood as a limitation of its function to the mere automatic execution of the law (if the law could anticipate every eventuality that might arise at various times and places, and supply a solution *a priori*, the administrative function would not be necessary). Rather, legality consists in the fact that the actions of the executive authority must always be produced "*legitime*," "*secundum iuris norms*." This means that sometimes the authority necessarily must act in a manner predetermined by the law, as in cases of regulated authority, and at other times must decide upon the action most suitable for the purpose that is entrusted to it in the Church. This authority must also be based on the capacity and range of decision granted to it by the law and using the resources—including juridical ones—proper to the authority that has been assigned, while always remaining within the limits determined by the law for its acting (discretionary authority).

1. Cf., on the penal precept, E. LABANDEIRA-J. MIRAS, "El precepto penal en el CIC," in *Ius Ecclesiae* 3 (1991), pp. 671–690.
2. *Comm.* 23 (1991), p. 32.
3. Cf., to the contrary, with certain distinctions, B. GANGOITI, commentary on c. 49, in A. BENLLOCH POVEDA (Dir.), *Código de Derecho Canónico. Edición bilingüe, fuentes y comentarios de todos los cánones*, 3rd ed. (Valencia 1993); P. LOMBARDÍA, commentary on c. 49, in *Pamplona Com.*

Therefore, when an executive authority, through a singular precept, lawfully establishes an obligation *praeter legem*, it is in fact acting *secundum legem,* since the law confers the following possibility of acting upon it: what legality requires is not that the content of the precept be predetermined by the law, but that the precept be given *secundum iuris normas.* Accordingly, it can be said that what distinguishes every singular precept—and therefore any administrative act—is precisely that "in a specific case, it creates, modifies, or extinguishes subjective juridical situations *in a manner subordinated to the law and by virtue of a power attributed by it.*"[4]

4. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 310–314.

50 **Antequam decretum singulare ferat, auctoritas necessarias notitias et probationes exquirat, atque, quantum fieri potest, eos audiat quorum iura laedi possint.**

Before issuing a singular decree, the person in authority is to seek the necessary information and proof and, as far as possible, is to consult those whose rights could be harmed.

SOURCES: —

CROSS REFERENCES: cc. 10, 51, 57, 128, 212, 1526–1586

COMMENTARY

Jorge Miras

1. *The regulation of the procedure of preparation of decrees*

For the commentary on this canon, we will distinguish the procedure of *preparation* of the administrative acts (the process from the moment of initiation until it comes to the decision), from the norms related to the forms of issuance (c. 51), notification (cc. 54–56), and execution (cc. 40–45).

The content of the plans for a law *of administrative procedure* ended up being only partially included in the Code, and that content was scattered in diverse places. The current regulation of the procedure of preparation of the administrative acts in general has proved to be excessively spare; it is composed of a few indications that can be gleaned from the norms common to the administrative acts (cf., especially, c. 38) and some prescriptions for specific cases found dispersed in the *CIC* (cf., for example, cc. 1748–1752, on the removal and transfer of parish priests; c. 1720 on the imposition of penalties by decree) In addition, some other norms exist that establish requisites to be fulfilled by the authority issuing the decree, such as a request for opinions or advice, or for hearing determined persons (cf. c. 127 § 1). Finally, a few norms discuss procedure among the canons on singular decrees and rescripts. It may well be that no complete, unitary, and clear regulation of this procedure exists.

As for the "procedure of preparation" proper to singular decrees, there is only one norm of general extension to be found in the *CIC,* which is the canon under discussion. Apart from the Code, there are some other norms of procedure for the Roman dicasteries in the *RGCR* (cf. arts. 98–138), whose meaning can be completed by the prescriptions contained in

the particular norms for each dicastery. For the rest, nothing prevents the bishop from issuing certain norms of procedure for the diocesan curia that he may deem useful or necessary. If we look only to the Code, however, the regulation of administrative procedure is very limited.

The parsimony and lack of unity of these norms is lamentable because this is a matter of great importance. Surely an appropriate regulation of the procedure for the preparation of administrative acts would be conducive to correct decision-making by the authority. Moreover, as a tangible manifestation of the principle of legality, it guarantees a just and thorough execution of the function of pastoral governance in the Church.[1] For this reason, these norms should not be seen as limitations or obstacles to the dynamism and efficiency of governance in the Church, but rather as a true service, both for the authority who carries out this function (who is primarily interested in exercising it effectively, but always in a lawful, just, and timely manner, without causing any unnecessary damage), and for those governed by it. An effective procedure for preparation would help the authority avoid improvisation and even the "suspicion of an arbitrary exercise of power" in decisions that can affect others.[2]

2. *Content of the procedure outlined in c. 50*

The text of this canon succinctly expounds two objectives/tendencies of the procedure for the preparation of decrees without specifying the means by which it has arrived at them, nor the consequences of the possible non-fulfillment of this prescription on the part of the executive authority. It can be said, then, that this is not, properly speaking, a norm of procedure, in the sense that it directly and expressly links the validity of the acts of the authority to the fulfillment of certain requisites. It is instead a strong appeal to the authority,[3] which largely subordinates the effectiveness of the juridical protection (cf. *Principles*, 7) to the sensitivity and juridical sense of the author of the administrative act. Let us look separately at the two requisites mentioned in the canon:

a) *Seeking the necessary information and proof*

Naturally, this is an activity that precedes the issuance of a decree. The authority must always endeavor to act with complete knowledge of the case, which is acquired in the course of preparing the decree. The knowledge referred to here, however, is merely the "necessary" informa-

1. Cf., e.g., J. HERRANZ, "La giustizia amministrativa nella Chiesa dal Concilio Vaticano II al Codice del 1983," in *La giustizia amministrativa nella Chiesa* (Vatican City 1991), pp. 30–31.
2. Cf. *Principles*, 7.
3. Cf., on the juridically binding character of the Code's different expressions, P. ERDÖ, "Expressiones obligationis et exhortationis in Codice Iuris Canonici," in *Periodica* 76 (1987), pp. 3–27.

tion and proof, not knowledge of the material in general. Instead, this activity involves the careful study of all specific aspects of the matter that could bear on the final decision, since we are concerned with a singular decree given for a particular case. Thus, the information to be obtained can be quite varied, depending on the case, and must permit the author of the decree to have an exact idea of the particular circumstances of the situation that the decision will affect, in order that the decree be, first and foremost, valid and effective (cf., for example, c. 38), but also licit, useful, and timely.

Sometimes, the norms of the Code indicate the points to be investigated (cf., for example, c. 114 § 3), and sometimes they also determine the consequences of the action performed when the acquisition of the necessary information has been overlooked. Thus, if it refers, for example, to the provision for an office, the office must first be shown to be vacant (c. 153 § 1), and information concerning the points mentioned in c. 149 § 1 must be obtained. In addition, the competent authority can deem it necessary to verify other elements as well, even if they do not constitute a legal requisite for the validity of the act.

As for the *proofs* properly so-called, they are necessary when a decree depends on the certain verification that an essential circumstance is true. This situation occurs in the decrees that impose penalties (cf. c. 1720), but also in other instances in which the decree responds to the allegation of determined circumstances by a person concerned (cf., for example, cc. 166 § 2, 179 § 1, 182 § 2, etc.), and especially in the decree that resolves a hierarchical recourse. In the absence of specific norms, cc. 1526ff may be applied to these proofs, at least as guidelines.

In so far as they determine the decision that is made, the information and the evaluated proofs will, of course, constitute the substance of the motivation for the decree (see commentary on c. 51).

b) *Hearing those whose rights could be harmed*

As we have said, this issue was considered in the *Schemata de procedura administrativa* during the work of revising the Code. For example, in 1970 this clause was mentioned in the following terms: "Summarie indicatur in Schemate [in the *Schema* of November 16, 1970, which was composed of 21 canons] qua via procedere debeat Superior in actu administrativo ferendo: necessarias notitias et probationes exquirat; eos audiat, quorum interest, nisi omnino id superfluum sit; petitori vel recurrenti notitias et probationes patefaciat, quae sine publico vel privato detrimento cognosci possint, et rationes forte contrarias ostendat, data ei facultate respondendi, et etiam, dum ne celeritate vel iustitiae noceat, patronum et peritum constituendi."[4]

4. *Comm.* 2 (1970), pp. 192–194.

In this document, language was developed concerning the procedure for hearing persons concerned that permits them to appear *in person* in cases that affect them and to know the reasons for the measure that will be adopted, as well as to have the possibility of making statements and even to receive the advice of an expert or an advocate. By contrast, c. 50 contains only the following laconic statement: "quantum fieri potest, eos audiat quorum iura laedi possint."

According to the discussions in the coetus that worked on the reform of the *CIC*/1917, we may observe that the introduction of the expression *"quorum iura laedi possint,"* in place of "quorum interest" or other similar ones, responds above all to the concern to determine more precisely the subjects who ought to be heard, because of the fear that the possible lack of precision in a concept as broad as "persons concerned" could in practice have a paralyzing effect on the authority.[5] This concern is a sensible one; however, we think that this restriction would have been more justified if the hearing had been formally established as a binding requirement on the authority—indeed, a requirement for the validity of the act. On the other hand, with the introduction of the expression *"quantum fieri potest,"* it would not have supposed an unnecessary hindrance to the activity of governance to require that all "persons concerned" be heard (not just those whose rights could be harmed), since it would be up to the competent authority to judge which persons to hear, depending on the importance of their possible interest in the matter.

Indeed, *"quantum fieri potest"* is also a clause introduced to point out a criterion that permits the authority to consider a proceeding concluded at the opportune time. In other words, this clause permits the authority to proceed to issue the decree after he deems that he has heard—or attempted to hear—those whose input he considers necessary. Thus, if it should prove impossible or remarkably difficult to hear those who might be affected in some cases, it would not be necessary to delay, because of a rigidly binding requirement, a decision whose postponement could harm the public good.

Thus the formulation "quantum fieri potest, eos audiat quorum iura laedi possint" shows that there was no intent to bind ecclesiastical authority strictly, in order to avoid the danger that the necessary activity of governance might be obstructed (or even paralyzed) in some cases. Nevertheless, one must also avoid the opposite danger, of stripping the norm of its meaning by interpreting it as if the general rule were to restrict the hearing to those affected, or to lightly omit the procedure altogether. This norm was unquestionably introduced to establish greater regulation of the exercise of authority as well as to provide more protection for the rights of the faithful.

5. For an example of the discussions on this question, cf. *Comm.* 23 (1991), pp. 32–33.

The particular importance of *dialogue* in the Church—understood in its correct terms—is well-known and essential, and it is no less so in the relationship between the administration and the faithful. Accordingly, we will not dwell on this matter here (instead, see commentary on c. 1733). However, we must not forget that the pleasant obligation of obedience to the lawful pastors is enhanced by a style of exercising authority which, as far as possible, shows itself to be sensitive to the requests and viewpoints that the persons concerned may express (cf. c. 212). This is especially true when they could be adversely affected—even if lawfully so—in their rights or situations.

From this point of view, the sensitivity required by the submission of the activity of the administration to this norm should be realized, in our opinion, through a strict interpretation of "*quantum fieri potest*" and a broad interpretation of "*quorum iura laedi possint.*"

The clause "*quantum fieri potest*" clearly requires a restrictive interpretation (cf. c. 18) because a broad interpretation would imply a reduction of juridical guarantees. A strict interpretation implies that if the authority decides to proceed with the case without having heard all or some of those affected, it must be because it was not in fact physically or morally possible to act otherwise; for example, because there was non-culpable ignorance of the existence or interest of the person in question; because the person refuses to speak with the authority, cannot be located, or engages in deliberately dilatory behavior; because it was prudently and reasonably anticipated that the audience would be prejudicial; because there would entail a delay that was excessively harmful to the good of souls; or because hearing all those affected would be otherwise gravely inopportune, etc.

By contrast, the clause "*quorum iura laedi possint*" must be broadly interpreted, that is, in such a way that the hearing is not limited exclusively to those who possess a strict right that is actually going to be harmed. The authority can—and must—also hear other parties who could possibly be affected. As a practical criterion, it might be said that the hearing should be granted at least to those who are likely to have lawful reasons to appeal the decree in the future; that is, those who could "consider themselves harmed by a decree" (for more on this, see commentary on c. 1737).

3. *Consequences of the omission of the procedure of c. 50*

As we have already pointed out, c. 50 does not expressly establish the nullity of decrees issued in contravention of it, and consequently, omission of this procedure does not directly carry with it the nullity of the act (c. 10). Nevertheless, this does not mean that the undue overlooking of this procedure does not have juridical consequences.

In the first place, omission of the obligation to gather the necessary information could render the decree null and void if it culminates in the case of ignorance or error contemplated in c. 126, or if the consequence is the non-observance, for lack of information, of any requisite that the law establishes for the validity or effectiveness of the act in question (for example, if the decree harmed a subjective right of a third party without the express clause mentioned in c. 38).

Furthermore, even when the act is not null, omission of this procedure makes it subject to recourse, and therefore, makes possible its eventual revocation, annulment, correction, or substitution (cf. cc. 1737 and 1739). In addition, the evaluation of the hierarchical superior and, if applicable, of the administrative tribunal concerning the justification of this omission, may be unlawful.

Finally, to the extent that the issuance of a decree with omission of these requisites may cause damages unlawfully, their repair can be requested of the administration (cf. cc. 128 and 57; *PB* art. 123 § 2).

51 Decretum scripto feratur expressis, saltem summarie, si agatur de decisione, motivis.

A decree is to be issued in writing. When it is a decision, it should express, at least in summary form, the reasons for the decision.

SOURCES: —

CROSS REFERENCES: cc. 37, 48, 54 § 2, 55, 58 § 2

COMMENTARY

Jorge Miras

Canon 51 refers to the *form of issuance* (or simply the *form*) of singular decrees, and it contains two requirements: that it be in writing, and that it give the reasons for the decision.

1. *The written form*

The general norm established by c. 37 for all acts of the external forum is explicitly reiterated here (see commentary on c. 37). The legislator thus establishes with total clarity that the decree is a formal dispositive act of the authority, for which the written form is the only one contemplated. The wording of the canon poses no alternative, and the other norms related to the extrinsic form of the decrees assume that they have been issued in written form. Even when the gravest of reasons prevents the possibility of a written notification, the notification is still to be made by reading the text of the decree to the person concerned (see commentary on c. 55). There are no exceptions to the rule of the written form other than the case of a singular precept, whose effectiveness—if it is imposed orally—is remarkably limited, both in time (cf. c. 58 § 2), and regarding the possibility that it can be enforced in the external forum (cf. c. 54 § 2).

If we bear in mind that most prescriptions of governance, the most important prescriptions for the public good of the Church (which often affect the way of life, as well as the rights and juridical situations of the faithful [cf. c. 50]) are adopted through decrees (cf. c. 48), then there is nothing strange about the legislator requiring the juridical security and certainty that only the written form provides. The written form allows for precise knowledge of the sense, content, motivation, and extension of a

decision. It also provides a certain documentary foundation for the juridical situations that are created, modified, or extinguished, as well for their review, which may take place hierarchically or administratively. The systematic use of oral decisions in governance would carry with it a generalized precariousness in juridical situations, with incalculable negative consequences for the life of the Church. Uncertainty and insecurity are not desirable, either in general or even in a single case; hence, the written form is expressly required for decrees.

What force does this requirement have? We have already pointed out that the legislator has not provided for decrees that are not in written form. Thus, it may be said that this is an essential element of the concept of decree,[1] on which its juridical effectiveness directly depends. Indeed, c. 54 § 2 establishes that the fulfillment of a singular decree that has not been issued through a lawful document cannot be required. This norm directly refers to the act of notification, but we have already seen that it presupposes that the decree has been issued in written form (c. 55 establishes that "without prejudice to cc. 37 and 51"), but that in certain circumstances the decree can be lawfully communicated by reading its text to the person concerned in the presence of a notary or of two witnesses. Therefore, the absence of the written form makes lawful notification impossible and carries with it the ineffectiveness of the decree.

In addition to the general norms of cc. 37 and 51, the Code often reiterates explicitly the requirement of the written form for many specific decrees (cf., for example, cc. 156, 179 § 3, 190 § 3, 193 § 4, 268 § 1, etc.), sometimes also indicating the precise consequences of the omission of that form for the case in question.

2. *The motivation of the decree*

The second formal requirement of c. 50 is that the reasons for the decree must be set forth, at least in summary form, "when it is a decision."

How are we to interpret "decision" in the context of this canon? The requirement to motivate administrative acts is connected to the abandonment of the view that the relationship of subjects to the administration would always take the form of a *supplicatio*, to which the authority would reply freely and as it chose. When it became possible to have recourse against administrative acts, with all that that implies for the notion of exercise of authority in the Church, the doctrine immediately notes that the motivation of those acts is necessary so that they may be challenged effectively.[2] In light of this shift, it can be said that, for purposes of motivation,

1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 307.
2. Cf. E. LABANDEIRA, *Tratado...*, cit., p. 368, note 58.

the notion of decision must be determined by considering the type of incidence of the decree in question and the possibility, insofar as it can be foreseen, that a person concerned may challenge it. This consideration will occur provided that the decree assumes "a resolution between contrary possibilities, in which some acquired right, or at least alleged right, is implied."[3] Thus, a decree that resolves a hierarchical recourse, settles another type of conflict, or imposes a penalty will have to be motivated,[4] just as will a decree that denies a requested provision (for example, when the competent authority decides not to appoint one who is presented for an office, or not to confirm an election [cf. cc. 163 and 179]) or rejects a lawful request (cf. c. 57). For all of these cases there is a decision by the authority that could contradict rights, expectations, or some other type of lawful claims, and it is logical to think that the persons concerned need to know the motivation in order to know what to expect.

The only case in which it is not necessary to motivate the decree—if this canon is read in light of c. 48—is when it contains a *provision*. In this case, the provisions—of offices or of something else—must be understood as actions in which the authority, protecting on its own initiative that bit of the common good that has been entrusted to it, applies the methods (personal, material, economic, etc.) that the authority believes to be most suitable to meeting the observed needs. The authority then abides by the criteria that the law, if applicable, points out to it, as well as by other norms of prudence, efficacy, opportuneness, suitability, good governance, etc. that it deems appropriate to take into consideration. Nevertheless, these cases do not involve, at least in principle, conflicts between the measure adopted and specific rights or interests. If there were such conflicts, the decrees would then be decisions rather than provisions.

The motivation[5] consists of an exposition of the reasons for the act, which embraces the basis in law, the facts of the case, and the reasons that led to the adoption of that particular decision rather than a different one. This canon requires the motivation to be expressed "at least in summary form." Perhaps it is fitting here to emphasize that this expression cannot be interpreted as if to mean *vaguely*, *abstractly*, or *generally*; a genuine motivation is required, one that sufficiently explains which reasons the authority has accepted and which he has not considered relevant for the decision. This motivation does not require an exhaustive explanation of the reasoning; it is sufficient to express it in summary form.

3. Idem, p. 368.
4. Cf. *Principles*, 7: "Requiritur... ut in processu sive iudiciali sive administrativo, recurrenti vel reo manifestentur omnes rationes quae contra ipsum invocantur."
5. For an assessment of this question in the doctrine and jurisprudence prior to the Code, cf. G. LOBINA, "La motivazione dei decreti amministrativi, dottrina e giurisprudenza," in *Monitor Ecclesiasticus* 72 (1983), pp. 279–294.

Since this norm is an absolute requisite of the canon for all decrees that contain decisions, the motivation (more or less elaborate depending on the case) cannot be omitted. The non-motivation of these decrees does not directly cause their nullity, pursuant to c. 10 (no express sanction of nullity is established as in the case of unmotivated judgments [cf. cc. 1611, 3° and 1620, 2°]), but it certainly does make them subject to hierarchical recourse (cc. 1732ff) and subsequently to contentious-administrative recourse (cf. *PB* art. 123 § 1).

52 Decretum singulare vim habet tantum quoad res de quibus decernit et pro personis quibus datum est; eas vero ubique obligat, nisi aliud constet.

A singular decree has effect in respect only of those matters it determines and of those persons to whom it was issued; it obliges such persons everywhere, unless it is established otherwise.

SOURCES: c. 17 § 3

CROSS REFERENCES: cc. 13 § 1, 35, 36 § 2, 48, 49, 51, 136

COMMENTARY

Jorge Miras

1. *The juridical "singularity" of decrees*

Canon 36 § 2 establishes, for all administrative acts, the principle that their effectiveness is not to be extended outside the cases that it expressly contemplates (see commentary on c. 36 § 3 for the basis of this principle).

While in general the analogous extension of singular administrative acts is prohibited by this prescription, c. 52 positively affirms that the singular decree is juridically effective ("*vim habet*") only in respect of those matters that it determines and those persons to whom it is issued. Therefore, it can be said that c. 52 in its first clause determines the positive scope of the characteristic of "singularity," which is proper to these decrees, in terms of juridical effectiveness.

The content of c. 36 § 2, a norm of interpretation, is designed to serve as a complement to this taxative limitation of the scope of the objective effectiveness of the singular decrees. Indeed, the strengthening of juridical certainty and security guaranteed by c. 52 necessarily demands respect for the requirement of the written form (see commentary on c. 51). It also assumes that the authority is careful to ensure the precision and clarity of the text of its decrees. Otherwise c. 36 and, as a complementary guarantee, the aforementioned prescription of its paragraph 2, would enter into play, and a singular decree would not be capable of juridically affecting persons or situations that only as a result of interpretation or some other doubtful means could be considered embraced by it.

2. *Personal effectiveness of singular decrees, as a general rule*

The second rule established by this canon, though one that in this case permits of exceptions, is the effectiveness *in principio personae* of singular decrees. Since by these decrees a decision is taken or a provision is made for a particular case (c. 48), the logical rule governing the scope of their effectiveness is personhood if there are persons directly affected by the decree (this is always the case with singular precepts [c. 49] and unlike the case of particular laws [cf. c. 13 § 1]).

This norm is, then, perfectly consistent with the nature of the acts whose effectiveness it regulates; if the decree creates, modifies, or extinguishes a subjective juridical situation, logically its effects should pertain to the person, unless it is established otherwise by reason of the nature of the matter (for example, in the case of a prohibition imposed on a person in relation to a determined place) or by an express prescription. It is also completely consistent with the scope of exercise of the executive power prescribed in c. 136; this power has the administrative acts as one of its proper means of manifestation. The reference to c. 136 serves, incidentally, to make explicit something that is implicit in c. 52, that personal effectiveness of the decrees presupposes that the persons affected are "subjects" of the authority that issues them. This presupposition constitutes one of the criteria that permits the determination of whether the authority is acting within the limits of its competence (cf. cc. 35 and 48).

53 Si decreta inter se sint contraria, peculiare, in iis quae peculariter exprimuntur, praevalet generali; si aeque sint peculiaria aut generalia, posterius tempore obrogat priori, quatenus ei contrarium est.

If decrees are contrary one to another, where specific matters are expressed, the specific prevails over the general; if both are equally specific or equally general, the one later in time abrogates the earlier in so far as it is contrary to it.

SOURCES: c. 48 §§ 1 et 2

CROSS REFERENCES: cc. 36 § 2, 38, 48, 52, 67 § 2

COMMENTARY

Jorge Miras

1. *Conflict between singular decrees*

Canon 53 contains the norms that are to be applied in resolving conflicts between decrees. It is proper to speak of *conflicts* because, according to cc. 36 §§ 2 and 52, a singular decree affects only those matters that it treats and those persons to whom it is directed. Thus, the objective presupposition for the application of c. 53 is the simultaneous existence of two or more singular decrees, equally lawful, that affect in whole or in part the same "particular case" (c. 48), the same persons, or the same cases and persons, and that are contrary one to another such that it is impossible to abide by them all simultaneously. In this situation, it is then necessary to determine which one is applicable and which of those in conflict are left without effect, and to what extent they are without effect.

Accordingly, c. 53 establishes two criteria that are to be applied in succession: the degree of "generality" of the dispositions contained in the decree and the temporal succession. Let us examine these two issues in more detail.

2. *The degree of "generality" of the decrees*

The first criterion establishes the prevalence of the more specific decree over the more general one, where specific matters are expressed. The immediate question then becomes: how can a singular decree, given for a "particular case," be said to be "general"?

Obviously, the generality mentioned here does not imply confusion between a singular administrative act and a general norm. Besides, conflicts between singular acts and general norms constitute a different supposition than the one we are now considering (cf. c. 38).

When we speak of greater or lesser generality, we always mean greater or lesser generality within the singular nature characteristic of these decrees. We are always talking about a provision or decision given for a particular case. A singular decree can affect persons and matters alike, as well as juridical situations in general, more or less directly or specifically ("peculiarly"). It must be borne in mind that the specificity or generality does not derive directly from the *decree*, but rather from the disposition(s) of the decree that affect(s) a specific case or a specific person or persons. For example, a decree can be more general (broader in content) in the sense that it treats of three parochial offices, while another decree affects only one of them (it is less general or more limited). What is supposed to be compared is not such "generality" as just described, but rather the more or less specific manner of disposition concerning the office affected by the two decrees: the specificity of the disposition contained in the decree regarding the particular case or the affected persons. Hence, c. 53 affirms the prevalence of the more specific decree precisely "where specific matters are expressed."

The greater specificity of a decree indicates that the competent authority is that much more concerned about affecting a certain situation in a specific way. Accordingly, a changed intention is not presumed unless it is revealed by the authority in a manner that is at least equally direct and specific. Thus, a decree that imposes an obligation on certain priests with respect to the Sundays in a given liturgical season will yield, with respect to one of those Sundays, to a contrary decree that directly affects that one Sunday, or that refers to only one of those Sundays. Furthermore, if the more general decree is later in time and does not mention the earlier one, then the earlier one continues in force and governs the affected priest or specified Sunday.

It can also be said, in our opinion, that c. 38 requires the specificity to be stated expressly as a condition for the efficacy of decrees that harm the acquired rights of third parties (see commentary on c. 38).

3. *The temporal succession of decrees that are equally specific or general*

It can happen that the degree of generality or specificity of two decrees—as we have defined these characteristics—is the same; that is, that they affect, in whole or in part, a situation, a matter, or a person(s), in an equally direct or indirect manner. Therefore, c. 53 stipulates that the later

decree prevails over the earlier one "in so far as it is contrary to it," leaving intact those dispositions of the earlier decree that are not contrary to it.

It would perhaps be illustrative to note that the norm established for the succession of rescripts makes use of a presupposition that is exactly opposite to the one established for decrees (whether the result of its application is very different in practice is another question). The general rule established in c. 67 § 2 is the prevalence of the earlier rescript over the later one, unless the latter expressly states the opposite, or unless the earlier rescript has fallen into disuse by reason of the deceit or negligence of the beneficiary. The reason is obvious: rescripts, by their very nature, grant favors, and therefore mark the beginning of the enjoyment of a favorable situation whose cessation is not presumed unless the authority expressly indicates that such is his intention.

The same is true of favorable situations, specifically of acquired rights, with respect to decrees. In fact, it is the same juridical reasoning that supports the requirement of an express clause of derogation (c. 38) for decrees that harm the acquired rights of third parties; in case of conflict, the automatic temporal succession established in c. 53 does not come into play since the decree "is without effect insofar as it" harms an acquired right of a third party without expressly manifesting an intention to derogate from it. In such cases, the expression "insofar as it is contrary to it," drawn from c. 53, must be interpreted as "insofar as it expressly derogates from it," because a disposition that was implicitly derogative would not suffice.

Nevertheless, in the remaining cases, the rule is exactly opposite to that established for rescripts: a later decree derogates from an earlier one where it contradicts the earlier one. Since decrees are not always concessive—as is the case with rescripts—but instead give decisions or make provisions undertaken on the authority's own initiative, a later decree presupposes a new evaluation of circumstances on the part of the competent authority, as well as the adoption of a new measure of governance devised precisely for the current circumstances of time, place, matter, and person(s). Therefore, the logical rule is that such a disposition, insofar as it is contrary to the earlier one, derogates from it.

MIRAS

54 **§ 1. Decretum singulare, cuius applicatio committitur exsecutori, effectum habet a momento exsecutionis; secus a momento quo personae auctoritate ipsius decernentis intimatur.**

§ 2. Decretum singulare, ut urgeri possit, legitimo documento ad normam iuris intimandum est.

§ 1. A singular decree whose application is entrusted to an executor, has effect from the moment of execution; otherwise, from the moment when it is made known to the person on the authority of the one who issued it.

§ 2. For a singular decree to be enforceable, it must be made known by a lawful document in accordance with the law.

SOURCES: § 2: c. 24

CROSS REFERENCES: cc. 37, 40–45, 51, 55–56, 58 § 2, 62

COMMENTARY

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1. *Initial moment of efficacy of decrees*

Canon 54 § 1 stipulates the first moment of efficacy of decrees, distinguishing two possibilities, depending on whether the decree requires execution or not:

a) *Lawful notification*

The rule for decrees whose application is not entrusted to an executor is that they enter into effect from the moment they are implied or made known to the person concerned, on the authority of the one who issued them (for the form of notification of decrees, see the commentary on cc. 55–56).

Notification is the key element for the efficacy of decrees, as is made clear in other places in the Code: for example, in c. 47 for the revocation of administrative acts, in c. 190 § 3 for decrees of removal from offices, and in c. 193 § 4 for those of transfer, etc.

Comparison of this norm with that which defines the beginning of efficacy of rescripts reveals a clear difference. According to c. 62, "a rescript in which there is no executor, has effect from the moment the document was issued ('a momento quo datae sunt litterae')," not from the moment it is received by the person concerned.

The reason for this difference must be sought in the nature of the content characteristic of these administrative acts. The rescript is the vehicle that implements the concession of favors; thus, its content is favorable to the person concerned. Since the concession does not depend on its acceptance by the designee but rather on the authority who issued the rescript, nothing prevents the efficacy from commencing at the moment the act of authority is completed. Nonetheless, for certain purposes, the date that must be taken into account is that of notification (cf., e.g., for purposes of possible recourses, cc. 1734 § 2, 1735).

By contrast, a decree may imply—in addition to the creation of favorable juridical situations—the emergence of burdens, duties, or obligations for the designee or for third parties; thus, it makes sense for it not to take effect until the individuals concerned receive official notification. Moreover, the date of notification acts as a precise *terminus post quem* for the changes that arise in a wide variety of subjective juridical situations, a very important matter in determining the juridical regimen of pending situations.

It is worthwhile to emphasize that this norm specifically affects the *efficacy* of decrees. As with rescripts, the decision of the authority is complete at the time the decree is issued, but for the reasons discussed above, its efficacy is made dependent on the lawful notification of the person concerned, as is established in paragraph 2.

b) *The execution*

In the case of a decree given *in forma commissoria* (see the commentary on c. 37, 4), its effects are not produced until the execution is correctly carried out in accordance with cc. 40–45 (see the corresponding commentaries). In this case, the norm is in fact the same as that established for rescripts given *in forma commissoria* (cf. c. 62). The date that the decree begins to be efficacious will be, therefore, the date on which the process of execution concludes, which must be recorded in writing for purposes of juridical certainty (cf. c. 37).

2. *Form of notification*

a) *The general rule: written form*

Canon 54 § 2 contains the first of the norms that the Code devotes to the notification (cf. cc. 55–56 as well). It incorporates the provisions of c. 24 *CIC*/1917 for precepts, extending their application to all singular decrees.

As a general rule, notification must take the written form: "legitimo documento ad normam iuris intimandum est." This clause reinforces the requirement of the written form for decrees (see the commentary on c. 51) inasmuch as notification through a lawful document will normally

consist in the delivery of the written text of the decree (cf. c. 55). Nevertheless, whereas c. 51 does not include any exception whatsoever to the written form for a decree (cf., however, c. 58 § 2), the legislator here has provided for the possibility that the notification may take place through other equally lawful forms; accordingly, the text includes the phrase "*ad normam iuris.*" This means that the specific norms on notification that influence the case affected by each decree, if there are any, must be observed; moreover, it establishes that the penalty fixed by c. 54 § 2 for decrees that are not communicated through a lawful document is not applicable to decrees that are communicated "*ad normam iuris*" by other lawful means, that is, in accordance with the exceptional forms described in cc. 55 and 56.

b) *Consequence of the omission of the lawful form*

The penalty established by the legislator for the case of omission of the lawful form of notification is that the decree cannot possibly be fulfilled. Canon 24 *CIC*/1917 established that precepts "*singulis data,*" if they were not imposed through a lawful document or before two witnesses, "*iudicialiter urgeri nequeunt.*" There is a certain difference between the expressions "imposition" (which is more general, in that it can refer to the validity and efficacy of the act alike) and "notification." The present extension of this norm to singular decrees in general, together with the existence of cc. 51 and 58 § 2, makes it possible to distinguish, in a technical and more precise way, the completeness of the act of authority *per se*, and the moments of commencement and cessation of its effects.

Canon 54 refers specifically to notification, which presupposes that the decree has been issued in the proper form (c. 51). This could, for various reasons, for a particular precept, be oral (c. 49), in which case its efficacy would cease on expiry of the authority of the author (c. 58 § 2). This form is valid however (i.e., suitable to produce effects). These effects begin to arise once notification has been made, which for precepts given orally would naturally not be in written form (cf. c. 55). Without lawful notification, whatever form it may take, the fulfillment of the decree cannot be required. In practice, this is equivalent to saying that the law is without effect if the designee demands due notification before he will observe it.

55 **Firmo praescripto cann. 37 et 51 cum gravissima rationale obstet ne scriptus decreti textus tradatur, decretum intimatum habetur si ei, cui destinatur, coram notario vel duobus testibus legatur, actis redactis, ab omnibus praesentibus subscribendis.**

Without prejudice to cann. 37 and 51, whenever the gravest of reasons prevents the handing over of the written text of a decree, the decree is deemed to have been made known if it is read to the person to whom it is directed, in the presence of a notary or two witnesses; a record of the occasion is to be drawn up and signed by all present.

SOURCES: —

56 **Decretum pro intimato habetur, si is cui destinatur, rite vocatus ad decretum accipiendum vel audiendum, sine iusta causa non comparuerit vel subscribere recusaverit.**

A decree is deemed to have been made known if the person to whom it is directed has been duly summoned to receive or to hear the decree, and without a just reason has not appeared or has refused to sign.

SOURCES: —

CROSS REFERENCES: cc. 37, 51, 54 § 2, 58 § 2, 482–484, 489, 1598 § 1

COMMENTARY

Jorge Miras

1. *Special norms on the form of notification of decrees*

The norms collected here stem from the schemata *De procedura administrativa.*[1] Canon 55 begins with a proviso: "*firmo praescripto* cc. 37 et 51." These canons establish the requirement of the written form for the issuance of all administrative acts in general, and of decrees in particular

1. Cf., e.g., *Comm.* 23 (1991), p. 34.

(see the commentaries to cc. 37 and 51). Thus the canon emphasizes from the start the difference between the form of issuance and the form of notification. This clarifies that the *form of issuance* must be written *in all cases*, and that the purpose of this norm is not to establish an exception to this general disposition. This disposition remains in force[2] (with the possible exception, little used by the legislator, of the oral precept [see the commentary on c. 58 § 2]), whereas, without prejudice to this requirement, *other forms of notification* besides the normal (written) one, could be lawful in certain circumstances. These are exceptional forms inasmuch as the general norm, contained in c. 54 § 2, makes the efficacy of decrees dependent on their communication through a lawful document; however, when the conditions established for these special forms are satisfied, their use constitutes another *lawful* mode of notification, and therefore a decree thus communicated begins to produce its effects (see the commentary on c. 54).

A combined reading of cc. 54 § 2, 55, and 56 allows us to distinguish two forms—ordinary and extraordinary—of *actual* notification of the decree, and one *fictitious* or equivalent form of notification. Let us consider each of these cases in more detail.

2. *The ordinary form of notification*

The ordinary form of notification consists in communicating the decree to the designee through a lawful document (c. 54 § 2); that is, delivery of the written text of the decree ("*scriptus decreti textus tradatur*"). For these purposes, it does not matter whether or not a cover letter or accompanying document is attached to the text. What is essential is that an authentic copy of the decree be given to the designee, either by mail (certified with acknowledgment of receipt, so that the date of notification can be certified) or by hand.

3. *The extraordinary form of notification*

a) *The gravest of reasons*

The extraordinary form of notification consists in the reading of the text of the decree so that the designee becomes cognizant of it. This mode of notification is lawful only when the *gravest* of reasons prevents the text of the decree from being delivered to the designee. In general, it can be said that what is desired—as is clearly revealed by the legislator—is that

2. Cf., for a dissenting opinion, T.I. JIMÉNEZ URRESTI, commentary on c. 55, in *Salamanca Com.*

the interested person be in possession of the text. In this way, he may know and study in depth the decision that affects him or her, and, where applicable, the reasons (which must be recorded, in the case of a decision, even when the text is not delivered) that underpin the decision. This is done, for example, so that the possibility of defense with a view to recourse is not impaired. On the other hand, the opposite situation is not to be considered normal, but rather *highly exceptional*,[3] compelled by the gravest of reasons. The superlative used in c. 55 is highly significant. In the entire Code, the adjective *gravissimum* is used in only seven other instances, while *gravis* or its comparatives is used over sixty times. This one fact alone shows that the superlative was employed deliberately.

What are we to understand by "the gravest of reasons"? First of all, it should be noted that even the gravest of reasons does not, of course, prevent the person concerned from *knowing* the text of the decree; it only prevents the text from being *physically delivered*. Secondly, the reason must be based on the gravest difficulties that could derive from the possible circulation of the official text, because of, for example, hostility to the Church in a given country, or the confluence of certain circumstances that could be foreseen to produce the gravest harm if the text were to fall into the hands of others (the press, civil courts, anyone incidentally mentioned in the decree, etc.).

In this respect, a helpful guide may be found in the textual process of another canon in which the legislator also uses the superlative *gravest*, and which regulates a case that is, to a certain extent, similar to that of c. 55, namely c. 1598 § 1: "... In cases which concern the public good, however, the judge can decide that, in order to avoid very serious dangers, some part or parts of the acts are not to be shown to anyone. He must take care, however, that the right of defense always remains intact." That possibility, which was not contemplated in the corresponding canon of the 1976 *Schema*—which simply required the publication of acts under penalty of nullification—was introduced in response to observations such as the following: "Such publication seems dangerous, because ... damage to the reputation of witnesses could arise from it, and because in regions in which the jurisdiction of the Church is not recognized, statements made by the parties or by witnesses could be brought before a civil court on a charge of calumny. Moreover, the minutes of ecclesiastical proceedings are sometimes used to bring a penal action before a civil court against one of the parties or witnesses."[4] While it is apparent that the cases are not exactly the same (in the case under discussion, the designee *does know* the decree), the evaluation of this gravest reason will very likely have to take

3. *Comm.* 5 (1973), p. 239: "De decreto notificando vel aliter intimando sunt qui opinentur periculosum esse admittere ut propter gravissima motiva omittatur traditio decreti, ideoque suadent ut saltem patrono decretum tradatur sub secreto, quod tamen aliis videtur periculosius."

4. Cf. *Comm.* 11 (1979), p. 134.

place within those parameters, or at least within similar limits. Furthermore, just as in the case under discussion, the right of defense must in every case remain intact, so that if the person concerned decides to have recourse but will not be able to present an authentic copy of the decree together with the petition, then certification of the act of notification must be facilitated for him or her. The superior who decides on the recourse must, in turn, request the necessary information from the author of the decree.

b) *Formal requirements*

The first formal requirement is that the reading be made in the presence either of a notary (i.e. the chancellor of the curia or one of the other notaries [cf. cc. 482–484]) or two witnesses who are not notaries. No special disposition has been established about the characteristics required of the witnesses; thus, any person who is capable is, in principle, competent for this function. Notwithstanding this lack of special disposition, the nature of the task must be prudently taken into account for purposes of selecting appropriate witnesses. It must not be forgotten that there is a very grave reason for not delivering the text, and therefore, for not allowing it to be made known imprudently to persons who might proceed without the necessary caution.

There is no directive regarding who should read the decree, but in the event that the person who does so is a notary, his mere presence does not appear to be sufficient; rather, the presence of a notary or of two witnesses is still necessary to fulfill this function properly.

Once the reading has been completed, a record of the occasion must be drawn up and signed by all present; that is, at least by the person who read the decree and by the notary, if one was present, or by the two witnesses. The designee must also sign, thereby acknowledging the decree. But should he or she refuse, the notification shall be held to have been effected without the signature, in accordance with one of the reasons contained in c. 56 (see 4, below).

Naturally, in these cases the "*gravissima ratio*" that forbade delivery of the text of the decree to the person concerned must advise that such a text, together with the record of its communication, be held in the secret archive (cf. c. 489).

4. *Notification in equivalent form*

Canon 56 governs two cases that are fundamentally different. The first concerns the non-appearance of the person concerned who has been duly summoned to receive or to hear the decree (for its communication, whether ordinary or extraordinary). When the person concerned cannot adduce a just reason for not appearing, the norm establishes that the decree *pro intimato habetur*. Properly speaking, this case constitutes a noti-

fication in equivalent form, or "*fictitious* notification."[5] The person concerned does not know the content of the decree through his or her own fault, and the law, in order to avoid the paralysis of governance through the bad faith of the designee, establishes a fiction by virtue of which the decree enters into effect without waiting for the person concerned to know the text. A person who later claims that he or she did not appear for a just reason (e.g., with a view to reckoning the time periods allowed for recourse) must prove the claim.

It is well understood that this fiction operates only in the event that the person concerned has been "*rite vocatus*." This requirement cannot be considered fulfilled if it cannot be ascertained that the person concerned has received the summons in the first place, whether oral or written.[6]

The second case considered in c. 56 is very different; it is not a fiction, because the person concerned has in fact appeared and knows the decree but refuses to sign. It is understood that he or she is refusing to sign the corresponding receipt or record mentioned in c. 55; therefore, it is not necessary for it to be "deemed to have been made known," because it has, in fact, been communicated. In this case, what the law establishes is only a formal requirement (the absence of a signature), but this case, for purposes of documentary certification, is equivalent to the *fictitious* notification because the signature of the person concerned does not appear in the record.

Although not expressly stated, a record must be drawn up, signed by the notary and the other witnesses, not only when the person concerned appears and refuses to sign, but also when he or she does not appear. When the decree first achieves its efficacy must be certified with certainty.

5. Cf., for this terminology, E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), p. 374.
6. Cf., along these lines, T.I. JIMÉNEZ URRESTI, commentary on c. 55, cit.

57 **§ 1. Quoties lex iubeat decretum ferri vel ab eo, cuius interest, petitio vel recursus ad decretum obtinendum legitime proponatur, auctoritas competens intra tres menses a recepta petitione vel recursu provideat, nisi alius terminus lege praescribatur.**

§ 2. Hoc termino transacto, si decretum nondum datum fuerit, responsum praesumitur negativum, ad propositionem ulterioris recursus quod attinet.

§ 3. Responsum negativum praesumptum non eximit competentem auctoritatem ab obligatione decretum ferendi, immo et damnum forte illatum, ad normam can. 128, reparandi.

§ 1. Whenever the law orders a decree to be issued, or when a person who is concerned lawfully requests a decree or has recourse to obtain one, the competent authority is to provide for the situation within three months of having received the petition or recourse, unless a different period of time is prescribed by law.

§ 2. If this period of time has expired and the decree has not yet been given, then as far as proposing a further recourse is concerned, the reply is presumed to be negative.

§ 3. A presumed negative reply does not relieve the competent authority of the obligation of issuing the decree, and, in accordance with can. 128, of repairing any harm done.

SOURCES: —

CROSS REFERENCES: cc. 48, 200–203, 212 § 2, 221 § 1, 1400 § 2, 1445 § 2, 1732–1739

COMMENTARY

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Canon 57 contains two norms that are new to canon law: the regulation of *administrative silence* (§§ 1–2) and the express declaration that the ecclesiastical administration is responsible for damages it has caused unlawfully in the course of exercising its duties (§ 3).

1. *Administrative silence*

In c. 212 § 2, the Code embodies a general declaration of the right of all the faithful to "make known their needs, especially their spiritual needs, and their wishes to the pastors of the Church." This general declaration certainly encompasses the so-called "right of petition" (see the commen-

tary on c. 212), by virtue of which the faithful may request from sacred pastors that which they consider proper, necessary, useful, opportune, or reasonable, provided that the matters at issue fall under pastoral authority. Some of these petitions, because they are directed toward obtaining a reply that requires a decision by authority, or because they require a specific provision (for the broad meanings of *decision* and *provision*, see the commentary on c. 48), can be said (in the words of c. 57) to have been made "*ad decretum obtinendum*" (at other times, the faithful turn to authority to request rescripts, or they limit themselves to stating facts or opinions without requesting any reply). Furthermore, this decree can be requested through a simple petition (cf. cc. 1734–1735) or through recourse (cf. c. 1737). It is essential for one of the faithful to be able to defend a right or juridical situation that he or she considers to have been harmed, both in an administrative recourse and before an administrative tribunal (cf. cc. 221 § 1, 1400 § 2, 1445 § 2; *PB* 123). Finally, sometimes the law itself requires authority to issue a decree, there being no need for a request from a person concerned (cf. c. 48). In this case, persons concerned have a strict right for that decree to be issued (cf., e.g., cc. 116–117, 163).

In all of these cases, should the competent authority give no reply, the person concerned would be left defenseless, with no other option but to insist on the petition until the administration deigns to reply, either positively or negatively. Regardless of the reasons that can be given for the rejection of a similar situation in civil law, it is obvious that both the purpose and characteristics of authority in the Church, and the dignity of all of the faithful (and of the other possible persons concerned), as well as the extremely delicate nature of the goods and rights affected by ecclesiastical authority, make especially imperative the diligent attention of sacred pastors to the needs and lawful claims of the faithful that fall within their competence. This attention often constitutes an obligation that is not merely moral, but also properly juridical. Thus, the introduction of *administrative silence* into the Code of Canon Law is quite appropriate.

Administrative silence is a mechanism—introduced relatively recently into civil law codes and now also into canon law[1]—to prevent the possible disregard of a reply by the administration, arising from negligence or from leading to a situation lasting longer than is reasonable of uncertainty and defenselessness for the person concerned. Accordingly, there are various technical formulae which, once a set time has elapsed without a reply, obviate the need for the person concerned to turn once again to the same authority who has not replied, in order to overcome his dilatoriness, because the law attributes a fixed value—of affirmation or negation—to that silence. From that point on, the person concerned may proceed on the basis of administrative silence.

1. For an assessment of the situation prior to the *CIC*, cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1993), pp. 408–409.

The Code has chosen, in the wording of its final version, to utilize the technical formula of presumption of a negative reply for purposes of a further recourse by the person concerned. Let us look more closely at the terms of the canonical regulation of administrative silence.

a) *The obligation to provide for the situation in the face of petitions or lawful recourses*

The validity of administrative silence presupposes a declaration that the administration is obliged to provide for the situation. In fact, the Code applies the norm regulating administrative silence only to decrees, without prejudging whether the reply to the *preces* to obtain a rescript is just or not, which is a different question altogether.

According to c. 57, the competent authority is under a true "obligation of issuing the decree" (§ 3) when the law requires that it be issued, or when a person who is concerned lawfully requests a decree or petitions recourse to obtain one (§ 1).

Lawfully, in the context of the presentation of recourses, means that a genuine hierarchical recourse is contemplated, and therefore, that the requirements established for recourses must be fulfilled (cf. cc. 1732–1739). The lawfulness of petitions will also include—where appropriate—the fulfillment of the requirements established by the law in the case of regulated petitions (cf., e.g., the petition regulated under c. 1734, which must be in written form and made within the peremptory time-limit of ten days). For all other cases, it is not necessary to define *lawfulness* in a way that restricts the right of petition[2] (and, correspondingly, the obligation to reply). Every formal petition will be lawful if it is duly presented by a capable person who can be considered "concerned" (in the case of rescripts, the request can be made by a person who is not concerned [cf. c. 61]), and is reasonable.[3]

b) *Presumption of negative reply for purposes of further recourse*

Once three months (cf. cc. 200–203) have elapsed from the date of the petition or recourse (unless the law has fixed a different time limit [cf., e.g., c. 1735]), the law *presumes* that the reply from the administration is negative.[4]

The technical mechanism of presumption finally adopted by the Code is of limited extension. In canon law, the law does not specifically attribute

2. T.I. JIMÉNEZ URRESTI seems to identify the "lawfulness" of the petition with the existence of a right or strict obligation to petition on the part of the person concerned: cf. commentary on c. 57, in *Salamanca Com.*

3. Cf. E. LABANDEIRA, *Tratado...*, cit., p. 410.

4. Cf., on the possibility that the Administration might interrupt the silence with an interlocutory reply, RGCR, 136 § 2; denying that possibility, G.P. MONTINI, "Problemata quaedam de silentio administrativo et recursu iuxta can. 57 CIC," in *Periodica* 80 (1991), pp. 482–483.

a value to the silence of the administration as happens in other law codes; it simply makes a presumption based on that silence with a view toward further recourses, *as though* the petition or recourse had been denied.

Therefore, the only effect produced by silence (speaking generally, for in certain cases the law can endow silence with substantive efficacy [cf., e.g., c. 268 § 1]) is to open the possibility of recourse to the person concerned with the result that if the recourse is not proposed, the situation would remain awaiting the decision of authority, and no substantive effect would be produced.

Since only a presumption is involved, it will yield to the certainty of an actual reply from the administration. The lapse of the time limit established for administrative silence does not relieve authority from the obligation of issuing the decree (§ 3); thus, it can still be issued when the recourse is still pending, but not if it has already been decided because, in that case, competence would have been assumed by the hierarchical superior. Accordingly, it can happen that the content of the decree, once actually issued, may render the recourse groundless, at least in part. In such cases, "equity requires that the recourse not be automatically frozen, thereby inflicting a second set of damages on the person concerned, but rather that it continue and retain its efficacy, unless the claims of the person concerned have been satisfied, in which case the recourse would be without its raison d'être and would no longer be current."[5] In addition, whatever the content of the decree issued outside the time limit, the damages conceivably caused by the delay (see 2 below) will have to be considered, which, at the very least, will be the costs incurred in proposing the recourse (§ 3).

2. *The responsibility of the public ecclesiastical administration for damages*

The second important innovation introduced by c. 57 is the formal recognition of the responsibility of the public ecclesiastical administration. According to paragraph 3, authority has "the obligation of issuing the decree, and, in accordance with can. 128, of repairing any harm done."

This clause applies to cases in which the administration's silence causes damages that would have been avoided by a timely response to the petition or recourse. But this disposition extends beyond the case of ad-

5. E. LABANDEIRA, *Tratado...*, cit., p. 411. On decrees issued outside of the time-limit, cf. G.P. MONTINI, "Problemata quaedam...," cit., pp. 486–487.

ministrative silence because c. 128 establishes the universal principle of canonical liability for all damages unlawfully caused, whether by a juridical act or by any other act performed through fraudulent or culpable actions. Therefore, by virtue of c. 57, ecclesiastical authority is also subject to this principle; it is liable both for damages caused unlawfully by its own juridical acts—among which are included administrative acts[6]—and for those caused by other acts performed through fraudulent or culpable actions.

What is to be understood by *damage* in the context of canon law? Certainly, it would not be appropriate to apply a restrictive definition that takes into account only the damages unlawfully caused to the patrimony of the persons administered. If one considers the wide range of goods and specific rights that fall within the competence of ecclesiastical authority by virtue of the very mission of the Church, it can be said that the patrimony of the faithful is only one of many possible areas that could be harmed. It is well to think, for example, of the possible damages, attributable to the negligence of authority, stemming from the culpable spiritual disregard of the faithful, or the possible damages of a moral nature caused by the imprudent conduct of authority, etc. Naturally, the uniqueness of the goods susceptible to damage would require that the possible reparation be capable of taking a number of proper forms. This view is in keeping with the specific means available to the Church for fulfilling its mission, which are not reducible to monetary reparation (though this is not excluded in cases in which that is the nature of the damage). Thus, for example, scandal caused by the negligence of authority in adopting measures of governance could be repaired by the exceptional spiritual care of the faithful, by extraordinary means of catechesis, by the appointment of a suitable pastor, etc.

Without question, what is needed is an effort on the part of doctrine and jurisprudence—using the many elements contained in the canonical tradition itself—to form a notion of damage and of reparation that, without ignoring material damages and their indemnification, also efficaciously includes the most authentic elements of canon law and of the life of the Church.[7]

As for the manner of presenting a claim founded on that liability, in addition to the avenue of administrative contestation expressly established by art. 123 § 2 *PB*, it is undoubtedly admissible to present that claim

6. J. KRUKOWSKI, "Responsibility for Damage resulting from illegal Administrative Act in the Code of Canon Law of 1983," in *Le Nouveau Code de droit canonique* (Ottawa 1986), pp. 231–242.

7. Cf., in this respect, G.P. MONTINI, "Il risarcimento del danno provocato dall'atto amministrativo illegittimo e la competenza del Supremo Tribunale della Segnatura Apostolica," *La giustizia amministrativa nella Chiesa* (Vatican City 1991), pp. 179–200; G. REGOJO BACARDÍ, "Pautas para una concepción canónica del resarcimiento de daños," in *Fidelium Iura* 4 (1994).

in a proper hierarchical recourse (see commentary on c. 1739, 3), or as an autonomous petition to authority, when the cause of the damage was not a juridical act (or, in this case, an administrative act) and, consequently, there was no possibility of proposing recourse. It is just such a petition that is foreseen in c. 57 § 1.

58 **§ 1. Decretum singulare vim habere desinit legitima revocatione ab auctoritate competendi facta necnon cessante lege ad cuius exsecutionem datum est.**

§ 2. Praeceptum singulare, legitimo documento non impositum, cessat resoluto iure praecipientis.

§ 1. A singular decree ceases to have force when it is lawfully revoked by the competent authority, or when the law ceases for whose execution it was issued.

§ 2. A singular precept, which was not imposed by a lawful document, ceases on the expiry of the authority of the person who issued it.

SOURCES: § 2: c. 24

CROSS REFERENCES: cc. 47, 54 § 2, 55–56

COMMENTARY

Jorge Miras

1. *Normal cessation of singular decrees*

The normal cessation of singular decrees can occur in two ways, according to paragraph 1: through their revocation and through the loss of force of the laws they execute, as the case may be.

a) *Revocation*

According to c. 47, the general norm applied explicitly here, revocation is produced by another administrative act, in which the competent authority (or the superior of that authority), because of a new evaluation of the situation affected by the singular decree, gives a decision or makes a provision for that situation that differs from the earlier one (on the different cases of revocation, vide commentary on c. 47). The revoked decree ceases upon the notification of the designee of the new decree (c. 47).

b) *Loss of force of the law executed by the decree*

A singular decree also ceases, indirectly, with the disappearance of the law "ad cuius excecutionem datum est." This expression, in our opinion, should not be construed narrowly, as though it affected only those decrees that explicitly constitute a specific application of a law (see commentary on c. 49: 3b), but rather as equivalent to the following: "on cessation of the law which constitutes the basis for the lawfulness of that which the decree specifically establishes."

2. *Precepts not imposed by a lawful document*

Canon 58 § 2 contains an express exception to the principle established in c. 46. When there is no authentic certification by a lawful document of the imposition of a singular precept, then, on the expiry of the authority of the person who issued it, the basis for the juridical certainty of the affected situation disappears. The legislator prefers not to prolong the validity of juridical situations whose basis is uncertain; hence, the provision for this special case of cessation of singular precepts (see commentary on c. 46).

Canon 24 of *CIC*/1917 regulated the "praecepta singulis data," and established that "iudicialiter urgeri nequeunt et cessant resoluto iure praecipientis, nisi per legitimum documentum aut coram duobus testibus imposita fuerint." Accordingly, two sanctions were simultaneously established for the case of *imposition* of precepts issued without the required formalities: the impossibility of requiring their fulfillment and their cessation on the expiry of the authority of their author.

A clear distinction has been made in the Code between the *form of issuance* and the *form of notification* of decrees. In actuality, the impossibility of requiring the fulfillment of a singular decree (and therefore of a precept as well), derives from the lack of communication or lawful notification (cf. cc. 54 § 2–56). Notification may be given orally in special cases (cf. c. 55), but it presupposes the written form of issuance when acts for the external forum are involved. If the authority wants the capability to require the fulfillment of a precept, it must always be issued in written form. This is true even when circumstances advise that the precept be communicated only orally, in the presence of a notary or of two witnesses who draw up a record to be kept in the secret archive (see commentary on cc. 55–56). In that case, however, we would no longer be within the purview of the case contemplated in c. 58 § 2. Such a precept would have been imposed by a lawful document; only the *form of its notification* would be oral (yet still lawful). Therefore, it would not cease on the expiry of the authority of its author.

The specific case addressed in c. 58 is the precept that has also been issued in oral form. In our opinion, however, the Code does not admit as a lawful hypothesis the notification of a precept for the external forum that was issued orally. In fact, whereas c. 24 of *CIC*/1917 authorized—in that it did not distinguish—both the issuance and the notification in the presence of two witnesses, the current c. 55, which authorizes oral notification in certain exceptional cases, begins by reaffirming the validity in all cases of cc. 37 and 51, which require the written form of issuance for acts issued for the external forum. If lawful notification is impossible, one must conclude that juridically requiring the fulfillment of a precept issued orally for the external forum is also in any and all cases impossible (c. 54 § 2). The limited efficacy which these precepts may have—they always depend on

their observance by the designee or on the direct involvement of their author who personally requires their fulfillment—disappears entirely on the expiry of the authority of the person who issued them.

It may well be that this question of interpretation has been complicated by this canon's retention of the technically imprecise expression "imposed by a lawful document." The expression is taken from c. 24 of *CIC*/1917 and does not in itself state whether, in light of the new regulation of administrative acts, this "imposition" refers to the issuance or to the notification of the precept. In our opinion, considering the norms on issuance and notification together, it seems clear that a precept issued orally does not enjoy the favor of law and is only possible for certain cases in the internal forum (cf. c. 130). In fact, once there exists the possibility of extraordinary notification for the gravest cases (c. 55), it is not well understood what reason could justify an external precept that is not issued in written form. Furthermore, this unusual provision does not accord with the legislator's intention to include singular precepts in the category of singular decrees and, therefore, to regulate them juridically as formal acts (see commentary on c. 49: 1).

CAPUT III
De rescriptis

CHAPTER III
Rescripts

59 **§ 1. Rescriptum intellegitur actus administrativus a competenti auctoritate exsecutiva in scriptis elicitus, quo suapte natura, ad petitionem alicuius, conceditur privilegium, dispensatio aliave gratia.**

§ 2. Quae de rescriptis statuuntur praescripta, etiam de licentiae concessione necnon de concessionibus gratiarum vivae vocis oraculo valent, nisi aliud constet.

§ 1 A rescript is an administrative act issued in writing by a competent executive authority, by which of its very nature a privilege, dispensation or other favour is granted at someone's request.

§ 2 Unless it is established otherwise, provisions laid down concerning rescripts apply also to the granting of permission and to the granting of favours by word of mouth.

SOURCES: —

CROSS REFERENCES: cc.35, 37, 38, 48, 49, 68, 70, 71, 74, 75, 221, 290 § 3, 293, 312, 390, 486, 533, 538, 550, 558, 561, 609, 612, 638 §§ 3 y 4, 639 § 1, 639 § 2, 647 §§ 2 y 3, 665 § 1, 668 §§ 2 y 4, 671, 672, 684, 686 §§ 1 y 2, 688 § 2, 691, 701, 727, 731, 733, 743, 744, 745, 764, 765, 801, 808, 826 § 3, 827 § 3, 828, 830 § 3, 831, 832, 858, 860, 862, 882, 886 § 2, 905 § 2, 911 § 2, 933, 934 § 1, 936, 944, 961 § 2, 966 § 2, 969, 1003, 1017, 1021, 1071, 1082, 1102 § 3, 1112, 1114, 1118, 1124, 1125, 1130, 1139, 1144, 1147, 1153, 1168, 1172, 1183 §§ 2 Y 3, 1189, 1190, 1210, 1215, 1223, 1224 § 2, 1226, 1228, 1241, 1265, 1267 § 2, 1281,1284 § 6, 1288, 1291, 1292 § 2, 1298, 1304, 1337, 1483, 1540 § 1, 1701, 1705 § 3, 1706, 1732

COMMENTARY

Javier Canosa

I. GENERAL INTRODUCTION

1. In the Corpus *Iuris Canonici*, the subject *De rescriptis* is discussed in the third title of the first book of the *Decretals* (*X* I, 3), which consists of 43 chapters. It also appears in the *Liber Sextus*, where 15 chapters are found under the title *De rescriptis* (*VI* I, 3) and in the *Clementinas*, under the title *De rescriptis* (*Clem* I, 2) with 5 chapters. The *CIC*/1917 incorporated this subject as one of six titles at the same level with ecclesiastical laws, custom, the reckoning of time, privileges, and dispensations in book I: *De normis generalibus*.

In the systematic ordering of the *CIC*, the treatment of rescripts no longer constitutes a separate title. Instead, it becomes a chapter of title *IV*, *De actibus administrativis singularibus*, in book I. In fact, title IV is comprised of five chapters: I, *Normae communes*; II, *De decretis et preceptis singularibus*; III, *De rescriptis*; IV, *De privilegiis;* and V, *De dispensationibus*. At the same time, part of the normative material that applied to rescripts in the *CIC*/1917 has come to form part—with slight modifications—of the first chapter of title IV, which contains the common norms for all of the singular administrative acts.[1]

2. The technical category of administrative acts does not appear in canon law until after the promulgation of the *CIC*/1917. Previously, rescripts had been classified instead as one of the various normative sources of law, in accordance with the definition traditionally attributed to institutions that, like privileges, determine their own content.

Indeed, it was in the course of the reform of the *CIC*/1917 that the category of singular administrative acts, which was already in use in civil law, was introduced into the draft of the Church's universal law. At first they were called *acts of administrative authority*, and then, at the beginning of session XII (October 22–26, 1973), *individual or singular administrative acts*, which went on to form a separate title of book I, which was then divided into the chapters already enumerated. That is why the text of c.59 does not specify that rescripts are singular administrative acts; this is already implied by the systematic position of the chapter *De rescriptis* and because they have been affirmed as such in c.35. In the course of the reform of the Code, those norms of the *CIC*/1917 that had formerly regulated rescripts were broken up into four different parts: some became

1. Cf. *Sessio* XII (X.22–26.1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 279.

what are now the common norms for singular administrative acts; others served to form the chapter on singular decrees, which had not existed in the *CIC*/1917; still others remained in the section dedicated to rescripts (now reduced from the category of title to that of chapter, with a reduction in the number of canons from 27 in the *CIC*/1917 to 16 in the *CIC*). Finally, as a consequence of a process of simplification,[2] some of the norms that regulated rescripts in the *CIC*/1917 have disappeared in the *CIC*.

Except for a definition that has been formally modified and greatly refined, the norms currently in force essentially reproduce the discipline of the *CIC*/1917. Among the changes made, along with the aforementioned suppression of some canons whose content can be assumed to have been incorporated in the revision, are modifications that moderate certain normative provisions that may have been somewhat rigid, for example, with respect to the validation of rescripts, as well as other less important linguistic revisions. Canonists, including Onclin, Mörsdorf, and Lombardía, among others, were part of the working committee that studied and proposed the reform.

3. The different regulating of rescripts in the two Codes poses—among others—one question that might seem paradoxical. Under the *CIC*/1917, rescripts figured more prominently than singular decrees at the theoretical level (not only in the canonical tradition) and in practice. Today, however, within the technical category of administrative acts, it seems that singular decrees tend to prevail over rescripts. This, too, is the result of a doctrinal and legislative evolution that aspires to strengthen *juridical security*.[3] Therefore, one could conclude that the *theoretical* range of applying rescripts, strictly speaking, has been reduced in the revised Code, in part because of the rise of the category of singular decrees. The connection between the two directions—the decline of the rescript and the rise of the decree—could also lead to confusion in certain cases (in which the same type of content could be executed through a decree or a rescript), which will require the distinction to be carefully maintained in legislation, jurisprudence, and administrative practice.

4. Although we have spoken of the diminished role in canon law that the *CIC* assigns to rescripts in the strict sense, this does not seem to be the case—and herein lies the paradox—when it comes to the extent of the practical application of the norms *De rescriptis* found in the *CIC*.

Indeed, the influence of the principle of subsidiarity has led to a greater practical operation of rescripts and their kindred measures. One should bear in mind, for example, the importance of the *Motu proprio*

2. Cf. *Sessio* II (November 13–17, 1967) of the commission "de Normis Generalibus," in *Comm.* 17 (1985), p. 45.

3. On the importance of juridical security, cf. V. GÓMEZ—IGLESIAS, "La aprobación específica en la 'Pastor Bonus' y la seguridad jurídica," in *Fidelium iura* 3 (1993), pp. 361–423.

Episcoporum muneribus of Paul VI,[4] which modified the discipline concerning the authority competent to grant dispensations (cf. c.87), which are typically granted by rescripts. Whereas the *potestas dispensandi* from ecclesiastical laws used to belong to the pope, and in some cases to the diocesan bishops, because of the application of the principle of subsidiarity to this level, the *potestas dispensandi* from ecclesiastical laws now belongs to the bishops, unless a specific dispensation is reserved to the pope or to the Holy See. In actuality, therefore, it can be said that rescripts of dispensation are granted, for the most part, by intermediate authorities. Historically, these authorities were primarily ordinaries and, less frequently, only in certain circumstances, the supreme authority. In 1951, M. Castellano included among the administrative bodies capable of granting dispensations, vicars forane, parish priests, and rectors of churches, in addition to ordinaries.[5] Subsidiarity relative to the institution of rescripts (one must remember that *potestas dispensandi* presupposes *potestas rescribendi*) yields greater flexibility and facilitates conclusive proceedings and preparatory acts. This has not had any perceptible adverse effects on the development of rescripts, while at the same time it has distributed many of the functions, which formerly were exercised by certain bodies of the Roman Curia, to the corresponding bodies of the diocesan curiae and other entities. This shift of authority has had resulting effects on other matters (the function of the style and practice of the Roman Curia in relation to the style and practice of the other curiae, the importance of the appropriate technical-canonical formation of the holders of *potestas rescribendi* and their assistants, etc.).

According to cc. 59 § 1 and 75, the norms on rescripts are to be applied to privileges (cc. 76–84) and to dispensations (cc. 85–93). Although the Code establishes further provisions for each of these measures, both the text of c. 59 ("a rescript … grants a privilege, dispensation, or other favor") and the doctrine[6] conceive of privileges and dispensations as types of concessions that are contained in the notion of *rescript*.

Similarly, c. 59 § 2 establishes with great practical importance for the regulation of rescripts that their norms are also to be applied to two other types of administrative acts: the granting of permissions and favors by word of mouth. This provision concerning permissions is especially important in light of the wide variety of possible situations and the importance of these acts throughout the Code. Indeed, the Code *expressly* requires the permission of the competent authority before various actions may take place, such as in the cases of the *munus sanctificandi* (cc. 561, 862, 886 § 2, 911 § 2, 933, 934 § 1, 969, 1172, 1223, 1226, 1228) and the

4. Cf. PAUL VI, mp *Episcoporum muneribus*, November 30, 1966: *AAS* 58 (1966), pp. 5–12.
5. Cf. M. CASTELLANO, *Lectiones Iuris Administrativi* (Rome 1951), p. 31.
6. Cf., e.g., E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd revised ed. (Pamplona 1993), pp. 324–325, 331–332, and 346–347.

munus docendi (cc. 764, 765, 826 § 3, 828, 830 § 3, 831, 832), in the law relating to the institutes of consecrated life (cc. 538, 609, 638 § 3, 638 § 4, 639 § 1, 639 § 2, 665 § 1, 668 § 2, 668 § 4, 671, 672, 731, 744), in matrimonial law (cc. 1017, 1071, 1102 § 3, 1112, 1114, 1118, 1124, 1125), and in the material relating to patrimonial law (cc. 1189, 1190, 1215, 1265, 1267 § 2, 1288, 1291, 1292 § 2, 1298, 1304). One may reasonably conclude that, in addition to the cases in which the Code expressly refers to rescripts, permissions, or favors granted by word of mouth, that the norms on rescripts are also to be applied to other singular administrative acts contemplated by the Code when referring to concessions (cc. 533, 550, 647 § 3, 701, 858, 860, 936, 1130, 1144, 1183 § 2, 1210, 1483, 1701), indults (cc. 686 § 1, 686 § 2, 688 § 2, 691, 727, 743, 745, 1021), consent (cc. 647 § 2, 684, 882, 905 § 2, 966 § 2, 1147), and authorizations (cc. 1153, 1224 § 2, 1281). Similarly, for certain actions that require issuance of consent (cc. 312, 390, 558, 609, 612, 733, 745, 764, 801, 808, 1003, 1284 § 6, 1337) or judgment (cc. 827 § 3, 944, 961 § 2, 1168, 1183 § 3, 1241) by the competent authority in response to an instance in which the juridical sphere of an interested person is enlarged, the rules on rescripts must be applied, unless it is established otherwise.

The same can be said regarding the acceptance of resignations (cc. 189, 354, 367, 401 § 1, 481, 538), as well as of permissions (c. 649), extensions (cc. 653 § 2, 657 § 2), admissions (cc. 656 § 3, 693, 1034), anticipations (c. 657 § 3), readmissions (c. 690), certain acts of delegation (cc. 1111, 1112, 1196, 1203), remissions of penalties (cc. 1355, 1356, 1361), various kinds of letters (of excardination, c.267; of incardination, c.267; dimissorial, c.1018), and the reduction of obligations (cc. 1308, 1310), which, as singular administrative acts, grant to a person concerned a *favorable situation*[7] that he or she did not enjoy previously. In the last analysis, these cases can just as well be classified as types of rescripts, just as in the cases of privileges and dispensations (indeed, some of these acts presuppose a dispensation or privilege) or as types of permissions or favors granted by word of mouth.

5. In the *Codex canonum Ecclesiarum orientalium (CCEO)*, rescripts are discussed in article III *De rescriptis*, in chapter III *De actibus administrativis*, title XXIX *De lege, de consuetudine et de actibus administrativis*. The internal ordering of the chapter devoted to administrative acts in the *CCEO* differs from that of the Latin Code, first in that it contains no common norms for all administrative acts, and secondly, in that, before giving the rules for rescripts, it discusses in article I the procedure for producing extrajudicial decrees, and in article II the execution of administrative acts. The biggest difference, however, is that it is within the article devoted to rescripts that, after giving some common norms

7. Cf. the mention of this notion in R. ENTRENA CUESTA, *Curso de Derecho Administrativo* (Madrid 1982), p. 189.

(cc. 1527–1530), the *CCEO* regulates privileges (cc. 1531–1535) and dispensations (cc. 1536–1539).

Likewise, the *RGCR* explicitly regulates rescripts only in article 133 of title IX (*Preparazione di atti amministrativi singolari*), although they are also mentioned in articles 109 § 2, 110 §§ 1–2, 112 § 2, 113, 116, 118 § 4, 119, and 120 § 4.

II. CANON 59

1. In addition to their status as singular administrative acts (see part I of this commentary), rescripts are further defined by the following characteristics, all of which can be inferred from c. 59 § 1: they grant a favor from a competent authority (a privilege, dispensation, or other type of favor) at someone's request, and accordingly, they take written form.

a) This reply must be in writing, as we can also infer from the etymology of the word *rescript*, which derives from the Latin *rescribere*, "to answer in writing." The formal requirement of the written form is a defining characteristic of the rescript, distinguishing it from the oral reply because in the latter case the singular administrative act that grants a favor at someone's request is said to be granted *by word of mouth* (this case is considered in c. 59 § 2). Furthermore, the written form is the general rule for administrative acts that affect the external forum (cf. c. 37). The written form facilitates, among other things, the proof of the favor in question; therefore, it allows the rescript to qualify as a public ecclesiastical document, inasmuch as it is a document drafted by a public person in the exercise of an ecclesiastical office while observing the formalities prescribed by the law (cf. c. 1540 § 1). Similarly, the written form makes possible the proper archiving of documents (cf. c. 486), which is very important for juridical security, even if in some cases (e.g. rescripts of the Apostolic Penitentiary)[8] the destruction of the rescript is mandated once its content has been made known.

b) A request from a person concerned is *ordinarily* required for the production of a rescript; we emphasize *ordinarily* because rescripts are possible *Motu proprio*—issued by an authority without the request of an interested party. This requirement of a previous instance shows that the rescript is in fact a *complex* administrative act. In other words, it is a procedure with different phases or moments (including the petition phase, which encompasses the preparation, development, and communication of

8. Cf. *AP*, Instr. *Suprema Ecclesiae bona*, July 15, 1984, prot. no. 456/84, *in fine*; reiterated in March 14, 1987 and, with certain modifications that took into account the entrance into force of the *CCEO*, on June 11, 1991, in *Il Monitore Ecclesiastico della Diocesi di Lugano* 97 (1991), pp. 394–399.

the petition, which, unlike the reply, need not be in writing; the phase of instruction or proof; the concession phase of the rescript; and finally, in some cases, the execution phase), in which different subjects are involved. The two principal subjects—the granting of authority and the person concerned—are both mentioned in c. 59, but other subjects are also possible, such as the legal adviser of the petitioner, the executor of rescripts that require execution, the ordinary to whom the rescript is presented, the bishop who prorogues the rescripts of the Holy See, etc.

2. From what we have considered thus far, it follows that rescripts have the following characteristics, which are, however, not unique to rescripts: they are defined as singular administrative acts (as are decrees and singular precepts (cf. cc. 48 and 49); they take written form (characteristic of all singular administrative acts (cf. c. 37), yet still an important feature of rescripts, for it distinguishes them from favors granted by word of mouth); they are issued by *competent* executive authority (as are singular decrees (cf. c. 48)); and they are issued at the request of an interested person (but in some cases, they are issued without such a request; on the other hand, it is easy to think of other singular administrative acts issued at the request of an interested person, as happens with quite a few singular decrees, for example).[9]

There are, nevertheless, two characteristics that distinguish rescripts from other singular administrative acts in *written* form:

a) Every rescript supposes the granting of a *favor*, meaning that it favors a particular subject and extends[10] his or her sphere of faculties and rights. It also means that such a concession implies, on the part of the authority that grants it, a *discretionary* assessment of the circumstances that justify the concession. In the course of the revision of the Code, one of the consultors advocated the elimination of the word "favor." He argued that gifts and favors have a different meaning, and that very few acts of an ecclesiastical administration can be considered favors or privileges in the modern sense. Included among those few would be acts that grant honorary titles, private oratories, and perhaps other things of this kind. All other acts ought to be subjected to juridical norms that are stable and public, and not, like favors and privileges, dependent on the benevolence of those who exercise executive authority. The same consultor who made this reality clear maintained that clarity and uniformity were essential to correcting the defects of administration, both in the conditions that had to be fulfilled in order to obtain a given administrative act, and in regulating what was to be expressed in the request, as well as the length of time allowed for the decision to be made and communicated to the petitioner. Finally, certainty

9. Cf., e.g., *CDWDS*, Decr. "*Instante excellentissimo* quo interpelatio 'esperanto' Missalis romani et Lectionarii romani pro dominicis et festis necnon Ordinis missae probatur," November 8, 1990, in *Notitiae* 26 (1990), pp. 692–693.

10. Cf. R. ENTRENA CUESTA, *Curso de Derecho Administrativo* (Madrid 1982), p. 189.

was essential to prevent any changes from arising in these practices except those that had been properly made known to the petitioner.[11]

Although these observations were not expressly incorporated, they doubtless influenced the discussion of administrative acts and rescripts (in fact, the former distinction between rescripts of favor and rescripts of justice has disappeared).[12] The reply to these observations was that the concept of favor continues to be an institution current in civil law codes as well. The debate in the Commission then drifted to the treatment of the range of authority's discretion in granting these favors. The conclusion that appears to have been accepted is that, in speaking of favors in this context ("termino 'gratia' tantummodo concessionem favorabilem in favorem alicuius indicari"),[13] reference is being made to concessions in favor of someone, in which there is a great measure of discretion. This must not be confused with arbitrariness, for there is a legal framework that allows one to speak, if not of a right to the concession, then certainly of a *legitimate expectation*,[14] which is equivalent to the *faculty of requesting* the concession or dispensation together with the expectation that the request will be acted upon. This faculty becomes a *right to recourse*[15] *if the authority does not respect the normative provisions that protect said expectation (cf. c. 1705 § 3). With respect to these questions of lawfulness, rescripts are subject to recourse through jurisdictional channels (a view supported by doctrine)*,[16] while the underlying matter can always form the basis for hierarchical recourse (cf. c. 1732).

b) The second characteristic unique to rescripts, as compared to other administrative acts, is that rescripts are given in the form of a *reply*[17] *("decretum nemini dirigitur, est absolutum et a precibus abstrahit; dum e contra rescriptum petentibus dirigitur."*[18] *Accordingly, the term elicitus* is preferred for rescripts, whereas for singular decrees, as for laws, the term *editus* is used).[19] Hence, the rescript must come at someone's "re-

11. Cf. *Sessio* XII (X.22–26.1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990) p. 292.
12. Cf. J. GAUDEMET, "Reflexions sur le livre I 'de Normis Generalibus' du Code de Droit Canonique de 1983," in *Revue de Droit Canonique* 34 (1984), p. 100.
13. Cf. *Sessio* XII (October 22–26, 1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 304.
14. Cf. L. GALATERIA—M. STIPO, *Manuale di Diritto Amministrativo* (Turin 1989), p. 277.
15. Cf. *Sessio* II (November 13–17, 1967) of the commission "de Normis Generalibus," in *Comm.* 17 (1985) p. 52.
16. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd revised ed. (Pamplona 1993), pp. 429–430; A. BERNÁRDEZ CANTÓN, *Parte general de Derecho Canónico* (Madrid, 1990), p. 140. This possibility is also allowed, though with certain reservations, by Z. GROCHOLEWSKI, "Atti e ricorsi amministrativi," in *Apollinaris* 57 (1984), pp. 259–263.
17. Cf. E. LABANDEIRA, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1992), p. 449.
18. Cf. *Sessio* XI (March 12–16, 1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 248.
19. Idem.

quest." It requires a petition or *preces* that the person concerned directs to the authority who is charged with safeguarding the common good. In this request, the petitioner draws attention to a particular need (cf. c. 221) that can be satisfied by an act of authority and *indirectly* redounds to the common interest, so that the authority *replies* to that particular need by means of a rescript, without ever losing sight of the public interest. The nature of the rescript as a reply has further consequences: in certain cases, rescripts must be presented to the ordinary (cf. c. 68); it also necessitates the rules on the executor's prudent judgment (cf. c. 70) and the use of rescripts (c. 71). In the course of the revision of the Code, these matters were reserved specifically for rescripts, because even though they are acts of administration, they take into account a unique relationship between the individual good and the common good.[20] If the request is not for the granting of a favor but for the exercising of a right to which the petitioner is entitled but which has certain public limitations in view of the common good, the result will be the granting of permission, which can also be either oral or written. If, on the other hand, the request is for something that, although provided for by the law, is not an entitlement but rather something that can be granted as a favor, or if the request is for something not provided for by the law or even contrary to it, then the result would be the granting of a favor—by word of mouth if granted in oral form, or by rescript if granted in written form.

3. In its strict sense in the *CIC*, therefore, the rescript is a *written reply* that *grants* a *favor*. In a broader sense, the rescript could be merely a written reply that grants a concession (this notion of rescript embraces the granting of permission as well), which is the meaning found in the *CCEO* (c. 1510 § 2,3°) and in the *RGCR* (art. 133). Indeed, it is also found in the *CIC*, inasmuch as c. 59 § 2 provides for the application of the norms on rescripts to the granting of permission, unless it is established otherwise (this is the meaning that has been used in establishing relationships between c. 59 and other canons in the *CIC*, which, if one remembers the many cases of permission found throughout the Code, explains why there are so many canons that relate to c 59). In a third, even broader sense, the rescript could be a written reply that grants or *denies* the requested concession. Because of their similarity, and even though they cannot be termed rescripts,[21] favors granted *vivae vocis* are included in these provisions, unless it is established otherwise (cf. c. 59 § 2).

In light of the third meaning and the aforementioned possibility of recourse[22] for both a rescript and the denial of a rescript, it must be concluded that rescripts can contain a negative reply (e.g., there is a rescript

20. Cf. ibid.
21. Cf. E. LABANDEIRA, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1992), p. 449.
22. Cf. ibid., p. 449.

of the *CDWDS* that concludes by saying: "ex deductis non constare de matrimonii inconsumatione in casu...," and then adding that the dicastery would be within its rights to authorize a supplementary instruction and to reexamine the cause).[23] A negative reply occurs when the concession is not granted but is deferred instead, or when the requested favor is denied. Even though such administrative acts cannot, strictly speaking, be called rescripts, they can be conceived of as rescripts in the broader sense of that word since they partake of other characteristics (e.g., the written form and the discretionary nature of the assessment by authority). This characterization is also endorsed by the practice of the Roman Curia, which does not require the denials of requested favors to take the form of decrees. Rather, despite the fact that they embody denials, they are to retain the form of replies but with a different tone, such as *non expedit, non expedire, dilata,* lectum, *in decisis,* etc.[24]

4. Thus far, we have spoken of the possibility that the petitioner may have recourse regarding the granting of a rescript or the denial of one. The petitioner, however, is not the only one who can have recourse against a rescript or its denial. This possibility is also open to any other concerned person who feels that he or she has been harmed in his or her acquired rights. This other person may be another authority by reason of a conflict of competencies or a more general guardianship of the public good, or it may be a private subject.

There is debate among authors regarding whether rescripts are subject to c. 57 § 2. This canon establishes a time period whose expiration permits the proposal of recourse if the authority has not issued the requested act (a provision that applies to singular administrative decrees) in the interim. Upon first consideration, since c. 57 is located in chapter II, which treats of singular decrees, and since there is no mention of it in chapter III *De rescriptis*, the answer might appear to be negative. Nonetheless, part of the doctrine (e.g. Lombardía and Labandeira)[25] argues that rescripts are subject to c. 57 § 2 precisely because it is the means by which the norms on hierarchical recourse (cc. 1732–1739) can be applied to rescripts produced in the extrajudicial external forum (those that are issued by authorities inferior to the Roman Pontiff or an ecumenical council [cf. c. 1732]). There are examples in particular law of the application of c. 57 to the granting of permissions, as is seen in the Instruction of the Italian Bishops' Conference on administrative matters. This Instruction established in number 53 that if three months elapse without the authority ei-

23. Cf. B. MARCHETTA, *Scioglimento del matrimonio canonico per inconsumazione e clausole proibitive di nuove nozze* (Padua 1981), p. 110.

24. Cf. B. GANGOITI, "De rescriptorum instituto in iure canonico," in *Studi di diritto canonico in onore di M. Maagliocchetti* (Rome 1975), pp. 660–661; and W. AYMANS, *Kanonisches Recht: Lehrbuch aufgrund des Codex iuris canonici* (Paderborn 1991), p. 245.

25. Cf. P. LOMBARDÍA, commentary on c. 59, in *Pamplona Com;* and E. LABANDEIRA, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1992), p. 449.

ther granting or denying his permission, then the reply is presumed to be negative and the person concerned can file for a recourse.[26]

There are cases in the *CIC* in which the possibility of having recourse is expressly discussed; for example, in c. 270 (recourse against the denial of requested excardination) and c. 1030 (recourse against the denial of a request for admission to the priesthood, formulated by a deacon destined for the priesthood). The general principle is that rescripts are subject to recourse, whether they are understood strictly or broadly, where even the theoretical possibility of recourse is attested to; for example, in connection with the permission needed for the publication of writings (cc. 825 § 2, 826 § 3, 828, 831 § 1, 832) (cf. Instr. of the CDF *on various aspects of the use of the instruments of social communication in the promotion of the doctrine of the faith* (March 30, 1992), where no. 10 § 3 provides that "administrative recourse is possible against the denial or approval of permission, in accordance with the norms of cc. 1732–1739, before the Congregation for the Doctrine of the Faith, the competent dicastery in this subject").

Notwithstanding this general principle of recourse for rescripts, there are legal exceptions to it. Rescripts, like the rest of the acts of the Roman Pontiff, are not subject to recourse (cf. cc. 333 § 3; 1732, in which the attempt to propose such a recourse is punished with censure; c. 1405 in connection with c. 1404, on the incapacity to judge the acts of the pope, or further, those acts which he has specifically approved [art. 134 § 4 of the *RGCR*]). The same is true of the acts of ecumenical councils and of rescripts granted for the internal forum.

5. Rescripts can take a variety of external forms—bull, brief, simple letter, or communication—depending on the granting authority, the purpose, the addressee, and the circumstances.

6. A distinction must be made between the permission and the granting of favors by word of mouth, both mentioned in paragraph 2. Regarding permission, it is well-established that there is no one term for that single institution, namely, for designating the singular administrative act whereby a subject is granted the faculty of exercising a right, and where in defect of such authorization the exercise would be unlawful, and sometimes invalid as well.[27] In most cases the *CIC* refers to *permission*, but in quite a few places it uses other terms—*sanction, grant, authorization, consent*—that do not seem to indicate different underlying ideas. By contrast, the *CIC* does establish a clear distinction between permission and approval (e.g., cc. 825, 826, 829) about the involvement of authority in the

26. Cf. CONFERENZA EPISCOPALE ITALIANA, *Istruzione in materia amministrativa*, April 1, 1992 (Rome 1992), no. 53.

27. Cf. F. RUIZ UGALDE, "Controles administrativos preventivos y sucesivos en el CIC," in *Excerpta e dissertationibus in Iure Canonico* IX (1991), p. 122.

publication of writings. The *CCEO* (c. 661) defines both, as does the Instruction of the CDF that is concerned with the issue.[28]

In any case, both permission and its kindred measures have as their end the *regulation* by authority of the exercise of rights in view of the common good (cf. c. 223). Thus, the one who requests permission is requesting not the granting of a right—which he already has—but rather the faculty to be able to exercise it in practice ("pro licentia ad eam obtinendam ius habetur.")[29]

With respect to the granting of favors by word of mouth, see c. 74 and its commentary.

28. Cf. CDF, "Instructio quoad aliquos adspectus usus instrumentorum communicationis socialis in doctrina fidei tradenda," March 30, 1992, in *Comm.* 24 (1992), pp. 18–27, no. 7 § 1a for approval, and nos. 7 § 1b and 8 § 3 for permission.

29. Cf. *Sessio* XII (X.22–26.1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 305.

60 Rescriptum quodlibet impetrari potest ab omnibus qui expresse non prohibentur.

Any rescript can be obtained by all who are not expressly prohibited.

SOURCES: c. 36 § 1; SCHO Resp. I, 27 ian. 1928 (*AAS* 20 [1928] 75)

CROSS REFERENCES: cc. 98, 99, 212 § 2, 293, 787 § 2, 1142, 1233, 1333 § 2, 1336 § 1, 2°, 1701 § 2

COMMENTARY

Javier Canosa

1. In a certain sense, c. 60 could imply the faculty expressed in c. 212 § 2, according to which "Christ's faithful are at liberty to make known their needs, especially their spiritual needs, and their wishes to the Pastors of the Church."

Nevertheless, the scope of c. 60 is greater, first because the expression "rescriptum quodlibet impetrari potest" does not refer solely to the declaration of one's own needs or wishes, nor does it extend merely to the capacity to present petitions to authority in the Church; as was emphasized more than once in the course of the revision of the Code,[1] to request is the same as to *obtain*.

Secondly, the extension of c. 60 is greater than the faculty cited in c. 212 § 2 because the power to obtain any rescript is not limited solely to the faithful. Any rescript can be obtained—according to c. 60—by "all who are not expressly prohibited," whether they are of the faithful or not, since the norm does not expressly state—as c. 60 requires—that they are prohibited from doing so. Consider, for example, the case of c. 787 § 2: "Missionaries are to ensure that they teach the truths of the faith to those whom they judge to be ready to receive the good news of the Gospel, so that, if *they* freely request it, they may be admitted to the reception of baptism." The word "they" has been italicized in order to indicate that it is precisely the unbaptized who can obtain admission to the sacrament of baptism. This admission implies an assessment of the request on the part of the competent authority, as well as a reply, which can take the written form, in which case an unbaptized person would have requested and obtained a

1. Cf., e.g., *Sessio* II (November 13–17, 1967) of the commission "de Normis Generalibus," in *Comm.* 17 (1985) p. 54, and *Sessio* XII (October 22–26, 1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 282.

rescript. In this respect, the provision of c. 1142 is no less clear: "A non-consummated marriage between baptized persons or between a baptized party and an unbaptized party can be dissolved by the Roman Pontiff for a just reason, *at the request of both parties or of either party,* even if the other is unwilling." The italics are meant to indicate that the text of the canon does not limit the faculty to request the dispensation in question to the baptized person; rather, it is extended to the unbaptized as well.[2]

2. Since the presentation of the instance gives rise to the birth of a juridical relationship between the authority and the concerned person, the signatory must be a person with sufficient capacity and standing to enter into this relationship.[3] The general regulations on capacity do of course apply to rescripts,[4] but they apply primarily to the person requesting the favor that is the object of the rescript, for that person is the one involved in the formation of the complex administrative act that is the rescript. By contrast, capacity is not necessarily required of the person who obtains the rescript. Thus, whereas the signatory to the instance must, as a general rule, have attained majority (c. 98) and have full use of his or her faculties (c. 99), the beneficiary of the rescript may be a minor or someone who habitually lacks the use of reason, just as the beneficiary may be a juridical person, as in the granting of privileges to shrines (c. 1233), a concession which is normally granted through a rescript.

3. In preparing the *preces*, or text, of the petition, the petitioner may avail himself of the technical collaboration of an expert in the law; for example, this is expressly provided in the directing of the process for the dispensation from a ratified and non-consummated marriage (cf. c. 1701 § 2, "An advocate is not admitted, but the bishop can, because of the difficulty of a case, allow the petitioner or respondent to have the assistance of an expert in the law").

4. As for the express prohibition on obtaining rescripts, c. 36 § 1 *CIC*/1917 remitted the determination of those prohibited from obtaining rescripts (excommunicated persons and those under personal interdict or suspension) to three other canons of that Code. Canon 60 *CIC*, however, does not refer to any penal canons, nor is there in the *CIC* any norm that specifies those prohibited from requesting rescripts. In contrast, the *CIC*/1917 established that the excommunicate, after the sentence of excommunication, could not "ullam gratiam pontificiam valide consequi, nisi in pontificio rescripto mentio de excommunicatione fiat" (c. 2265 § 2). In the corresponding canon of the current Code (c. 1333 § 2), it is established that the excommunicate is prohibited "frui privilegiis antea concessis."

2. Cf. another case along these lines in J.Mª IGLESIAS, *Procesos matrimoniales canónicos* (Madrid 1991), pp. 489–490.

3. Cf. R. ENTRENA CUESTA, *Curso de Derecho Administrativo* (Madrid 1982), p. 259.

4. Cf. O. GIACCHI, "Natura giuridica dei rescritti in Diritto canonico," in *Studi senesi* 2 (1937), p. 207.

Only the enjoyment of privileges—which can be but do not have to be, contained in rescripts—is, therefore, expressly prohibited in the current Code, and solely with respect to excommunicates and during the time that the censure is in effect. Since civil law presents no hypothesis that relates directly to c. 60, we should assume that c. 60 allows for the possibility of particular penal laws. We may, therefore, imagine a penalty consisting of the deprivation of the right to obtain, if not any rescript, then certainly specific rescripts (cf. c. 1336 § 2). On the other hand, it becomes difficult to conceive of the deprivation of the right to request any rescript, which, among other things, would imply incapacity to request remission of the penalty itself.

In contradistinction to the prohibition on obtaining rescripts that attaches to the petitioner would be the possibility of a prohibition that forbids an authority to grant rescripts in certain cases in which he might ordinarily grant them. For example, c. 293 establishes that a cleric who has lost the clerical state cannot be enrolled as a cleric again except by rescript of the Apostolic See. This presupposes a prohibition on obtaining the same rescript of re-enrollment from an authority competent in the enrollment of clerics but inferior to the Holy See. Similarly, the limitations that influence aspects of capacity can imply limitations on the right to request a given rescript. This happens with certain *vetita* of sentences in processes concerning nullity of marriage and with clauses in dispensations implying a prohibition regarding the obtaining of specific rescripts of dispensation from impediments to marriage.

61 **Nisi aliud constet, rescriptum impetrari potest pro alio, etiam praeter eius assensum, et valet ante eiusdem acceptationem, salvis clausulis contrariis.**

Unless it is established otherwise, a rescript can be obtained for another, even without that person's consent, and it is valid before its acceptance, without prejudice to contrary clauses.

SOURCES: c. 37; SCR Resp., 1 aug. 1922 (*AAS* 14 [1922] 501)

CROSS REFERENCES: cc. 241, 293, 597, 690, 692, 735, 1034, 1109, 1132, 1142, 1156, 1157, 1164, 1357 § 2, 1697

COMMENTARY

Javier Canosa

1. The law requires in certain cases that the petitioner or the signatory to the case be the same person who will be the beneficiary of the rescript. Such is the situation, for example, in the case of a petition for admission to baptism by an adult, which must be made by the candidate himself; similarly with the other petitions for admission found in the Code, such as a petition for admission to the orders of the diaconate and priesthood, considered in c. 1034. Moreover—although it is not stated explicitly in the text of the law—a similar presumption may be made in the cases of petitions for admission to the major seminary (c. 241), for admission to an institute of consecrated life (c. 597), and for readmission of a person who left an institute before perpetual profession (c. 690), as well as in the cases of a request for admission to a society of apostolic life (c. 735) and re-enrollment (c. 293), etc.

Nevertheless, when this requirement is not stated, the petitioner may be someone other than the person benefiting from the rescript. This difference occurs habitually with rescripts requested by one ecclesiastical authority of another, superior authority, when the beneficiaries will be a specific faithful subject to the inferior authority. Public officeholders in these cases must act through their public persona and not through private status.[1] The same is true with other rescripts in which the petitioner is simply distinct from the beneficiary, as in the case of c. 1357 § 2. This canon authorizes remission in the internal sacramental forum of the *latae sententiae* censure of excommunication or interdict that has not been declared,

1. Cf. L. GALATERIA—M. STIPO, *Manuale di Diritto Amministrativo* (Turin 1989), p. 260.

so that the request—in this case, the obtaining of the rescript with remission of the penalty—may be effected by means of a confessor, without indicating the name of the penitent. In this case, the beneficiary knows that he is in the process of obtaining a rescript in his favor, and it is his will that this be done. On the other hand, it can happen that the beneficiary does not know that he is obtaining or has obtained a rescript in his favor because the request was made by a petitioner other than himself. It could even be that the beneficiary does not consent to the rescript (cf. c. 61); notwithstanding, unless there are clauses to the contrary, the rescript will be valid.

2. From the Middle Ages until the promulgation of the *CIC*/1917, the prevailing doctrine acknowledged that the acceptance of the beneficiary was required for the valid use of rescripts, since—it was argued—"nihil volitum nisi praecognitum." This opinion was maintained above all by those who understood that the granting of a rescript was similar to a grant and was juridically completed only when it was accepted by the petitioner. For this they adduced the authority of Cicero, for whom "neque donationem sine acceptatione intelligi posse." This notion of the granting of a favor by rescript *ad instar donationis* began to be questioned relatively recently, but still prevailed until the new stance was adopted by the legislator in 1917. The wording of c. 37 *CIC*/1917 prompted commentators (Van Hove and Wernz-Vidal, among others) to conceptualize the granting of favors by rescript as a jurisdictional act of the superior, the value of which was dependent, not on its acceptance by the person subject to authority, but on the authority of the person issuing the rescript. From this point of view, which the legislator implicitly established in 1917, the granting of a favor by rescript would not be a *res*, the control of which passes to the petitioner by virtue of a giving that is completed and accepted; rather, it would be a *ius*, granted by the superior to the petitioner, that he might have the benefit of the favor. In the context of that right, competence will always depend on the will of the superior. In this shift of perspective concerning the juridical nature of a rescript, it is possible to document a move from certain categories of private law to very different categories of public law, to the extent that the rescript is now conceptualized as a singular administrative act, and therefore as unilateral, as is the current position of both the *CIC* and the *CCEO* (c. 1528). In the course of the preparation of the latter, a doubt arose in this respect, in response to which it was reaffirmed that the authority is free to grant favors even to those who do not desire them, since, in the last analysis, it is up to those individuals to decide whether or not they will make use of the favor.[2]

It must be remembered that all of the foregoing is subject to a condition stipulated in the canon itself ("... without prejudice to contrary clauses"). Canon 61, in short, provides for the possibility of clauses that run counter to the general norm that upholds the validity of rescripts

2. Cf. *Nuntia* 18 (1984), p. 89.

independent of the will of the grantee. Furthermore, the canon also anticipates certain cases in which the law itself requires the acceptance of the grantee, as happens in the case of an indult to leave a religious institute. According to c. 692, "An indult to leave the institute which is lawfully granted and made known to the member, by virtue of the law itself carries with it, *unless it has been rejected by the member in the act of notification,* a dispensation from the vows and from all obligations arising from profession."

There are other cases as well in which the notification of the rescript is required for its practical efficacy. For example, in the case of rescripts that grant dispensations after an invalid contract of marriage, such as must be granted in order to begin the convalidation, the party who is aware of the impediment must be notified of the rescript in order to be able to renew consent at the appropriate time (cf. cc. 1156 and 1157).

3. Save for these exceptions of a legal and practical nature, and those that can arise from contrary clauses (which the administrative authority decides to add in order to limit or broaden the basic effects of the act),[3] the norm is that rescripts are valid even when the grantee is not the petitioner and is not aware of the concession. Thus, for example, a rescript would be valid once the faculty has been granted, and therefore, so would a marriage celebrated before a priest who is not the ordinary or the parish priest (cf. c. 1109) if the faculty to assist at that marriage has in fact already been granted to him, even when the delegation to assist at the marriage has not been requested of the parish priest, and further, even when the priest is not aware that someone else has requested the delegation for him.

Similarly, in some cases, c. 61 produces effects not only when the grantee does not consent because he is not aware of the rescript, but even when the grantee is aware that the request has been made, and has indicated his opposition to the favor that is the object of the rescript. In these cases as well, the rescript is valid before its acceptance, which might never occur. A perfect example is found in c. 1142—the content of which was reaffirmed in c. 1697—which states that a non-consummated marriage can be dissolved by the Roman Pontiff for a just reason—in this case, a dispensation would be the object of the rescript—at the request of both parties or of either party, *even if the other is unwilling.*

3. Cf. L. GALATERIA—M. STIPO, *Manuale...*, cit. (Turin 1989), p. 267.

62 Rescriptum in quo nullus datur exsecutor, effectum habet a momento quo datae sunt litterae; cetera, a momento exsecutionis.

A rescript in which there is no executor, has effect from the moment the document was issued; the others have effect from the moment of execution.

SOURCES: c. 38; SCDS *Normae*, 7 maii 1923, 103 (*AAS* 15 [1923] 413); SCDF *Normae*, 13 ian. 1971, V/1 (*AAS* 63 [1971] 306); SCDF Decl., 26 iun. 1972, IV (*AAS* 64 [1972] 642)

CROSS REFERENCES: cc. 37, 40–45, 54, 68, 60, 69, 202, 1078 § 2, 1082, 2°, 1161 § 2

COMMENTARY

Javier Canosa

1. Appearing in c. 62 is the expression *effectum habet* (has effect, is efficacious), which should be understood as distinct from the term *valet* (is valid), used in c. 61. This distinction was introduced in the *CIC*/1917 and implies a departure from the law prior to the *CIC*/1917. The issue did not cease to be important, since acts sometimes became null if no reference to the date was contained in them, as happened, for example, after the Decree *Ne temere* in the documentation of marriage vows. It was, perhaps, questions such as this, and later, the new procedural forms of the Roman Curia contained in the Apostolic Constitution *Sapienti Consilio*, June 29, 1909,[1] that impelled the codifiers of the *CIC*/1917 to draft the precursor of c. 62. This canon established that a rescript *in quo nullus datur exsecutor* (in which there is no executor) has effect *a momento quo datae sunt litterae* (from the moment the document is issued) and other rescripts *a tempore exsecutionis* (from the moment of execution).

2. Presupposing efficacy as distinct from validity, c. 62 is concerned with the two types of rescripts, a classification that reflects the moment in which their efficacy begins. It is important not to lose sight of the fact that the canon refers expressly to the *moment*, not to the day (cf. c. 202), a distinction that can be important in a particular case.

a) The first type of rescript discussed in c. 62 is that which takes effect with *immediate efficacy*,[2] that is, from the very moment in which the document is *issued*. That moment occurs when the granting authority

1. Cf. PIUS X, Ap. Const. *Sapienti Consilio*, June 29, 1909, in *AAS* 1 (1909), pp. 7–8.
2. Cf. L. GALATERIA—M. STIPO, *Manuale di Diritto Amministrativo* (Turin 1989), p. 344.

signs the document of concession.[3] Only then, and not before—for example, when the favor is granted by the conference or by the full corresponding congregation—or later, does the rescript begin to have effect, save in a few exceptional situations; in these, the norm establishes that certain rescripts have effect from the very moment of the concession, before the issuance of the document. Such is the case with a pontifical dispensation *super matrimonio rato et non consummato*, in accordance with the content of the norms governing this dispensation contained in the Decree *Catholica doctrina* of May 7, 1923.[4] In that decree, article 103 states: "Attenta eiusmodi forma, rescriptum *effectum habet a temporis momento quo in die audientiae summus Pontifex dispensationem concessit.*" Something similar occurs when the convalidation of an invalid marriage is granted, if the text of c. 1161 § 2 is interpreted strictly: "The validation takes place *from the moment the favor is granted*; the referral back, however, is understood to have been made to the moment the marriage was celebrated, unless it is otherwise expressly provided."

Rescripts of this type were traditionally called *rescripts in forma gratiosa.*

b) In contrast to the first type, c. 62 distinguishes rescripts that begin to have effect with *deferred efficacy*,[5] from the moment of their execution; these rescripts are traditionally called *rescripts in forma commissoria.*

In addition to the difference in their moment of efficacy, these two types of rescripts differ in the authorities that must be involved in order for the act to have effect. Whereas the efficacy of the first type depends only on the granting authority, that of the second depends as well on the involvement of an *executor.* Normally this is an ecclesiastical authority inferior to the granting authority who performs the *execution* or controlling activity. On the one hand, this authority facilitates the prevention of abuses, while on the other hand, it guarantees the actual fulfillment of the clauses imposed in the rescript by the granting authority when these are to be verified prior to the concession. For example, the granting by the Holy See of the dispensation from the impediment of crime (cf. c. 1078 § 2, 2°), which is given only when sufficient passage of time prevents the occurrence of scandal, requires that an authority inferior to the Holy See, more closely associated to the grantee, verify that the scandal has truly been removed, and that therefore, there is nothing to prevent the impediment from being dispensed with.

3. The execution of rescripts requires the written form when they affect the external forum, as is expressly established in c. 37 for the execution of any singular administrative act. This disposition affects only the

3. Cf. A. VAN HOVE, *De rescriptis* (Malines-Rome 1936), p. 116; and E. LABANDEIRA, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1992), p. 450.

4. Cf. SCDS, Decr. *Catholica doctrina* of May 7, 1923, *AAS* 15 (1923), pp. 389–436.

5. Cf. L. GALATERIA-M. STIPO, *Manuale...*, cit., p. 344.

lawfulness, not the validity, of the execution, unless it is established otherwise. The written form is required for the execution because this is the ordinary and simplest means of proving acts that must be submitted to the external forum. The proceedings that accompany the execution do not necessarily have to be recorded in writing, but it is indeed appropriate to preserve a record of them in a document other than that of the execution.

In the internal *sacramental* forum, however, the execution of a rescript can never take written form. It would be possible for the execution of rescripts in the *non-sacramental* internal forum to take a written form; at least, the proceedings are usually written down, as in the case of a dispensation from an occult impediment to marriage, which is recorded in a book to be kept in the secret archive of the episcopal curia. One of the reasons for this is so that if the occult impediment subsequently becomes a public one, a new dispensation will not become necessary for the external forum unless a rescript of the penitentiary provides otherwise (cf. c. 1082).

It is also possible to conceive of an execution that is tacit or de facto; for example, the tacit admission of a secularized religious in a diocese owing to the fact that the diocesan bishop has entrusted him with a pastoral work within his jurisdiction.

Execution in written form facilitates the fixing of the precise moment of execution, and consequently, makes it possible to determine the very *moment* that the rescript begins to produce effects. This occurs when the document is signed by the executor, independent of whether the document is yet to be intimated or made known to the person in whose favor the rescript has been granted.

63 **§ 1. Validitati rescripti obstat subreptio seu reticentia veri, si in precibus expressa non fuerint quae secundum legem, stilum et praxim canonicam ad validitatem sunt experimenda, nisi agatur de rescripto gratiae, quod *Motu proprio* datum sit.**

§ 2. Item validitati rescripti obstat obreptio seu expositio falsi, si ne una quidem causa motiva proposita sit vera.

§ 3. Causa motiva in rescriptis quorum nullus est exsecutor, vera sit oportet tempore quo rescriptum datum est; in ceteris, tempore exsecutionis.

§ 1. Except where there is question of a rescript which grants a favour *Motu proprio*, subreption, that is, the withholding of the truth, renders a rescript invalid if the request does not express that which, according to canonical law, style and practice, must for validity be expressed.

§ 2. Obreption, that is, the making of a false statement, renders a rescript invalid if not even one of the motivating reasons submitted is true.

§ 3. In rescripts of which there is no executor, the motivating reason must be true at the time the rescript is issued; in the others, at the time of execution.

SOURCES: § 1: cc. 42 § 1, 45; *SAP* Monitum *Quo magis*, dec. 1941
§ 2: cc. 40, 42 § 2; SCDS Decr. *Catholica doctrina*, 7 maii 1923 (*AAS* 15 [1923] 390); SCDF *Normae*, 13 ian. 1971, II/1 (*AAS* 63 [1971] 303); SCDS Instr. *Dispensationis matrimonii rati*, 7 mar. 1972, I/f (*AAS* 64 [1972] 247–248)
§ 3: c. 41; SCDS *Normae*, 7 maii 1923, 103 (*AAS* 15 [1923] 413)

CROSS REFERENCES: cc. 14, 65, 90, 1049 § 2, 1049 § 2, 1292 § 3, 1358, 1359

COMMENTARY

Javier Canosa

1. When a rescript is granted by authority, it is presumed that the request has a basis in truth. In fact, the clause "*si preces veritate nitantur*," taken from classical law, was contained in a canon of the *CIC*/1917. It was not passed on to the *CIC* because its content was understood to be obvious.

It is through comparison of the *preces* with the truth that the terms *subreption* and *obreption* get their meanings. In the law prior to the *CIC*/1917, the doctrine never preserved an agreement on the meaning of subreption and obreption. Before the definitions were formalized in the *CIC*/1917, it was not uncommon to confuse the two terms, as can be seen in numerous texts of canon and Roman law in which obreption and subreption are used interchangeably.[1] Canon 42 *CIC*/1917 completely justified to the will of the codifiers to establish definitively at the outset what was to be understood by these two terms.

The same ideas were passed on to c. 63 *CIC*, which can be seen as one more step in the process of clarifying and simplifying concepts[2] that was begun by the codifiers of the *CIC*/1917. At the same time, it can also be seen as a stage in a different process—the increasing juridical objectivity of the relationship between the petitioner and the authority issuing the rescript. Even in c. 42 *CIC*/1917, this relationship had ceased to be quasi-private in nature ("*ad instar donationis*"). It ceased to resemble donation, in which one person donates a good from his patrimony on the condition of a determined degree of sincerity in the donee—which must also be evident in the degree of truth—and became a juridical relationship of public law. These psychological processes do not in themselves have any importance for the extinction, modification, or creation of juridical situations, because these effects have already been established by the norms.[3] In short, the petitioner is not a donee, but is simply said to be administered to, while the authority issuing the rescript is not a donor, but an administrator, whose powers are jurisdictional, not proprietary. Along with this development, the reasons are no longer thought of as facts that motivate the *voluntas donationis* of the superior. Instead, they have been transformed into objective circumstances that the law, practice, and style of the curia consider sufficient for the granting of the favor that is being requested. At the same time, this change supposes that the granting authority, like the executing authority, is subject to administrative law. One example of this objectivity, which was already present in the *CIC*/1917, is the remission of a censure to an offender, which, as c. 1358 stipulates, cannot be refused, once the offender has withdrawn from his contumacy.

2. *Subreption* is understood in the *CIC*, as it was in the *CIC*/1917, as a withholding of the truth, such that the validity of a rescript is impeded because the request does not express that which, according to canonical law, style, and practice—not the greater or lesser liberality of the grantor—must be expressed for validity. In addition to this general principle that regulates the objective relationship, there are also cases in which

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1. Cf. A. VAN HOVE, *De rescriptis* (Machliniae—Rome 1936), p. 136.
2. Cf. *Sessio* II (November 13–17, 1967) of the commission "de Normis Generalibus," in *Comm.* 17 (1985) p. 45.
3. Cf. L. GALATERIA-M. STIPO, *Manuale di Diritto Amministrativo* (Turin 1989), p. 263.

the good or bad faith of the petitioner becomes relevant. For example, when a petitioner asks in his or her request for the remission of several penalties to which he or she is subject, the remission is valid only for those penalties expressed in the request for remission. In the case of general remission, all penalties are removed except those that the offender concealed in bad faith in the petition (cf. c. 1359).

When a request for a rescript is missing part of "that which must for validity be expressed," but the authority grants the rescript with the clause *Motu proprio*, said omission, which would otherwise invalidate the rescript, is thereby validated. The clause *Motu proprio*—another indication that the activity of the administration generally unfolds in a practical and direct manner—supposes a further act that makes good the omission of necessary information in the request. This act is performed by the authority issuing the rescript, is based on the request, and is carried out through the means proper to the administration. In the words of Bernárdez Cantón, "in the *preces*, the reasons are especially important, since it is their verification that makes reasonable the granting of a special favor to a specific person, and moreover, the objectification of the reason through the practice guarantees the keeping of the principle of equal favorable treatment for those in similar circumstances."[4]

Reasons may be *motivating*, when they are sufficient in themselves to obtain the favor, or *impelling*, when they facilitate or contribute to its obtainment. From this also follows one of the differences between decrees and rescripts, as was made clear in the course of the reform of the Code: if the situation that moves the authority to issue a decree is not based in the truth, the decree does not thereby cease to be valid, though it may be revoked by the authority who issued it. This is not the case with rescripts, whose validity is indeed affected.[5]

Subreption, then, is the concealment of circumstances relevant to the resolution of the question at issue, because the request did not express—*in precibus expressa non fuerit*—what had to be expressed, independent of the good faith of the petitioner. As was clarified during one of the sessions of the *coetus*,[6] the term *expressa* should be understood to mean that the information adduced must be not only sufficiently clear, but also *sufficiently proven*.

The text of c. 63 § 1 requires that the request state that which law, style, and practice require for validity. Cases in which the law determines the specific matters that are to be expressed in the request are found, for example, in c. 1049 § 2. This canon specifies that in order to obtain a dis-

4. Cf. A. BERNÁRDEZ CANTÓN, *Parte general de Derecho Canónico* (Madrid, 1990), p. 141.
5. Cf. *Sessio* XI (March 12–16, 1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 250.
6. Cf. *Sessio* XI (March 12–16, 1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 243.

pensation from irregularities for the reception or exercise of orders in the case of an irregularity arising from willful homicide or from a procured abortion, the *preces* must state, in order for the rescript to be *valid*, the number of offences committed. Another example is that of the request for permission mentioned in c. 1292, concerning the case of alienation of ecclesiastical goods whose value exceeds a determined sum. Canon 1292 § 3 establishes that if the goods to be alienated are divisible, then the request must mention the parts that have already been alienated; otherwise the permission is *invalid*.

Just as in the aforementioned cases the publication of the law enables the petitioner to know what the law specifies, so too the specifications of the style and practice of the curia can be known by the regulations governing them, the declarations of various bodies, and other channels through which this style and practice are manifested. For example, it is the practice of the *CDWDS* not to grant the petitions of permanent deacons who have become widowed and request a dispensation in order to remarry.[7] Practice and style are not to be understood as peculiar to the Roman Curia; each ordinary has his own style and practice that determine what must be observed within his territory (on the analogy of particular law with respect to universal law). For rescripts in which the style and practice of the diocesan curia coincides with that of the Roman Curia, the latter takes precedence.

3. Obreption is the "*expositio falsi*" within the limited context of motivating reasons. This reduces the value that earlier doctrine attributed to the expression of falsehoods that did not directly concern motivating reasons. When only one reason is alleged, it must be motivating, and if it be false, the rescript will be invalid. If more than one reason is alleged, it will suffice for the granting of the rescript for one of the motivating reasons to be true. If, on the other hand, only various impelling reasons are alleged without any motivating reason, then in order for a motivating reason to be generated from the group of impelling reasons, all of the impelling reasons must be true, unless the reason that is not true is merely an accidental one of little importance. For example, in the case of a dispensation from canonical form in a marriage between Catholic children or Catholic relatives of non-Catholic ministers who wish to celebrate their marriage before their relatives, the circumstance of being the son or daughter or very close relative would be, in this case, the motivating reason,[8] without which the dispensation, and therefore the rescript, would be invalid, because falsity in this circumstance would constitute obreption. The same would not hold if it were other, accidental circumstances that were not true, which in this hypothetical case would be merely impelling reasons (such as the possibility that the ceremony, if it were performed

7. Cf. *L'attività della Santa Sede*, 1991, p. 1152.
8. Cf. ibid., p. 1152.

thus, might serve to bring the non-Catholic relatives of the couple closer to the Catholic faith).

Unlike subreption, obreption cannot be validated by a *Motu proprio* clause, not only because the falsity of adduced reasons often occurs together with an *animus doli*, but also because it is, at the very least, unlawful to grant a favor without a sufficient reason. Moreover, in many cases the absence of a sufficient reason also produces invalidity (cf. c. 90).[9]

4. Regarding what is expressed in the *preces*, it is for the authority issuing the rescript to verify which reasons are motivating and which are impelling. If obreption has occurred in one of the reasons, the authority must investigate in order to determine whether one, at least, of the motivating reasons is true.

In fact, however, in rescripts for which there is no executor, the absence of subreption and obreption is actually verified by the same person who issues the rescript. Thus, the verification must be in reference to the time at which the rescript is issued; often only the person granting the rescript can determine the veracity of the motivating reason at that specific moment. In rescripts for which there is an executor, it is he who, at the time of execution, verifies whether subreption or obreption has occurred. Accordingly, in rescripts that grant a dispensation from an impediment to marriage, this controlling activity of the executor is helped by specific mention of the motivating reason that has determined the dispensation, so that the executor may verify the accuracy of the motivating reason, on which depends the validity of the rescript.

5. When there is doubt about the existence of subreption or obreption, c. 14 must be applied if the doubt is a doubt of law. Laws, even invalidating and incapacitating ones, do not oblige when there is a doubt of law. Therefore, reticence in divulging elements of the truth that are not required to be expressed in order for the rescript to be valid, does not void the rescript. When there is doubt about the existence of a fact that must be expressed, that fact must be expressed in order for the act to be valid,[10] unless it is established otherwise. For example, the practice of the Roman Curia does not grant standing to a petition for a dispensation from a ratified and non-consummated marriage when there is doubt about the fact of non-consummation.

9. Cf. B. MARCHETTA, *Scioglimento del matrimonio canonico per inconsumazione e clausole proibitive di nuove nozze* (Padua 1981), p. 324.

10. Cf. D. *de rebus dubiis*, XXXIV, 5, 12.

64 **Salvo iure Paenitentiariae pro foro interno, gratia a quovis dicasterio Romanae Curiae denegata, valide ab alio eiusdem Curiae dicasterio aliave competenti auctoritate infra Romanum Pontificem concedi nequit, sine assensu dicasterii quocum agi coeptum est.**

Without prejudice to the right of the Penitentiary for the internal forum, a favour refused by any department of the Roman Curia cannot validly be granted by another department of the same Curia, or by any other competent authority below the Roman Pontiff, without the approval of the department which was first approached.

SOURCES: c. 43

CROSS REFERENCES: cc. 57, 59 § 2, 65, 130, 139, 609 § 2, 691, 693, 1082, 1165, 1732

COMMENTARY

Javier Canosa

1. Canons 64 and 65[1] consider cases in which different authorities are competent to grant the same rescript and establish basic rules to avoid possible conflicts of competence between them. Such a situation is to be distinguished from that which arises when, in connection with the same matter, the involvement of two different authorities is required, each through a rescript or a permission governing the same matter (e.g., c. 609 § 2, on the establishment of monasteries of nuns, for which the permission of the Apostolic See is required in addition to the written consent of the diocesan bishop). It is also to be distinguished from that which occurs when the obtaining of a rescript from one authority is a necessary condition for the admissibility of a second rescript from a different authority (e.g., cf. c. 693, according to which an indult to leave a religious institute will not be granted to a member, if he be a cleric, until he has found a bishop who will incardinate him in his diocese or at least receive him there on probation).

The different authorities capable of granting the same rescript may be at the same level (e.g., both the CDF and the CC are competent to rehabilitate priests who have incurred canonical penalties[2] to the exercise of

1. Cf. *CCEO*, which simplifies and collects in one canon (c. 1530) practically the same dispositions as those contained in these two canons of the CIC.
2. Cf. *L'attività della Santa Sede*, 1991, pp. 1135 and 1252.

sacred orders), or at different levels. Two examples of the latter are found in cc. 691 and 1165. Canon 691 establishes that a perpetually professed religious may obtain an indult from the Holy See to leave an institute, but it states that, if the institute is of diocesan right, such an indult may also be granted by the bishop in whose diocese the house to which the religious is assigned is located. Canon 1165 establishes that retroactive validation, which can always be granted by the Apostolic See, can also be granted by the diocesan bishop in individual cases, provided no impediment is involved whose dispensation is reserved to the Apostolic See. In either case, the regimen established by cc. 64 and 65 determines how the chronological and hierarchical criteria are to be applied in order to avoid or resolve conflicts of competence and promote the certainty of the law[3] (cf. c. 139 § 1, which establishes that "the fact that a person approaches some competent authority, even a higher one, does not mean that the executive power of another competent authority is suspended," while § 2 adds that "a lower authority, however, is not to interfere in cases referred to higher authority, except for a grave and urgent reason, in which case the higher authority is to be notified immediately").

2. Regarding c. 64, we must start with two assumptions:

a) The first concerns the type of favor affected by this norm, namely, *a favor refused by any department of the Roman Curia.* Even though, as in c. 65, the text refers to the asking and granting of *favors*, with c. 59 § 2 in mind, we should understand this regulation as also applying equally well to permissions and to favors granted by word of mouth, unless it is established otherwise, so the word *favor* here should be interpreted broadly. It must also denote the *same* favor, with the same passive subject and the same object. Further, it must be a favor *refused,* inasmuch as the canon does not refer to a favor that has only been requested or processed, or requested so long ago that it can be presumed to have been refused through administrative silence (cf. c. 57). Nor does it refer to the case in which the same favor has already been granted by a different dicastery, assuming it was open to being granted again.

b) The second concerns the authorities affected by this disposition. The refusal must emanate from a dicastery (cf. *PB* 2 § 1) of the Roman Curia authorized to issue rescripts (cf. *RGCR,* 133). Therefore, c. 64 does not refer to a favor refused by an authority inferior to a dicastery, so the favor could be validly granted by a dicastery of the Roman Curia, though it would lack the consent of the authority who initially refused it. Canon 64 affects the dicasteries of the Roman Curia and the other granting authori-

3. On the principle of hierarchy in the organization of the Church, cf. J.I. ARRIETA, *Organizzazione ecclesiastica. Lezioni di Parte Generale* (Rome 1992), pp. 206–208.

ties inferior to them, but it does not affect the Roman Pontiff, the same dicastery which refused it, or the Apostolic Penitentiary for the internal forum. In this last case, one must remember the competence of the Apostolic Penitentiary to grant favors validly for the internal forum which have previously been refused by another dicastery, by virtue of the fact that the external and internal fora are independent and governed by different regimens (cf. cc. 130 and 1732). This diversity, in turn, rests on the different ways of safeguarding the *salus animarum*, considering the peculiarities of the two fora. When the *salus animae* of one member of the Church compromises the *salus animarum* of other members (e.g., in situations where there is a danger of scandal with consequent harm to the faithful), the response of authority differs from its response in the internal forum, where the granting of a favor in no way compromises the *salus animarum* of other members (because it may be that it is appropriate for the *salus animae* of a grantee to be freed of a burden before God, yet inopportune for the Church, that that burden be relaxed). Therefore, rescripts of the Apostolic Penitentiary that grant favors, absolutions, dispensations, validations, pardons, or other similar acts are valid for the internal forum even though they may have been refused in the external forum by another dicastery. *Per accidens*, however, in the case of dispensation from matrimonial impediments granted in the non-sacramental internal forum, the rescript of the Penitentiary can be valid in the external forum if the impediment should subsequently become public (cf. c. 1082). On the other hand, in matters unrelated to matrimonial impediments (e.g., sanation, reduction, and other similar acts connected with the obligations of priests, requested of the Apostolic Penitentiary in the internal forum), there is no normative disposition by which, with the passing of time, a favor already granted in the internal forum can become valid in the external forum.

3. One might ask whether a favor refused by the Penitentiary in the internal forum may be obtained from a different authority or dicastery in the external forum. There was a measure of consensus in the *coetus* that developed c. 64 that it could,[4] but such a disposition was never incorporated in the Code. The doctrine[5] is also inclined to answer in the affirmative, arguing that the competence of the dicasteries and other authorities does not extend to factors that affect only the internal forum and noting that the reasons provided by the Penitentiary in its refusal cannot be revealed, and so cannot be known.

4. Once these conditions have been stated, c. 64 establishes the invalidity of the concession (not of the request *per se*, which at most could be considered unlawful) made by a dicastery or some other inferior authority

4. Cf. *Sessio* II (November 13–17, 1967) of the commission "de Normis Generalibus," in *Comm.* 17 (1985) p. 51.

5. Cf., e.g., F.J. Urrutia, *De Normis Generalibus. Adnotationes in Codicem: Liber I* (Rome 1983), p. 42.

of a favor previously refused by a dicastery of the Roman Curia, without the approval of the dicastery that had refused it; nor is it sufficient simply to mention the refusal in the rescript of concession.

5. One case not addressed in c. 64 is that of a favor refused by a dicastery and granted by the Roman Pontiff, even when the request does not mention the refusal, and so does not have the approval of the dicastery. In this case, the action of the petitioner could be unlawful, and the act, though valid, could be revocable.

65 **§ 1. Salvis praescriptis §§ 2 et 3, nemo gratiam a proprio Ordinario denegatam ab alio Ordinario petat, nisi facta denegationis mentione; Ordinarius gratiam ne concedat, nisi habitis a priore Ordinario denegationis rationibus.**

§ 2. Gratia a Vicario generali vel a Vicario episcopali denegata, ab alio Vicario eiusdem Episcopi, etiam habitis a Vicario denegante denegationis rationibus, valide concedi nequit.

§ 3. Gratia a Vicario generali vel a Vicario episcopali denegata et postea, nulla facta huius denegationis mentione, ab Episcopo dioecesano impetrata, invalida est; gratia autem ab Episcopo dioecesano denegata nequit valide, etiam facta denegationis mentione, ab eius Vicario generali vel Vicario episcopali, non consentiente Episcopo, impetrari.

§ 1. Without prejudice to the provisions of §§ 2 and 3, no one is to seek from another Ordinary a favour which was refused by that person's proper Ordinary, unless mention is made of the refusal. When the refusal is mentioned, the Ordinary is not to grant the favour unless he has learned from the former Ordinary the reasons for the refusal.

§ 2. A favour refused by a Vicar general or an episcopal Vicar cannot be validly granted by another Vicar of the same bishop, even when he has learned from the Vicar who refused the reasons for the refusal.

§ 3. A favour refused by a Vicar general or an episcopal Vicar and later, without any mention being made of this refusal, obtained from the diocesan bishop, is invalid. A favour refused by the diocesan bishop cannot, without the bishop's consent, validly be obtained from his Vicar general or episcopal Vicar, even though mention is made of the refusal.

SOURCES: § 1: c. 44 § 1

§ 2: *ES* I, 14 § 4

§ 3: c. 44 § 2; *ES* I, 14 § 4

CROSS REFERENCES: cc. 59 § 2, 107 § 1, 128, 1389

COMMENTARY

Javier Canosa

1. Canon 65 considers those rescripts that can be granted by different authorities that do not belong to the central government of the Church. This class of rescripts includes, on the one hand, those that can be granted by authorities of equal rank in different jurisdictional structures, and on the other hand, those that can be granted by various authorities of equal or different rank in the same jurisdictional structure.

In this canon, too, the term *favor* should be understood in its broadest sense (cf. c. 59 § 2), which includes permissions as well. A specific example of the application of c. 65 to a permission is the reference back to c. 65 made by the CDF's *Instructio quoad aliquos adspectus usus instrumentorum communicationis socialis in doctrina fidei tradenda*, in establishing that "when the permission has been refused by a local Ordinary, one may have recourse to another competent Ordinary, provided one mentions the earlier refusal; the second Ordinary, for his part, is not to grant the permission without having obtained from the first Ordinary the reasons for the refusal."[1]

2. In the cases considered in c. 65, it is not difficult to see that, whereas violation of the sequential criterion alone results in the unlawfulness of the request or the concession, violation of the sequential criterion together with transgressions of the hierarchical principle determine as well the invalidity of the rescript. The unlawfulness mentioned in c. 65 and other canons is not simply a moral unlawfulness, but rather a juridical unlawfulness with juridical consequences, such as the possible revocation of the act, the obligation to repair any damage done (cf. c. 128), and administrative sanctions, not excluding the possibility, in grave situations, of penal sanctions (cf. c. 1389).

3. Given the differences between the internal and external fora, and bearing in mind the exception discussed in the commentary on c. 64 with respect to the Apostolic Penitentiary, it should be understood that the provisions of c. 65 apply only to the external forum.

4. Canon 65 § 1 discusses the case of rescripts that can be requested of more than one ordinary of equal rank; for if they are of unequal rank, the hierarchical principle enters into play, and it then becomes necessary to refer either to c. 64, or to c. 65 § 3.

Once again, c. 65 is concerned with a favor which has been *refused*, in this case by the proper ordinary. One should remember that a favor refused is different not only from a favor that has not yet been requested of

1. Cf. CDF, Instructio quod aliquos adspectus usus instrumentorum communicationis socialis in doctrina fidei tradenda, March 30, 1992, in *Comm.* 24 (1992), pp. 18–27, no. 11 § 2.

the proper ordinary, but also from a favor that has been requested and not yet refused (even when it is *presumed* to be refused through administrative silence). It also differs from a favor requested and granted, but capable of being granted a second time by a different ordinary because of failure to use it the first time.

Further, it must have been refused by the *proper ordinary*. Generally, in a case of territorial administrative divisions, the proper ordinary, according to c. 107 § 1, is the ordinary of domicile or quasi-domicile. Since the canon refers to the proper ordinary, it should be remembered that c. 65 is concerned not only with the diocesan bishop,[2] but also with vicars general and episcopal vicars. For members of clerical religious institutes or clerical societies of apostolic life of pontifical right, the proper ordinary is the major superior.

It would not be lawful to grant the favor without consulting the proper ordinary who first refused it. The petitioner would incur personal unlawfulness if he failed to mention that detail in his request, thereby risking rescission of the rescript if it is so established by the practice or style of the granting ordinary's curia. The granting authority, not the petitioner, incurs unlawfulness if the earlier refusal was reported in the *preces*.

This situation is to be distinguished from others in which it is necessary to have two rescripts from different authorities, though the petitioner is the same and the objects are related. Such a situation occurs, for example, in the case of c. 267 ("To be validly incardinated in another particular church, a cleric who is already incardinated must obtain a letter of excardination signed by the diocesan bishop, and in the same way a letter of incardination signed by the diocesan bishop of the particular church in which he wishes to be incardinated"). Of course, the positions of clerics who wish to be incardinated in a new diocese can be very diverse. It may be that a cleric wishes to be incardinated in a new diocese after his bishop has already refused him a letter of excardination. It would be lawful for the cleric to request a guarantee of incardination in a new diocese precisely so that he can present to his current ordinary a new request for excardination. On the other hand, it is understood that in the majority of cases, it would not be lawful to request a guarantee of incardination from a new diocese without mentioning the first refusal of excardination, because even though the requests are for different favors, those favors are related. For his part, the second ordinary in this hypothetical situation may give these guarantees without having to receive the reasons for the first refusal of excardination, because excardination and incardination are different acts. Similar cases are found in cc. 638,[3] 678, 684, 686, 745, 824, and 971.

2. Cf. this same clarification in CBI, Istruzione in materia amministrativa, April 1, 1992 (Rome 1992), no. 61a.
3. Cf. CBI, ibid., no. 62.

It must also be remembered that the request is made to a *different ordinary*. The term *ordinary* is understood as, "apart from the Roman Pontiff, diocesan bishops and all who, even for a time only, are set over a particular church or a community equivalent to it in accordance with can. 368, and those who in these have general ordinary executive power, that is, vicars general and episcopal vicars; likewise, for their own members, it means the major Superiors of clerical religious institutes of pontifical right and of clerical societies of apostolic life of pontifical right, who have at least ordinary executive power" (c. 134 § 1). By this legal definition of ordinary, which includes the Roman Pontiff, the first of the two juridical illegalities established in c. 65 § 1 acquires a greater extension; in effect, the illegality of requesting a favor without mentioning the refusal of the proper ordinary will apply as well to a request made of a higher authority (the Roman Pontiff, or authorities that enjoy the vicarious power of the pope, such as the dicasteries of the Roman Curia). On the other hand, the hierarchical principle cannot be disregarded in considering the unlawfulness that can accrue to an authority who grants a rescript without knowing the reasons for the refusal; therefore, it does not seem that the granting authority would incur such unlawfulness, provided the authority is a higher body. Of course, in most cases it would not be most opportune for an authority inferior to the Roman Pontiff but superior to the ordinary who refused the request to act in this way, though it might be in individual cases.

The prohibition on the petitioner requesting of a second ordinary a favor that was refused by the proper ordinary without mentioning the earlier refusal, holds even when the second ordinary may also be proper.

One should bear in mind the normative dispositions concerning the competence necessary to issue a rescript of the type under discussion. One may be a titular of a certain delegated *potestas rescribendi* without necessarily having ordinary power (cf. cc. 639 § 1, 647 § 2, 649 § 2, 653 § 2, 671). Titulars of ordinary executive power have varying degrees of competence to issue rescripts—at least, rescripts understood in the broad sense—depending on the normative dispositions. Some could have a certain power to issue rescripts in the broad sense of that word by virtue of their office. These include the rector of a church (c. 561) and the parish priest (cc. 874 § 2, 911 § 2, 1111, 1118, 1196). Any ordinary can issue rescripts in connection with the matters regulated, for example, in cc. 1168, 1189, 1223, 1281, and 1284, 6°. By contrast, only the proper ordinary can do so in cases governed by cc. 1115 and 1288.[4] The local ordinary is competent (cf. c. 134 § 2) to issue the rescripts and permissions mentioned in cc. 527, 630, 930 § 1, 933, and 1071. Only the diocesan bishop (cf. c. 134 § 3), who is simultaneously the ordinary, the proper ordinary, and the local

4. Cf. CPI, Reply regarding the figure of the the proper Ordinary referred to by c. 951, April 23, 1987, *AAS* 79 (1987), p. 1132.

ordinary, is competent to issue, among others, the rescripts or permissions mentioned in cc. 271, 609, 701, and 1692 § 2.

5. Canon 65 §§ 2 and 3 establish the regimen for the concession of rescripts that can be granted by more than one authority *in the same hierarchical structure*. Canon 65 § 2 concerns authorities who are of the same rank and enjoy vicarious power, while paragraph 3 concerns authorities of different rank within the same hierarchical structure.

Canon 65 § 2 essentially echoes the criteria given for the Roman Curia in c. 64; now, however, they are applied to the intermediate level of ecclesiastical organization. Whereas it is valid to grant a favor that has not been refused by another vicar of the bishop, it is not, however, valid to grant a favor that has already been refused by another vicar of the bishop, even if the reasons for the refusal have been obtained beforehand. On the other hand, though it is not explicitly stated in the text of the canon, it seems logical to think that the granting of the favor, if the second vicar has granted it with the consent of the first, would not be invalid, since such consent, after the earlier refusal, acts like a revocation of that refusal.

In order to understand why invalidity in paragraph 2 replaces unlawfulness in paragraph 1, since both discuss authorities of equal rank, one must remember that the power of vicars belongs properly to the principal office, in this case, to the bishop, and that the vicars participate vicariously in this power (cf. c. 391). It is unreasonable to suppose that the same power can contradict itself, even when different titulars participate in it in different ways. In this sense, c. 65 preserves uniformity in the exercise of executive power[5] attributed to the bishop for the granting of rescripts. Canons 473 § 1 and 480 fulfill the same function, though in more general contexts.

This explains why, in c. 65 § 3, the criterion of hierarchy does not come into play: a favor granted by a bishop is invalid, if it was previously requested of, and refused by one of his vicars, and no mention was made of that refusal in the request submitted to the bishop. This disposition does not represent a failure in the power of the bishop vis-à-vis the power of the vicar—that would be impossible. Rather, the norm, by determining that legal subreption has occurred—failure to mention in the *preces* that the favor being requested has already been refused by a vicar—protects and reinforces the unity of executive power exercised by the bishop, either in his own right or through his vicars.

5. Cf. E. LABANDEIRA, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1992), p. 452 and J.I. ARRIETA, *Organizzazione ecclesiastica. Lezioni di Parte Generale* (Rome 1992), p. 200.

66 **Rescriptum non fit irritum ob errorem in nomine personae cui datur vel a qua editur, aut loci in quo ipsa residet, aut rei dequa agitur, dummodo iudicio Ordinarii nulla sit de ipsa persona vel de re dubitatio.**

A rescript is not rendered invalid because of an error in the name of the person to whom it is given or by whom it is issued, or of the place in which such person resides, or of the matter concerned, provided that in the judgement of the Ordinary there is no doubt about the person or the matter in question.

SOURCES: c. 47

CROSS REFERENCES: cc. 39, 67 § 3, 100, 102, 134, 1292, 1732

COMMENTARY

Javier Canosa

1. In principle, a rescript free of errors does not pose any difficulty about its validity. On the other hand, if there are errors, they *can* result in the invalidity of the rescript.

In the course of reforming the Code, there was debate about the importance of error with respect to invalidity. Several arguments were put forth favoring the retention of this canon. These included one supported by a consultor who argued that the purpose of this norm is to protect acts of administrative authority, which are not acts between private persons, in which, in case of error, the interpretation of the other party must always first and foremost be taken into account. Thus, while this norm could by no means be applied to acts between private persons, it can indeed be applied, as in fact it is, to unilateral acts of the administration.[1]

2. The source of the invalidity is not the error *per se*, but the lack of accord between the contents of the rescript and the person to whom the rescript is issued, or the matter to which it refers. The reason for this is that a rescript is granted not to the *name*, but to the *person* of the petitioner and to his or her intrinsic characteristics. Therefore, when the person making the request and the truth are clearly attested in the *preces*, an error in the name does not become an obstacle. The same is true of an error in the place in which the person resides, and of an error in the matter concerned.

1. Cf. *Sessio* XII (October 22–26, 1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 295.

As was made clear in the discussion of error in connection with c. 66 in the course of the reform of the Code, the errors contemplated in c. 66 merely constitute defects of form that do not become defects of substance; they are *material* errors that at the start affect only the "instrumental act;" they can become *substantial* errors, and therefore *invalidating* ones, when they come to affect the "transactional act."[2] The one who judges whether an error in these details extends also to the substance of the act is an authority of the administration, namely the ordinary, who, like the overseer, protects the will of the administration. The text of the canon does not specify which ordinary shall carry out this function (as, by way of contrast, it does in c. 67 § 3). Therefore it should be understood that any ordinary who has any connection to the rescript or to the petitioner is competent to resolve doubts on this question. The recourse to the ordinary mentioned in the canon is not required when the error is so obvious that there is no cause for doubt, because the law does not contain useless mandates ("eum qui certus est, certiorari amplius non oportet"[3]). If the ordinary should judge that there is uncertainty about the identity of the subject, then the rescript would be affected by invalidity, which in this case is closer to inefficacy than to unlawfulness; that is, it would not produce any effects, and the rescript would have to be granted anew, or the error would have to be corrected.

3. In addition to an error in the name of the person to whom the rescript is granted, an error in the name of the person granting the rescript may be relevant. This situation produces few cases in which doubt could arise, because the person granting the rescript is an authority with executive power, and so it is more important that his function and competence be clear than that his specific identity be correctly recorded.

4. As for the place of residence (which does not necessarily have to correspond to the domicile or quasi-domicile, according to cc. 100 and 102), it does not appear to be relevant to promoting doubt about the petitioner's identity, except in the case of rescripts for which there is an executor; in this case, error about the place in which the grantee resides may produce nullity if the error implies the involvement of an executor who does not have the power necessary to execute the rescript. Before the *CIC*/1917, an error in the name of the petitioner's country did not nullify the rescript, but an error in the name of the diocese did indeed nullify it *ipso iure* when, as a result of said error, the ordinary would not be able to execute a rescript given *in forma commissoria*. Yet already in the *postulata* proposed in Vatican Council I by the Bishops of Germany and Belgium, it was requested that "Statuat Concilium litteras dispensationis a S. Sede expeditas in posterum non amplius fore invalidas ob errorem nominis diocesis vel

2. Cf. *Sessio* XII (October 22–26, 1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 295.
3. Cf. *VI, Regula Iuris* 31.

nominis aut cognominis contrahentium, dummodo constet de personarum identitate."[4] This new disposition was introduced in the *CIC*/1917.

5. Regarding the substantive content of the rescript (for example, an error in the naming of the impediment in a rescript of dispensation), nullity does not result if the wording of the request allows the issuing authority to understand the factual situation and to assess it correctly. Under the former law, if one favor were mistakenly granted in place of another, the rescript would be automatically null. As time went on, this discipline was softened. In effect, if a dispensation from affinity was requested instead of a dispensation from consanguinity, the rescript was voided because derogation from general law must be interpreted strictly and cannot be extended beyond what is expressed. By contrast, if in the context of the impediment of consanguinity a dispensation were requested for a nearer degree, when the actual relationship was a more distant degree, and the request was granted, then the rescript would be valid because it is understood that the nearer degree also contains the more distant one, and therefore the Roman Pontiff, in dispensing for the nearer degree, has also dispensed for the more distant one.

6. To this point, we have examined errors that do not invalidate a rescript as long as the ordinary is not in doubt. There can be cases of errors in other elements (for example, concerning the motivating reason), as well as errors of such complexity that they give rise to doubt about the very validity of the rescript, such as when a rescript is considered invalid and so is requested anew, or as in c. 67 § 3, when one has recourse to the issuing authority in order to resolve a doubt or correct an error.

Regarding the errors with which c. 66 is concerned, however, namely those errors that invalidate only when in the judgment of the ordinary there is doubt about the person or the matter in question, it could happen that the addressee, petitioner, or executor may be in doubt while the ordinary is not, and in such a case the rescript will be valid. Even though the mention of invalidity in the text of c. 66 is negative (*non fit irritum*), one should remember the invalidating force of the particle *dummodo* ("provided that" [cf. c. 39]), which is also present in c. 66 and can be relevant in several situations:

a) If there are doubts about the person or the matter in question, and if, in spite of these doubts the rescript is executed before the ordinary makes his judgment, then both the rescript and the execution are invalid, provided that the subsequent judgment of the ordinary determines that such doubts really did exist.

b) If there is a judgment that resolves the doubts but which is not a judgment of the ordinary (cf. c. 134), but of a private person or authority other than the ordinary, then both the rescript and the execution are in-

4. Cf. VATICAN COUNCIL I, *Acta et Decreta S. S. Concilii Vaticani*, Appendix, p. 878, ad. III.

valid, provided that the subsequent judgment of the ordinary determines that such doubts really did exist.

c) If there is a judgment of the ordinary that does not resolve the doubts, and if in the meanwhile the rescript has been used or executed, said use or execution is likewise invalid.

In any of these cases, and likewise, when the ordinary believes that there is no doubt but that the grantee is convinced that there is an error in the rescript, an interested person who believes him- or herself to have been harmed may have recourse to the issuing authority (cf. c. 67 § 3). There is also the possibility of hierarchical recourse, in accordance with c. 1732, as long as the rescript has not been granted by the pope or by an Ecumenical Council, and has not been granted for the internal forum.

67 **§ 1. Si contingat ut de una eademque re duo rescripta inter se contraria impetrentur, peculiare, in iis quae peculiariter exprimuntur, praevalet generali.**

§ 2. Si sint aeque peculiaria aut generalia, prius tempore praevalet posteriori, nisi in altero fiat mentio expressa de priore, aut nisi prior impetrator dolo vel notabili neglegentia sua rescripto usus non fuerit.

§ 3. In dubio num rescriptum irritum sit necne, recurratur ad rescribentem.

§ 1. If it should happen that two contrary rescripts are obtained for one and the same thing, where specific matters are expressed, the specific prevails over the general.

§ 2. If both are equally specific or equally general, the one earlier in time prevails over the later, unless in the later one there is an express mention of the earlier, or unless the person who first obtained the rescript has not used it by reason of deceit or of notable personal negligence.

§ 3. In doubts as to whether a rescript is invalid or not, recourse is to be made to the issuing authority.

SOURCES: § 1: c. 48 § 1
§ 2: c. 48 § 2
§ 3: c. 48 § 3

CROSS REFERENCES: cc. 38, 41, 47, 64, 65, 66, 68, 69, 84, 128, 139

COMMENTARY

Javier Canosa

1. While the problems that can arise from the concurrence of multiple rescripts issued by different authorities are resolved in detail by the *CIC* on the basis of the twin criteria of chronology and hierarchy (see commentaries on cc. 64 and 65), the problems that arise from the interpretation and application of contrary rescripts are resolved on the basis of criteria that take into account the content and the date of issuance; the specific rescript prevails over the general, and the earlier prevails over the later, provided that the later does not expressly derogate the earlier, and provided that the person who first obtained the rescript has not used it by reason of deceit or of notable personal negligence.

2. Thus, the first precondition for applying c. 67 is that two rescripts have been issued for one and the same thing. If they are not for the same thing, this canon is not applicable. If the rescripts are obtained from different authorities of differing rank, then in addition to c. 67, c. 65 must also be taken into account.

The second precondition requires that the petitioners be different, for if it is the same petitioner who receives two contrary rescripts, the petitioner himself—not the legal criterion—will choose the one that will benefit him. This is true except when the rights of a third party come into play and without prejudice to the principle that, if the granting authorities are different, one must bear in mind other canons of the *CIC* (namely, cc. 64, 65 §§ 2 and 3, 84, and 139). These establish that, if there is a concurrence of two authorities acting at different levels of the hierarchy, then the authority must respect the administrative hierarchy.

A third precondition is that the rescripts be contrary in their totality or in one of their parts. If they can be reconciled, c. 67, at least in its first two paragraphs, will not apply.

The expression "prevail," which at first glance seems to denote the validity of one rescript and the nullity of the other, in fact reflects the capacity to act of one grantee as compared to that of the other grantee. If the first grantee desists in his or her use of the rescript, or ceases to use it by reason of deceit or of notable personal negligence, it is the rescript that had not prevailed before, but which is still valid, that becomes efficacious.

3. Now that the preconditions for the application of c. 67 have been established, three possible cases can be foreseen:

a) The first (§ 1) considers the case of two contradictory rescripts; that is, two rescripts that request the same thing but that are granted at different times. In this case, the *specific* derogates the *general*, without regard to the time of issuance. The specific prevails because it is assumed that the will determinative of the specific is more efficacious. Thus Alexander III had settled in this way a controversy over the manner of proceeding when two rescripts had been requested, one general and the other specific. The pope prescribed that the later, more specific rescript derogated the earlier, more general one, even if there had been no mention made of the earlier rescript (*X* I,3,1). He based this conclusion on the Roman principle, derived from Papinian, that "in toto iure generi per speciem derogatur."[1] This doctrine was widespread prior to the *CIC*/1917, and the codifiers of that Code simply reproduced it. From the *CIC*/1917 it passed to the *CIC,* where the criterion of specificity is also applied to contrary singular administrative decrees. The Code employs the same Latin formula for both rescripts and decrees: "peculiare in iis quae peculiariter exprimuntur, praevalet generali."

1. Cf. Digest, 1, 8, 17, whence is derived *VI, Regula Iuris* 34.

b) When the two rescripts are equally specific or equally general ("aeque peculiaria vel generalia") the second rule of the canon (§ 2) establishes that the earlier rescript prevails over the later one (*X* I,3,3 and *X* I,3,12). Chronological priority is determined, not by the date of execution, but by the date of the rescript, even when there is an executor. It is important to note that in this second case, the criterion for primacy is different for the two principal types of singular administrative acts: in the case of rescripts, the earlier prevails, whereas in the case of singular decrees, it is the later that derogates the earlier to the extent that the later contradicts the earlier. In the course of revising the Code, the question was posed as to whether the prevailing norm for rescripts could be applied to decrees, or whether, to the contrary, a change was required. Just such a modification was introduced during *sessio* XIII in 1974, rendering the canon on contradictory decrees practically identical to the one now in the *CIC*, with a regimen—taking into account a classical rule that was applicable by analogy to laws—that is the opposite of that of contrary rescripts. In rescripts, so went the classical text, "quoniam igitur si memores fuissemus nos pro praedicto N. litteras direxisse, pro adversario nullo modo scripsissemus."[2] The authority knows the general laws, but cannot be expected to remember all the rescripts that he has issued; hence it is the earliest (in this case) that prevails.

This is one of the points that best illustrates the difference between these two types of singular administrative acts; whereas a decree looks principally to the general interest, a rescript seeks the good of an individual[3] to the non-detriment of the common good. Accordingly, in determining that the later derogates the earlier, the norm on contradictory decrees that are equally specific or equally general protects juridical security, which is predominantly relevant within the sphere of the general good. By contrast, in the case of two contradictory rescripts that are equally specific or equally general, determining that the earlier prevails has the effect of rewarding the individual good of the first grantee by applying the principle of private law, "prior tempore potior iure."[4] In effect, the first rescript has granted to the beneficiary an acquired right that must be respected in itself (cf. c. 38), unless its revocation is foreseen in the rescript itself (cf. cc. 38 and 67). Moreover, there are two further exceptions that protect the principle of notification essential to every administrative act.

First, express mention must be made of the first rescript, in which case the provision of c. 47 also comes into play. Pursuant to this disposition, the revocation of an administrative act by another administrative act

2. Cf. *X* I,29,12.
3. Cf. E. LABANDEIRA, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1992), p. 449.
4. Cf. *VI, Regula Iuris* 54.

of the competent authority takes effect only from the moment at which the person to whom it was issued is lawfully notified.

Secondly, the first petitioner who obtained the rescript must not have used it by reason of deceit or culpable negligence, for example, by intentionally failing to present the rescript to its executor (c. 69) or to the proper ordinary (c. 68). This exception is also one that has been traditionally observed (*X* I,3,26).[5] For example, in c. 84, which concerns the abuse of a power that has been given by a privilege, it is possible to conceive of an abuse that consists of a failure to use a privilege, which in turn impedes another petitioner in the enjoyment of the same privilege. Canon 84 establishes that the ordinary, after a warning that has been in vain, is to deprive the holder of the privilege if he or she persists in its abuse. Of course, this deprivation holds only if the grantor of the privilege was the ordinary himself. If the privilege had been granted by the Apostolic See, the ordinary is obliged to make the matter known to it.

Thus the contradictory rescript loses its prevalence for one who has failed to use it by reason of deceit or of notable personal negligence. In addition, there is the further sanction of reparation of damages when said deceitful use has caused unlawful harm to someone else.

c) The first and second rules settle the question of prevalence in the case of two contrary rescripts, first by reference to their extension, and secondarily by reference to temporal priority. Nevertheless, they make no provision for the case in which those rescripts were requested for one and the same thing on the same day and it cannot be known which of the two was requested first. In this case, older law made use of quite a few distinctions, including whether the rescript was granted *in forma gratiosa* or *in forma commissoria*, whether one of the petitioners presented the rescript and the other only requested it, etc. Canon 48 § 3 *CIC*/1917 also considered the case in which two rescripts carried the same date, and it was unknown which of the two petitioners had presented his *preces* first. It was established that both rescripts were to be considered null, with the possibility of having recourse to the issuing authority. This norm was suppressed in the *CIC*, and therefore the question must be resolved according to the terms of paragraph 3, which prescribes recourse to the issuing authority as a generic solution applicable to every rescript about whose validity the ordinary (c. 66) or the executor (c. 41) has well-founded doubts.

5. Cf. F. AROCENA, *Los rescriptos en los trabajos de codificación de 1917* (Pamplona 1982), *pro manuscripto*, p. 105.

68 **Rescriptum Sedis Apostolicae in quo nullus datur exsecutor, tunc tantum debet Ordinario impetrantis praesentari, cum id in iisdem litteris praecipitur, aut de rebus agitur publicis, aut comprobari condiciones oportet.**

A rescript of the Apostolic See in which there is no executor must be presented to the Ordinary of the person who obtains it only when this is prescribed in the rescript, or when there is question of public affairs, or when it is necessary to have the conditions verified.

SOURCES: c. 51; SCDS *Normae*, 7 maii 1923, 105 (*AAS* 15 [1923] 413)

CROSS REFERENCES: cc. 360, 364, 8°, 436 § 2, 1049, 1082, 1224, 1228, 1264 § 1

COMMENTARY

Javier Canosa

1. Canon 68 essentially recapitulates the provisions established by *Ordo servandus* in 1909[1] concerning rescripts *in forma gratiosa* that do not require an executor, but which must be presented to the ordinary in two situations:

a) "Si de rebus agatur publicis." The intent here was to collect a group of dispositions previously issued by the Holy See on those aspects that affect the common good of the entire ecclesiastical society, for example, the faculty to establish a "Via Crucis," or privileges that run counter to the jurisdiction of the ordinary.

b) "Si comprobare quaedam conditiones oporteat." This disposition derogated the establishment of the Council of Trent concerning matrimonial dispensations, which prescribed that "eae, quae gratiose conceduntur, suum non sortiatur effectum, nisi prius ab eisdem (Ordinariis) tanquam delegatis apostolicis, summarie tantum et extraiudicialiter cognoscatur."[2]

Canon 51 *CIC*/1917 already contained the three specific cases mentioned in the *CIC*, perhaps because aside from these, favors granted by rescript "generatim versantur circa res privatas, solum beneficiarium directe respicientes, ideoque ordinem publicum societatis, quod praeprimis Ordinarii curae concreditur, nullatenus vel accidentaliter tantum attingunt."[3]

1. PIUS X, *Ordo servandus. Normae peculiares*, III.1, no. 4 , *AAS* 1 (1909), p. 63.
2. Cf. COUNCIL OF TRENT, *Sess.* XXII, *De reformatione*, ch. 5.
3. Cf. G. MICHIELS, *Normae generales iuris canonici*, I (Paris-Tournai-Rome 1949), p. 435.

2. There are two preconditions for the application of c. 68:

a) The first is that the rescript in question must have been issued by the Apostolic See, not by any other ordinary. The "Apostolic See" is here understood to mean not just the Roman Pontiff, but also the Secretary of State, the Council for Public Affairs of the Church, and other institutions of the Roman Curia (cf. c. 360 and *PB* 2 § 1) authorized to issue rescripts (cf. *RGCR*, 133). During the revision of the Code, in *sessio* II *de Normis Generalibus*, it was decided to broaden this disposition to include all rescripts, not just those of the Holy See;[4] however, the provision was once again limited to rescripts of the Holy See after taking into account certain observations made in connection with scrutiny of the *schema* of 1977.[5]

b) The second precondition is that the rescripts in question not require an executor. Some rescripts issued by the Holy See do require an executor, and the Code refers to these, sometimes explicitly, as for example in c. 1264 § 1, and sometimes implicitly (e.g., c. 364, 8° on the functions of papal legates and c. 436 § 2 on the functions of the Metropolitan). Thus, it is clear that the presentation to the ordinary mentioned in c. 68 is not an act of execution. This distinction can be seen in the context of the taxes, which, if required for the execution of rescripts from the Holy See (c. 1264 § 1), are not required for the mere presentation of the rescript.

3. Canon 68 establishes—with consequences for lawfulness but not for validity—that a rescript of the Holy See in which there is no executor must be presented to the ordinary in the following three cases:

a) When the presentation is prescribed in the rescript itself, as happens, for example, when by order of the Apostolic Penitentiary, special faculties are granted to priests for the absolution of censures in the internal forum. In this case the rescript must be shown to the ordinary. The aforementioned clause can be a requirement for the valid use of the favor if it is expressed with the particles *si*, *nisi*, or *dummodo*.

b) When the rescript concerns public affairs, that is, those that are not private. In this case *public* refers more to the relationship of the affair to the public good than to the greater or lesser extent to which the affair is generally known. Along these lines, one can say that all administrative decrees refer to public affairs, whereas the same is true only of some rescripts.[6] Hence, while the presentation to the ordinary of a rescript granted in the internal forum is not, in itself, required, a dispensation from the Apostolic Penitentiary granted by rescript in the internal non-sacramental forum for an occult impediment to marriage, must nevertheless be re-

4. Cf. *Sessio* II (November 13–17, 1967) of the commission "de Normis Generalibus," in *Comm.* 17 (1985), p. 65.

5. Cf. *Sessio* II *recognitionis Schematis* "de Normis Generalibus" (October 23–27, 1979), in *Comm.* 23 (1991), p. 192.

6. Cf. *Sessio* XII (October 22–26, 1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 287.

corded in the book kept in the secret archive of the curia (cf. c. 1082 and c. 1049). This is so because even though such a dispensation may not affect a public affair at that time, it does have the potential to do so in the future. The affairs in question may be public by reason of the persons to whom the rescript is addressed (e.g., members of a religious institute), or by reason of the manner in which the favor granted is exercised (e.g., through public acts), or by reason of the subject matter (e.g., the granting of indulgences to churches of religious institutes, the dedication by papal indult of altars to the Blessed in churches and oratories, the granting of dispensations from ratified but not consummated marriages, the granting of permission to propose relics for public veneration, and all privileges that run counter to the jurisdiction of the ordinary).

c) When it is necessary to have the conditions verified, as in the case considered in c. 1224: "The Ordinary is not to give the permission required for setting up an oratory unless he has first, personally or through another, inspected the place destined for the oratory and found it to be becomingly arranged" (also cf. c. 1228).

4. Proof that the ordinary has examined it is indicated by the word "seen." Economic compensation cannot be requested, but an accounting of the costs occasioned by the presentation is to be requested when the presentation is obligatory. Naturally, the presentation is to occur before the beneficiary begins to make use of the favor that has been granted.

69 **Rescriptum, cuius praesentationi nullum est definitum tempus, potest exsecutori exhiberi quovis tempore, modo absit fraus et dolus.**

A rescript for whose presentation no time is determined, may be submitted to the executor at any time, provided there is no fraud or deceit.

SOURCES: c. 52

CROSS REFERENCES: cc. 40, 67 § 2, 68, 78, 84, 128

COMMENTARY

Javier Canosa

1. Canon 69 applies to cases in which: a) a rescript has an executor distinct from the authority who issued it; and b) no time has been determined for the execution of the rescript. These are preconditions for applying the canon.

2. Quite apart from the provisions of c. 68, one of the faithful who obtains a rescript *in forma commissoria* is normally obliged to present it to the executor, who is, according to the usual style of the curia, his or her proper ordinary. Rescripts issued "pro foro interno" by the Apostolic Penitentiary or by some other authority, have always been customarily remitted "discreto viro confessario ex approbatis ab Ordinario" (it should be noted that "confessor" here is to be understood as anyone who can hear the confession of a penitent). The choice of confessor is that of the person who obtains the rescript. If after he has chosen, the petitioner wishes to change his choice of confessor, he may do so. It is important to bear in mind this practice—which even antedates the *CIC*/1917—because neither the codifiers of the *CIC*/1917 nor the consultors who worked on the *CIC* added any rule concerning the qualifications of the executor beyond those established in the rescript itself. Moreover, this practice continues to be the normal one used today. Canon 69 appears just as it did in the *CIC*/1917. No changes have been made. Although the suppression of this canon was proposed in the *coetus*, in the end it was decided to preserve it, the argument being that to do otherwise could give rise to a great many difficulties.[1]

1. Cf. *Sessio* II (November 13–17, 1967) of the commission "de Normis Generalibus," in *Comm.* 17 (1985) p. 65.

3. Canon 69 establishes the time at which the presentation is to take place. The governing principle is that "decet concessum a Principe beneficium esse mansurum."[2]

The general norm is, therefore, that rescripts have effect at all times because the favors are presumed to be perpetual (for privileges, cf. c. 78).

4. Normally, in the case of rescripts *in forma commissoria*, it is customary for the granting authority to address the rescript to the ordinary, who will normally also be the executor, and it is the executor who makes known and even proposes the time of executing the rescript. It is also possible, however, for the petitioner to receive the rescript directly, and in this case he or she must approach the executor with the rescript in order to proceed to its execution, since the executor cannot execute the document until he has received it (cf. c. 40). In either case, c. 69 grants to the interested party the freedom to choose the time of execution. This self-determination can be granted because the principal aim of a rescript is the private good of the one to whom it is administered, provided there is no fraud or deceit that could result in harm for both the private and the common good—harm which is incompatible with the public purpose essential to every act of the administration (a similar sentiment is contained in the final clause of c. 67 § 2, discussed previously).

5. When there is fraud or deceit, it is impossible to postpone the execution. This circumstance can, in turn, give rise to the invalidity of the rescript in some cases, for example when the execution is delayed deceitfully in order for certain elements of the *preces* that do not reflect the truth to be verified at the time of execution, because they were false when the rescript was issued. Canon 69 does not appear to say that the execution of the rescript would be invalid in such a case[3]; then the particle *dummodo* would have been used in the text of the canon. Rather, it says that fraud and deceit annul the self-determination of the person concerned to choose a suitable time for the execution, which in turn can determine the subreption or obreption of the rescript, and thence its invalidity. In addition to the ordinary, it is the executor (when these two are not the same [cf. c. 41]) who must determine whether such fraud or deceit took place during the time between the granting of the rescript and its execution. In this case, his assessment would have retroactive effects for the subreption or obreption of the rescript.

Deceit is defined as a deliberate intent, by unlawful means, to induce someone to act or not to act. These means include actions such as omitting the obligation to provide information and misrepresentation through words or deeds.

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2. Cf. *VI Regula Iuris* 16.
3. Cf. E. LABANDEIRA, *Cuestiones de Derecho Administrativo Canónico* (Pamplona 1992), p. 454.

Fraud can have several meanings: one of them is classified as a specific type of deceit carried out with words; another refers to a specific type of deceit carried out in an occult manner; a third, as a type of deceit that inflicts harm on others. In law, fraud signifies an act aimed at avoiding the law. It is, therefore, an act that is *contra legem* but which appears to be *secundum legem*.

6. There is a debate about whether the copulative conjunction *et* in c. 69 is not more disjunctive than conjunctive in force. According to Michiels, the expression *fraus et dolus* has been set forth by the legislator as if it were a unity, in order to exclude any case in which there is a malicious presentation with a view to execution; in other words, a deceitful delay would become fraud under the law. One could commit fraud by, for example, maliciously delaying the presentation of the *preces* so that, once circumstances changed, they might be rendered truthful, or so that another person's right might cease to interfere, or so that the petitioner might become capable, having been incapable before. Others perceive deceit in the execution when there is a delay in order to inflict harm on a third party, for example, by dissuading that party from any expectations. In this sense, cc. 84 and 128 should also be taken into consideration.

70 **Si in rescripto ipsa concessio exsecutori committatur, ipsins est pro suo prudenti arbitrio et conscientia gratiam concedere vel denegare.**

If in a rescript the very granting of the favour is entrusted to the executor, it is a matter for the executor's prudent judgement and conscience to grant or to refuse the favour.

SOURCES: c. 54 § 2

CROSS REFERENCES: cc. 40–45, 63, 129, 479 § 3, 1224

COMMENTARY

Javier Canosa

1. Canon 70 applies only to rescripts that have been entrusted to an executor, be they rescripts from the Holy See or from the ordinary, for the external forum or the internal forum.

2. Once the *CIC* has disposed of the temporal dimension in granting of rescripts, it sets forth the regulations for the person of the executor himself. Taking into account the question that occurs before the rescript is executed, canon law has traditionally distinguished between two types of executors: mere executors (when the rescript is granted by the mere deputation of the executor) and mixed executors.[1] Nearly all of the norms in the first chapter of the title *De actibus administrativis singularibus*, which includes the chapter on rescripts, are applicable to both types—specifically, cc. 40 and 42–45, which contain provisions found in the title *De rescriptis* of the *CIC*/1917. These were considered suitable, in the course of the reform of the Code, to be included in the common norms applicable not just to rescripts, but to all singular administrative acts.

a) The mere executor is entrusted with the simple task of execution without being able to obtain proof of the truth of the *preces*; he need not investigate the opportuneness of granting the rescript or the qualifications of the petitioner. He has only to refrain from the execution if there is clear evidence of a defect of obreption or subreption in the *litterae*. He does not decide whether or not the rescript is null; he simply refrains from executing it.

b) The executor to whom the granting of the rescript is entrusted, receives the delegated power to grant the favor or not to grant it (cf., e.g., c. 1224), because it has yet to be granted by the issuing authority. Once invested with this power, the executor must investigate the truthfulness

1. Cf. A. VAN HOVE, *De rescriptis* (Malines—Rome 1936), pp. 229–232.

of the *preces* (cf. c. 63), verify the necessary conditions (cf. c. 41), and decide authoritatively whether the rescript should be executed. This deputizing is established either *ipso iure* or by special clauses, such as *constito de assertis*, *vocatis vocandis*, or *si preces veritate niti repereris*. He must investigate whether that which has been set forth in the *preces* is in fact true. The granting of the favor cannot be verified in his judgment without this prior ascertainment and the subsequent verification of whether the prescriptions contained in the *litterae* have been observed. This inquiry, however, is not imposed as a requirement for the validity of the execution. The executor is entrusted only with the faculty to grant or to refuse the favor, unless it is expressly established otherwise in the rescript.

3. There are no regulations in the *CIC* concerning who may be an executor. For the internal forum (see commentary on c. 65), rescripts to be executed are entrusted to the confessor chosen by the petitioner from among those approved by the ordinary. The petitioner is free to change his choice of confessor, and therefore of executor, when the terms of the rescript offer this possibility and the petitioner considers it opportune.

For the external forum, the practice and style can vary greatly. Depending on the case, the executor will often be the ordinary or his delegate. For example, in the case of matrimonial dispensations from public impediments, the executor is generally the ordinary of the petitioner, that is, the ordinary who issued the testimonial documents or transmitted the *preces* to the Holy See; normally, the executor is the vicar-general (c. 479 § 3). For other types of rescripts, the executor will be the religious superior or his or her delegate. In the case of the mere executor, the execution can be entrusted to a layperson because in this case the execution is not an act of jurisdiction, but a form of cooperation in the exercise of authority (cf. c. 129).

4. Canon 70, as we have seen, provides for the case of the mixed executor to whom is entrusted the power to grant, not just to execute, the favor. The tenor of the words "pro suo prudenti arbitrio et conscientia" comes from the older "*Ordo servandus*," which established: "Eius aequo iudicio rectaque conscientiae imploratae gratiae largitio ... habita ratione formae rescripti, rerum Sanctae Sedi expositarum, et opportunitatis gratiae concedendae."[2] Clearly, however, these words do not imply unlimited freedom for the executor,[3] for he grants or refuses the favor not at his discretion, but rather after diligent scrutiny of the truth of the *preces* and the rest of the factors that he must know before proceeding.[4]

2. Cf. PIUS X, *Ordo servandus. Normae peculiares*, III.1, no.4, *AAS* 1 (1909), p.63.

3. Cf. SCCouncil, *Reply*, March 21, 1868, *AAS* 3 (1867[sic]), p. 524; *Reply*, January 23, 1886, *AAS* 18 (1885[sic]), p. 528.

4. Cf. G. MICHIELS, *Normae generales iuris canonici*, I (Paris—Tournai—Rome 1949), p. 495.

71 **Nemo uti tenetur rescripto in sui dumtaxat favorem concesso, nisi aliunde obligatione canonica ad hoc teneatur.**

No one is obliged to use a rescript granted in his or her favour only, unless bound by a canonical obligation from another source to do so.

SOURCES: c. 69

CROSS REFERENCES: cc. 47, 59 § 1, 81, 994, 1336 § 1

COMMENTARY

Javier Canosa

1. Canon 71 applies to all types of rescripts that are strictly personal and private in nature and issued exclusively in favor of the beneficiary, whether granted by the Holy See or by some other competent authority. It is assumed that the rescript is valid; the acts of requesting and granting the rescript are now in the past, and what we might call the act of using the rescript has begun.

2. It is made clear once again that there is in the rescript a combination of public elements (it should always be remembered that rescripts have the characteristics of singular *administrative* acts, as follows from c. 59 § 1) and elements of free will, as is clearly shown by the fact that there are rescripts *granted solely in favor of the grantee*, without any responsibility for its use and without any additional provision or obligation (cf., e.g., c. 994, which states, "All members of the faithful can gain indulgences, partial or plenary, for themselves, or they can apply them by way of suffrage to the dead." This rescript granting an indulgence can be used or not used, and its use can be begun at the time considered most opportune, or even interrupted, etc).

3. Canon 71, however, raises the possibility that there is an obligation to use a rescript, and not just rescripts granted *not solely in favor* of the grantee (such as, for example, dispensations from a ratified and non-consummated marriage, which are granted in favor of both spouses), but even rescripts granted solely in favor of the grantee. The nature of the obligation to use a rescript can take many forms: it could be a natural obligation or a moral one, etc. The regulation establishing that a person who has obtained a rescript is not obliged to use it unless bound by a *canonical obligation* was not present in the *CIC*/1917. The *CIC* does refer to canonical obligation, that is, an obligation founded in law and established in the

Code,[1] such as the obligation of a confessor who has the faculty to absolve reserved censures to use this faculty in response to a lawful request, or the obligation to use certain faculties received from the Roman Pontiff.[2]

4. Although the Code does not say as much, the opposite possibility could arise, that is, the obligation not to use a rescript, when, for example, there is a revocation of the rescript by the authority that granted it (cf. c. 47 for all singular administrative acts, and c. 81 for privileges, a type of rescript). In other cases, the obligation not to use the rescript results from the imposition of a canonical penalty (cf. c. 1336 § 1: "Expiatory penalties can affect the offender either forever or for a determined or an indeterminate period. Apart from others which the law may perhaps establish, these penalties are as follows: ... (2°) deprivation of power, office, function, right, privilege, faculty, favor, title, or insignia, even of a merely honorary nature").

1. Cf. *Sessio* II (November 13–17, 1967) of the commission "de Normis Generalibus," in *Comm.* 17 (1985) p. 68.

2. Cf., e.g., JOHN PAUL II, *Rescritto concedente speciali facoltà al Cardinale Presidente della Pontificia Comisione "Ecclesia Dei,"* October 18, 1988, *AAS* 82 (1990), pp. 533–534. For a commentary on this rescript, cf. J. MIÑAMBRES, "Attribuzioni di facoltà e competenze alla Comissione 'Ecclesia Dei,'" in *Ius Ecclesiae* 3 (1991), pp. 341–344.

72 Rescripta ab Apostolica Sede concessa, quae exspiraverint, ab Episcopo dioecesano iusta de causa semel prorogari possunt, non tamen ultra tres menses.

Rescripts granted by the Apostolic See which have expired, can for a just reason be extended by the diocesan bishop, but once only and not beyond three months.

SOURCES: *PM* 1; SCB Facul., 1 ian. 1968, 13; SCEP Facul., 1 ian. 1971, 9

CROSS REFERENCES: cc. 46, 65 § 1, 66, 68, 202, 368, 381 § 2

COMMENTARY

Javier Canosa

This canon was not found in the *CIC*/1917. In the course of reforming the Code, it was incorporated in the norms on rescripts that came from the first *schema* "De Populo Dei" of 1980, when the work of codification was already well underway.[1]

Canon 72 applies only to rescripts that have already been granted by the Apostolic See and which, furthermore, are nearing the end of their effect.

Even though rescripts, like any other singular administrative act, do not cease upon the expiration of the authority of the person who issued them (cf. c. 46), the law can establish otherwise, and therefore must do so expressly. Accordingly, though not as a general rule, one possible cause of the termination of a rescript is the end of the authority of the person who issued it.

Notwithstanding this first cause, a more typical cause is the conclusion of a determined period of time that has been fixed for the effects of the rescript; that is, the imposition of a time period which, once completed, brings about the cessation of the favor (e.g., the special granting of indulgences for a specific place or sanctuary for the remainder of the year in which a celebration of particular relevance for that place is commemorated).[2]

1. Cf. *Sessio* V *recognitionis Schematis* "De Normis Generalibus" (5–7 maii 1980)," in *Comm.* 23 (1991), p. 280.
2. Cf., e.g., *AP*, *Rescripto de concesión de indulgencia plenaria a quienes visiten el Santuario Mariano iglesia de S. Andrea delle Fratte, en Roma, en la Solemnidad de la Inmaculada Concepción, el 20 de enero y en las fiestas litúrgicas de S. Francisco de Paula y de S. Maximiliano Kolbe*, December 8, 1991, in *Rivista Diocesana di Roma*, 1992, pp. 1089–1090.

For rescripts in which there is an executor, one may think that there is also a time period determined to carry out their execution.

Canon 72 confirms the norm established by Paul VI in *Pastorale Munus*, while increasing the time period from one month to three.

In the previous canons on rescripts, several mentions were made of the ordinary in discussing intermediate authorities with competency over these administrative acts (cc. 65 § 1, 66, 68). Canon 72, by contrast, restricts the faculty of prorogation to the diocesan bishop and the heads of the other communities of the faithful mentioned in c. 368 (cf. c. 381 § 2).

The prorogation can be for a determined time not longer than three months from the day of expiration of the rescript. In other words, if a prorogation is granted so that it becomes effective on the same day that the rescript expires, then the rescript can be extended for three months, which will be reckoned according to the calendar (cf. c. 202) since it is a period of continuous time. If it is granted at a later time, the prorogation will last for the maximum length of time that remains before completion of the three months from the expiry of the rescript. The prorogation can also be granted for an indeterminate period of time, as long as it does not exceed the end of the three month period reckoned according to the calendar.

Through application of the hierarchical principle, a prorogation of greater duration will be invalid beginning with the completion of the third month. The same is true, even of a prorogation of duration shorter than the legal period, if it was granted more than once, or was not supported by a just cause.

73 **Per legem contrariam nulla rescripta revocantur, nisi aliud in ipsa lege caveatur.**

No rescripts are revoked by a contrary law, unless it is otherwise provided in the law itself.

SOURCES: *c. 60 § 2*

CROSS REFERENCES: cc. 4, 9, 20, 36 § 1, 38, 46, 47

COMMENTARY

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In order for c. 73 to apply, a rescript must already have been granted; then, and not before, can it be revoked. Revocation prior to the granting of the rescript would amount to the revocation of the preparatory acts and therefore to the non-granting of the rescript.

The sense of this canon does not presuppose a crack in the hierarchical principle in the sources of law, but rather a correction of that principle in order to provide for the case that the legislator, who acts with a view to general criteria and future matters (cf. c. 9), ignores particular situations and acquired rights that are juridically supported by a prior rescript (priority in time and non-tacit derogation are also contemplated for particular and special law, for c. 20 states that "a universal law, however, does not derogate from a particular or from a special law, unless the law expressly provides otherwise").

Canon 38 introduces the idea that the time at which the rescript is granted is of great importance with respect to the law. This canon is applicable to all singular administrative acts and states that "an administrative act, even if there is question of a rescript given *Motu proprio*, has no effect insofar as it harms the acquired right of another, or is contrary to a law or approved custom, unless the competent authority has expressly added a derogatory clause." One concludes, therefore, that the presumption that favors rescripts over laws holds only when the rescript precedes the law in time. It is a presumption *iuris tantum*, for if the text of the later law itself provides for the revocation of the rescript, then the advantage enjoyed by the rescript over the later law no longer holds. Such is not the case with singular decrees[1] for which there is no analogous protection.

1. Cf. *Sessio* XII (October 22–26, 1973) of the commission "de Normis Generalibus," in *Comm*. 22 (1990), p. 288.

Consequently, a singular decree will be revoked by a contrary law, even if revocation is not expressly provided in the law itself. The reason lies, once again, in the predominantly public purpose of singular decrees. By contrast, the favor enjoyed by the grantee of a rescript, the purpose of which is only secondarily the public good and primarily the good of the grantee, so long as that is not in conflict with the public good, finds further support in other canons on general norms applicable to administrative acts. These include c. 46, which states that administrative acts do not cease with the expiration of the authority of the person who issued them, unless the law expressly provides otherwise, and c. 47, according to which the revocation of an administrative act by another administrative act of the competent authority takes effect only from the moment at which the person to whom it was issued is lawfully notified.

One should keep in mind c. 36 § 1, according to which an administrative act, when there is doubt, is to be interpreted strictly when it runs counter to a law in favor of private persons. Accordingly, even though the later law does not revoke the rescript unless such revocation is expressly provided, it can indeed generate the obligation, beginning at the moment of publication of the law, that the rescript be interpreted strictly.

74 **Quamvis gratia oretenus sibi concessa quis in foro interno uti possit, tenentur illam pro foro externo probare, quoties id legitime ab eo petatur.**

Although one who has been granted a favour orally may use it in the internal forum, that person is obliged to prove the favour for the external forum whenever this is lawfully requested.

SOURCES: c. 79

CROSS REFERENCES: cc. 37, 39, 59 § 2, 130, 283 § 1, 390, 1082, 1357

COMMENTARY

Javier Canosa

1. This canon, not found in the *CIC*/1917, was incorporated *ex novo* in the course of the reform of the Code, in a manner that forbade it to serve as one of the common norms applicable to the other singular administrative acts.[1] A similar canon in the *CCEO* (c. 1527) includes that the dispositions concerning favors granted by word of mouth are contained in cc. 59 § 2 and 74.

2. For c. 74 to apply, there must be a matter of a favor granted by word of mouth, that is, a favor granted orally by the Roman Pontiff or by some other authority with executive power. Therefore, c. 74 does not apply to rescripts, one of whose characteristics is precisely that it is a concession that takes the written form (cf. c. 59 § 1). Nevertheless, *oracula vivae vocis*, unless it is established otherwise, are governed by the norms on rescripts (cf. c. 59 § 2). It is not difficult to imagine that such oral favors will sometimes constitute the usual for various cases in which a permission is required. This is the case, for example, with the permission of c. 283 § 1 and the consent mentioned in c. 390.

3. Canon 74 once again makes use of the distinction between the internal and external fora. Whereas there is no general rule requiring the written form for the internal forum, there is indeed such a norm for singular administrative acts issued for the external forum (cf. c. 37), and thus, in theory, favors granted by word of mouth constitute an exception in this forum. Different requirements for efficacy apply in the two fora. They are more rigorous in the external forum because the private good of the

1. Cf. *Sessio* XII (October 22–26, 1973) of the commission "de Normis Generalibus," in *Comm.* 22 (1990), p. 289.

grantee, which in the internal forum redounds directly and immediately to the *salus animarum*, in the external forum not only operates in a mediated and indirect way for the attainment of this end, but can even come into conflict with it. Hence, canon law requires proof of the favor as a guarantee that the granting authority is aware that the oral favor will also have efficacy in the external forum. It also establishes controls of authority ("that person is obliged to prove the favor for the external forum whenever this is lawfully requested"). Since the text of the canon does not state that requiring proof of the oral favor is *ad validitatem* (since the particles *dummodo*, *nisi*, and *si*, mentioned in c. 39, are not present), lack of proof when it is lawfully requested will determine the inefficacy, or, if use of the favor persists, the unlawfulness of the concession.

The *use* in the internal forum of a favor that has been granted orally by an authority (cf. c. 130: "Of itself the power of governance is exercised for the external forum; sometimes however it is exercised for the internal forum only, but in such a way that the effects which its exercise is designed to have in the external forum are not acknowledged in that forum, except in so far as the law prescribes this for determinate cases") is not very different depending on whether the favor was granted in the external or internal forum, or the sacramental or non-sacramental forum: the grantee may enjoy the benefits of the favor under the conditions established in the concession, knowing that he is not obliged to offer any proof of the favor in order to use it in the internal forum.

This is not the case when one proposes to use in the external forum a favor that was granted orally, because there exists the distinct possibility of proof for use in the external forum, depending upon whether the favor was granted in the internal sacramental or the internal non-sacramental forum. In the first place, one must take into account in a general way for both cases, the prescription of the *Ad pascendum*, which provides that "rescripts which contain the replies of the Apostolic Penitentiary, ordinarily should be destroyed as soon as possible, except when in particular cases and for specific reasons, they are to be treated otherwise. One should particularly note that ordinarily the Rescripts of the Penitentiary should not be kept in the archives of diocesan Curias, of religious Orders, etc., nor should any notes extracted from those Rescripts be added to the registers."[2] Notwithstanding this prescription, while it is possible in the internal non-sacramental forum to obtain a proof that permits—in those cases prescribed by law and in unusual circumstances—the use of the same favor in the external forum (cf. c. 1082), to begin from the moment in which the dispensation is recorded in the secret registry of the curia,

2. Cf. AP, Instr. *Suprema Ecclesiae bona*, July 15, 1984, *in fine*, prot. no. 456/84, reiterated on March 14, 1987 and again, with some modifications that take into account the entrance into force of the *CCEO*, on June 11, 1991, in *Il Monitore Ecclesiastico della Diocesi di Lugano* 97 (1991), pp. 394–399.

this does not occur as often as the case in which the favor was granted in the internal sacramental forum (cf. c. 1357).

4. In principle, a favor granted by word of mouth in the external forum is efficacious from the moment it is granted, unless the efficacy is conditioned on another circumstance. Therefore, it can be used without waiting for further testimonial evidence that would make the proof of such a favor possible. It is important to distinguish two types of oral favors: authentic, which are restated in writing and can be proven, and non-authentic, which are not repeated in writing and are more difficult to prove, requiring other measures prescribed by law (in particular, testimonial proof). With this classification in mind, the oral favor, by its very nature, begins as non-authentic, although it may subsequently become authentic if its proof is lawfully requested or through other circumstances (e.g., when there is the possibility of conflict with a right of another person, or in the case of a favor *contra legem*).

5. There is one type of favor that is called *rescriptum ex audientia Ss.mi* that occupies a middle position between the rescript and the oral favor. According to Urrutia, it is defined as "a cardinal's testimony on the *oraculum vivae vocis* of the Pontiff. It is well known that the cardinal's testimony is considered, doctrinally, as fully valid legal proof."[3]

An example of a recent *rescriptum ex audientia Ss.mi* granted after the oral favor had already taken effect is the one issued by the CDF on September 19, 1989.[4] This rescript made known that on July 1, 1988 the Roman Pontiff approved the new forms for the profession of faith and the oath of fidelity. The signature of the Cardinal Prefect of the Congregation appears on this rescript.

3. Cf. F.J. URRUTIA, "De specifica approbatione summi pontificis," in *Revista Española de Derecho Canónico* 47 (1990), pp. 543–561, p. 548, in note 8.

4. Cf. CDF, *Rescriptum ex audientia Ss.mi*, September 19, 1989, *AAS* 81 (1989), p. 1169. For a commentary on this rescript, cf. J.A. FUENTES, "Sujección del fiel en las nuevas fórmulas de la profesión de fe y del juramento de fidelidad," in *Ius Canonicum* 30 (1990), pp. 104–106.

75 **Si rescriptum contineat privilegium vel dispensationem, serventur insuper praescripta canonum qui sequuntur.**

If a rescript contains a privilege or a dispensation, the provisions of the following canons are also to be observed.

SOURCES: c. 62

CROSS REFERENCES: cc. 59, 76–84, 85–93

COMMENTARY

Javier Canosa

By its very nature, a rescript grants a privilege, dispensation, or other favor. In the case of the granting of a permission (cf. c. 59 § 2), the following canons would not apply. The same is true in the case of a favor that is neither a dispensation nor a privilege (e.g., an indulgence, the admission to a religious institute, or the remission of a censure). On the other hand, it should be understood that if an oral favor contains a dispensation or a privilege, the respective canons would also apply unless it is established otherwise.

CAPUT IV
De privilegiis

CHAPTER IV
Privileges

76 **§ 1. Privilegium, seu gratia in favorem certarum personarum sive physicarum sive iuridicarum per peculiarem actum facta, concedi potest a legislatore necnon ab auctoritate exsecutiva cui legislator hanc potestatem concesserit.**

§ 2. Possessio centenaria vel immemorabilis praesumptionem inducit concessi privilegii.

§ 1. A privilege is a favour given by a special act for the benefit of certain persons, physical or juridical; it can be granted by the legislator, and by an executive authority to whom the legislator has given this power.

§ 2. Centennial or immemorial possession of a privilege gives rise to the presumption that it has been granted.

SOURCES: § 2: c. 63 § 2

CROSS REFERENCES: cc. 59, 74, 75, 199 §§ 2.et 3, 312 §§ 1, 3° et 3, 317 § 2, 328, 377 § 5, 438, 1331 § 2, 3°–4°

COMMENTARY

María J. Roca

1. *Introductory questions*

Canon 76 § 1 defines what is to be understood by *privilege.* Within this concept, two fundamental aspects can be distinguished in accordance with the canon itself: the substantive,[1] which always presupposes the

1. Bernárdez calls it a particularized situation produced as a result of the act of concession: A. BERNÁRDEZ-CANTÓN, *Parte general de Derecho canónico*, 2nd ed. (Madrid 1990), p. 143.

obtainment of a grace or favor,[2] and the material source from which it issues; a privilege can be acquired by grant of the legislator, by grant of an authority with executive power, and by centennial possession with the *praesumptio iuris* of the prior grant of the privilege.

Labandeira maintains the necessity of distinguishing between the privilege and the act through which it is granted. In his opinion, the doctrinal controversy surrounding the privilege derives from locating the essence of this form "not in the favor granted, but in the act by which it is granted."[3] In our opinion, the nature of the privilege cannot be centered exclusively on its beneficial and executive character. As Labandeira himself rightly notes, there do exist favors that are granted not through *ius singulare*, but through *ius commune*. At the same time, not all specific acts that grant a favorable situation to their addressee constitute privileges (consider, for example, dispensations). Labandeira proposes two characteristics as defining the essence of privileges: they grant a favor and they are issued to a single addressee. Two further characteristics must be added, however: first, the granting authority must in certain cases act with legislative power (either his own power or that delegated to him), and secondly, privileges are by nature objective law. One cannot fully explain the nature of privileges if these additional characteristics are denied or ignored. Since none of the three essential aspects on which the nature of any juridical phenomenon depends (the content or subject matter, the competency of the subject who carries it out, and the form of the act) is currently free of controversy, it seems appropriate to indicate here the following problems that have produced the principal doctrinal differences of opinion:

a) The *subject matter* (i.e., the content of the favor or grace) should not, strictly speaking, constitute an essential characteristic of privileges: "A privilege is the granting of a singular juridical statute which can be either temporary or permanent; that is, it is the act which grants rights to, or withdraws them from, a single subject. ... By its nature, there is no reason why a privilege must grant advantages or disadvantages, for typically it bestows a juridical statute upon a single entity which it names, without that signifying a statute which is better or worse than that of other entities."[4] Notwithstanding this restriction on subject matter, the *Codex* establishes it as such *expressis verbis*; therefore, this characteristic cannot be disregarded. This is a matter that is now clearly prescribed in this way by the law in force.

2. *Lex privata favorabilis* : D.3, c.3; *X* V, 40, 25.

3. E. LABANDEIRA, *Tratado de Derecho administrativo canónico*, 2nd revised ed. (Pamplona 1993), p. 322.

4. J. HERVADA, *Lecciones propedéuticas de Filosofía del Derecho* (Pamplona 1992), p. 393.

b) The *nature* of the act depends in large part on the subject who carries it out. Hence it is necessary to determine up to what point the legislator is acting with executive power, or the administrative authority is acting with delegated legislative power. Centennial possession can always be traced back to the decision of the legislator or of the administrative authority since once the presumption of a prior concession is included, there can be no comparison with an acquired prescription, which would not require the involvement of the public power in the act of concession.

c) The *form* of the concession also affects the nature of certain acts. The ordinary form for the granting of a privilege is the rescript. This, in turn, is itself an administrative act. Can one then conclude that there are some privileges that are administrative acts (those granted by means of a rescript) and others that are not? First of all, one should take note of the fact that, in connection with these juridical phenomena that we call privileges, the legislator has not raised any one form to the category of being essential or required *ad validitatem*.

These and other questions that affect the essential aspects of privileges will be treated in the paragraphs to follow.

2. *Compatibility of their nature as favors with the principle of equality*

Pursuant to paragraph 1, every privilege carries with it a grace in favor of the person to whom it is granted. Hence, it seems possible to conclude that every privilege implies an inequality, and since justice requires equality, every privilege must constitute an injustice. This appears to be the latent syllogism in some treatments that oppose the admission of privileges in canon law. This system propounds, on the one hand, a principle of equality among the members of the Church (cf. c. 208)[5] that the law must respect, and on the other hand, the subjection of legislative power to the limit of reasonableness[6] and executive power to the principle of legality.[7] Can privileges be admitted within these parameters?

In order to answer this question, one must first examine the premises of the syllogism formulated above. First of all, to verify whether every privilege entails inequality requires us to analyze, in effect, whether any grace in favor of specific persons is always a cause of inequalities. In this respect it is advisable to distinguish the equality enshrined in c. 208—

5. Cf. J. HERVADA, *Elementos de Derecho constitucional canónico* (Pamplona 1987), pp. 96–97; J. FORNÉS, "El principio de igualdad en el ordenamiento canónico," in *Fidelium Iura* 2 (1992), pp. 113–144.
6. P. LOMBARDÍA, *Lecciones de Derecho canónico* (Madrid 1984), pp. 151–152.
7. P. LOMBARDÍA, *Lecciones*..., cit., p.164. Cf., nevertheless, the observations of the same author in the commentary on c. 35 in *Pamplona Com.*

the fundamental equality among the members of the Church—and equality as a normative principle. The normative principle arises from the fundamental *a priori* equality; however, it does not yet refer to the existence of subjects, but to one or several features (*tertium comparationis*) of these subjects, whose equality must be respected by the norm.

It happens that in the case of privileges, a personal quality is taken into consideration, by virtue of which a favor or a favorable juridical consequence is credited. Berlingò attributes such importance to this feature that he comes to identify privileges with the preference of persons, while dispensations would be characterized, in his view, as the preference of causes. This does not pose an obstacle, in our opinion, to the argument put forward here, since the preference of persons is neither identified with the singularity of the addressee, nor excludes it from being caused by the singularity of the supposition of fact. Moreover, the fact that preference of causes has been identified as proper to dispensations does not mean that privileges can be granted arbitrarily. The author himself believes that privileges have their raison d'être *in pectore principis.*[8]

At this point, it is necessary to demonstrate that the principle of equality does not exclude fixed distinctions in the abstract and for all purposes. In other words, equality, as a normative principle, does not establish that it is unlawful to take a personal quality of the subject as a point of reference in connection with specific juridical consequences. Thus, for example, the principle of equality forbids differences to be established among the faithful based on their academic qualifications for purposes of the attribution of the *ius connubii*, but it does not forbid these differences to be utilized for purposes of access to specific offices. Canon 1420 § 4, for example, prescribes that in order to exercise the office of judicial vicar, one must have a doctorate or at least a licentiate in canon law.

Now if the principle of equality does not require that all addressees of norms have the same rights and obligations—that is, it does not prevent the linking of different juridical consequences (a favorable consequence, a grace, in the case of a privilege) to different situations (subjects in possession of a quality or a worthiness that is "rewarded" with the privilege)—does it therefore prevent unity of the addressee? The answer is no—singularity of the addressee is not *a priori* contrary to equality. In fact, in some cases, it can be required by it. When a singular norm is directed toward avoiding possible disadvantages that begin as consequences of the abstract character of the law, it is not impinging upon the principle of equality. On the contrary, it is establishing it by measuring all cases against the objective standard to which the law claims to adhere. As Hervada has observed, "if a law produces a good in the generality of cases and a bad effect in a particular case, it causes an inequality in a way that

8. S. Berlingò, "Privilegi e dispense: dibattito aperto," in *Ephemerides Iuris Canonici* 35 (1979), p. 96.

the singular norm which corrects this bad effect makes the particular case equal to the generality of cases."[9]

What, then, does the principle of equality require regarding privileges? We understand that it requires equality between the conditions of subjects and the juridical consequences (the graces or favors) attributed in each case through a privilege. There should be a parallel between the quality of the beneficiary that has been taken into consideration and the favor granted by the privilege. The principle of equality also requires that the *tertium comparationis* adopted for the granting of the privilege suit the norm's purpose. The purpose of the norm, though it be singular, must be the common good.[10] Of course, privileges favor the particular good,[11] but this must always be done as a function of the common good.[12]

3. *Compatibility of their singular character with the legislative competence of the person who grants them*

Doctrine has repeatedly affirmed the legislative character[13] of privileges as an essential element of their juridical nature. This affirmation is based fundamentally on the fact that the legislator is the only subject capable of granting and interpreting privileges. By contrast, others claim that privileges, though granted by the legislator, are granted with executive power.[14] There are also those who, like Bolognini,[15] in an attempt to make its location in the Code compatible with its juridical source, (the legislator), have pointed out that the privilege is an anomalous administrative act.

The unavoidable obstacle contained in the expression *privata lex* is precisely that generality is one of the essential characteristics of law. This difficulty is resolved by arguing that what characterizes privileges "is not the singularity of the addressee—that is, the quality of the act which connotes its link to a previous law that develops, applies, and executes it by

9. J. HERVADA, *Lecciones propedéuticas*..., cit., p. 396.
10. J. HERVADA, *Lecciones propedéuticas*..., cit., p. 395. For an exhaustive exposition of the tension between the common good and the private interest in the case of privileges, cf. S. GHERRO, *Privilegio, bene comune e interesse privato* (Padua 1977).
11. A. BERNÁRDEZ-CANTÓN, *Parte general*..., cit., p. 143.
12. J. HERVADA, *Lecciones propedéuticas*..., cit., p. 395; along the same lines, J. ARIAS, "Las fuentes del *ius singulare* y el acto administrativo," in *La norma en el Derecho Canónico. Actas del III Congreso Internacional de Derecho Canónico*, I (Pamplona 1979), p. 942.
13. For one opinion of the authors and the reasons adduced by them, beginning from the Decretal *Abbate* of Innocent III, cf. J. ARIAS, "Las fuentes del *ius singulare*...," cit., pp. 943–944. For his part, M. CABREROS DE ANTA, *Comentarios al Código de Derecho canónico* (Madrid 1963), p. 245, thinks that even though it proceeds from legislative power, it is not law in the strict sense, but rather a less plenary exercise of legislative power.
14. J.M. PIÑERO, *La ley de la Iglesia*, I (Madrid 1985), pp. 164–165 and A. BERNÁRDEZ-CANTÓN, *Parte general*..., cit., p. 144.
15. F. BOLOGNINI, *Lineamenti di Dirittocanonico*, 2nd ed. (Turin 1991), p.118.

making it specific to a particular case—but rather the singularity of the supposition of fact which it contemplates."[16] Along the same lines, it has been noted that privileges, insofar as they are granted in reference to specific presuppositions of fact, do share the characteristic of abstraction with legislative mandates.[17]

The first question that needs to be answered is whether the juridical regimen of the privilege in the *CIC* now allows us to lay the question to rest in the manner just expounded, or whether, on the contrary, it will launch a new debate on the subject based on new insights.

The wording of the canon permits three interpretations:

a) The reference to authority in c. 76 § 1 *in fine* supposes a fundamental change in the nature of the privilege on this point. That is, all privileges—in accordance with the systematic arrangement of the Code and the fact that they can be granted by legislators and administrators—are administrative acts. This understanding[18] appears to be reinforced by c. 77, which remits to the norms of interpretation of administrative acts to indicate how the subject called to interpret privileges should act. Likewise, the reference to privileges in c. 75 would buttress this position, since no one doubts the unequivocally administrative character of rescripts. Further support is provided by the placement of the chapter "Privileges," in title IV, which carries the heading "Singular Administrative Acts." This is the opinion currently maintained by Labandeira, who *a fortiori* of these arguments robustly affirms that "singular acts can only be executive (administrative) or judicial, not legislative."[19]

b) Neither the systematic placement nor the reference to executive authority is completely conclusive. Firstly, the argument from the placement in title IV runs counter to the literal terms of c. 35 itself, which, in referring to singular administrative acts, mentions decrees, precepts, and rescripts, while maintaining a noteworthy silence concerning privileges and dispensations.[20] In addition, to conclude from the reference to executive authority that privileges have ceased to have a juridically legislative nature, is—at the very least—as inexact as concluding the opposite, since the canon mentions the legislator first, and the competence of the administrative authority is restrained by authorization from the legislator himself. In fact, when granting a privilege, the administrative authority does so with delegated legislative power.[21] In other words, the granting of a privilege by one who has only executive power is subject to the rules of cc. 135 § 2 and 30. So, in principle, the privilege must be granted by the legislator, but

16. J. ARIAS, "Las fuentes del *ius singulare*...," cit., p. 945.
17. S. BERLINGÒ, "Privilegi e dispense...," cit., p. 102.
18. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo canónico*, cit., pp. 328–338.
19. Ibid., p. 330.
20. P. LOMBARDÍA, commentary on c. 35, in *Pamplona Com.*
21. H. SCHWENDENWEIN, *Das neue Kirchenrecht* (Graz-Vienna-Cologne 1984), p. 87.

since c. 76 provides for the possibility that this power is delegated to the administrative authority, it must be granted in accordance with the principles of c. 30, which Lombardía describes in these terms: "1) the assigning of competence is to be made by an act of express delegation, determining precisely the matter which the legislative body may legislate and of the conditions under which this legislative activity can be exercised; outside of this purview, any legislative act of an executive body would be null; 2) the dispositions issued through use of this delegated power are of a legislative nature, being, therefore, fully subject to cc. 7–22."[22] Finally, considering the expression of c. 75, even if we take the meaning of the text of the canon as cumulative and not adversative, we understand that the principle of specificity must be applied here, according to which, when there are rules that consider a juridical situation specifically, those rules are to be applied before applying rules that are more general. Thus, one would not say that privileges are subject to the same rules as rescripts and *also* to the rules on privileges; rather, privileges are primarily and principally governed by the rules on privileges, and when they are issued by means of rescripts—which is not essential but is in fact the most typical means—they are also subject to cc. 59–75.

c) We are confronted with two types of privileges that are completely distinct, depending on whether they are granted by the legislator or one with delegated legislative power, or by administrative authority exercising executive power. In the former case, they retain the legislative nature attributed to them by classical doctrine. In the latter case, they would be merely administrative in nature.

This distinction is not based on the form in which the privilege is granted since in that case it could be objected that the form of an act does not change its nature, unless that form has been constituted as an essential element of the act, which does not happen in the case of privileges. The distinction proposed here is based on the content of the favor that has been granted, which will, depending on the case, require the involvement either of the legislator or of the administrative authority. Clearly then, we have arrived at a more subtle understanding: the faculty to grant privileges is possessed in principle only by the legislator; the administrative authority, in order to grant them, requires the authorization of the legislator[23] even if it is a question of something that falls within his competence.

22. P. LOMBARDÍA, *Lecciones*..., cit., p. 155.
23. W. AYMANS-K. MÖRSDORF, *Kanonistisches Recht Lehrbuch Aufgrund des Codex Iuris Canonici*, I (Paderborn-Munich-Vienna-Zürich 1991), p. 261.

4. *Compatibility of their character as objective law with their possible acquisition by centennial possession*

The hypothesis that every privilege creates objective law appears to have been definitively resolved by the legislator in suppressing prescription as one of the means of acquiring a privilege. The nature of objective law corresponds imperfectly with the possibility afforded by the *CIC*/1917 of acquisition through prescription[24] (c. 63 *CIC*/1917).

This does not mean that there is still not the following latent question: what differentiates a subjective right from a privilege when the privilege is personal? First of all, a privilege cannot be inherited, nor can it be renounced without the approval of authority; moreover, subjective rights can be acquired by other just claims besides the involvement of authority, whereas privileges necessarily require the involvement of the public power.[25]

Canon 76 § 2 presupposes that, for the possessor of the privilege, only the lack of possession can be alleged against him, not the lack of concession.[26] According to Feliciani, another form of acquiring privileges, in addition to the direct concession by authority, is communication, applicable to cases in which a privilege is extended to new subjects.[27] In reality, this constitutes, in our opinion, a new act of concession. Therefore, neither in the case contemplated in c. 76 § 2, nor in the possible extension of the privilege to new subjects, does the involvement of the authority cease to be present. This presumption certainly has an act of concession as its object. What is presumed is not any type of just claim in the possessor, but the involvement of those who create objective law.

24. A. van Hove, *Commentarium Lovaniense in Codicem iuris canonici*, vol. I, t. V, *De privilegiis. De Dispensationibus* (Malines-Rome 1939), p. 16, maintains that when the privilege is acquired by prescription, objective Law is not created.

25. J. Hervada, *Lecciones prodedéuticas*..., cit., p. 394.

26. W. Aymans-K. Mörsdorf, *Kanonistisches Recht*..., cit., p. 262.

27. G. Feliciani, *Le basi del diritto canonico* (Bologna 1979), p.46.

77 **Privilegium interpretandum est ad normam can. 36 § 1; sed ea semper adhibenda est interpretatio, qua privilegio aucti aliquam revera gratiam consequantur.**

A privilege is to be interpreted in accordance with can. 36 § 1. The interpretation must, however, always be such that the beneficiaries of the privilege do in fact receive some favour.

SOURCES: *cc. 49, 50, 67, 68*

CROSS REFERENCES: cc. 36 § 1, 1150

COMMENTARY

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Canon 77 directs attention to the rules for administrative acts as norms interpreting privileges. This prescription is not absolute, however. Since privileges constitute a favorable juridical position, when recourse to the rules of interpretation of administrative acts impedes the benefit from an advantage for those who have it, one cannot have recourse to those rules. This precept makes it clear that not all privileges are administrative acts and that the substantive aspect—attainment of the favor—takes precedence over the formal aspects at the time of interpretation.

In Lombardía's opinion,[1] c. 77 signifies a reinforcement of the privilege as a rule of objective law since it emphasizes the innovative nature of the definition of the privilege in the canonical system.

The remission to c. 36 § 1 requires us to examine, even if briefly, the guidelines for interpretation contained therein, both for the persons called upon to execute a privilege and for their addressees. The question at hand is: to what extent can a juridical situation be considered included within the sphere of action of the privilege?

A first source of interpretative doubts stems from the fact that the proper meaning of the words and the common manner of speaking do not always offer the interpreter an unambiguous conclusion. Two categories must be distinguished: on the one hand, strictly juridical concepts, that is, those of legislative creation (as is the case with concepts such as judgment, *querela nullitatis*, appeal, adjudged matter, etc.—all concepts that do not exist outside the realm of law) or those that the legislator himself

1. Commentary on c. 77, in *Pamplona Com.*

defines (e.g., c. 361 defines what is to be understood by "Apostolic See" or "Holy See," and c. 1061 § 1 defines the "ratified marriage"); and on the other hand, indeterminate juridical concepts (such as "means of social communication" (c. 823 § 1), "newspapers, periodicals or pamphlets" (c. 831), "poverty" (c. 848), "act of formal abandonment of the faith," etc.). These cases are examples of concepts taken from reality, but which, in being used by law to define a supposition of fact or to fix the extension of juridical consequences attributed to the supposition, acquire juridical meaning.

The indeterminate juridical concept[2] is doubtful because it does not clearly outline the reality to which it refers and does not have any precise limits. Nevertheless, it serves to define the supposition of fact to which a determined juridical consequence must be applied, or else is integrated in the definition or extension of the juridical consequence itself. At the same time, it offers a correct understanding only in the context of the privilege in which it is found. The use of an indeterminate juridical concept in the text of the concession of a privilege does not mean, then, the assignment of the faculty to use discretion in choosing, among the various possible solutions, the one that is considered opportune. In civil law it is commonly accepted that the control of the application of indeterminate juridical concepts is considered a problem of the control of the motives of the act, which includes not only the determination of whether the fact exists, but also its juridical value.[3]

This significance has only a kernel of positive certainty (*Begriffskern*) (that which does, beyond all doubt, enter into the concept) and a kernel of negative certainty (that which, with all surety, is excluded from the concept). Between the two there is a zone of uncertainty (*Begriffhof*) or "halo of the concept."

The definition of the concept requires, in addition to the common use of the language, an understanding of the specific juridical function that the concept serves.[4] Only in the functional context in which they are used do the concepts acquire their proper meaning and their specific extension. The application of these juridical criteria to the interpretation of privilege presupposes that the determination of the extension of a supposition of privilege must always be made by adding the specific function of the particular privilege in question to the generic juridical function of every privilege—to grant a favorable juridical statute to its beneficiaries. This extension, in turn, must always be determined in light of the purpose for which the grace or favor is granted.

2. F. SAINZ MORENO, *Conceptos jurídicos indeterminados, interpretación y discrecionalidad administrativa* (Madrid 1976), pp. 70ff.
3. Cf. F. SAINZ MORENO, *Conceptos jurídicos…*, cit., p. 256.
4. C.W. CANARIS, *Die Feststellung von Lücken im Gesetz* (Berlin 1964), p. 15.

78 **§ 1. Privilegium praesumitur perpetuum, nisi contrarium probetur.**

§ 2. Privilegium personale, quod scilicet personam sequitur, cum ipsa extinguitur.

§ 3. Privilegium reale cessat per absolutum rei vel loci interitum; privilegium vero locale, si locus intra quinquaginta annos restituatur, reviviscit.

§ 1. A privilege is presumed to be perpetual, unless the contrary is proved.

§ 2. A personal privilege, namely one which attaches to a person, is extinguished with the person.

§ 3. A real privilege ceases on the total destruction of the thing or place; a local privilege, however, revives if the place is restored within fifty years.

SOURCES: § 1: c. 70
§ 2: c. 74
§ 3: c. 75

CROSS REFERENCES: cc. 306, 1233

COMMENTARY

María J. Roca

The perpetuity of the privilege, which has enjoyed an uninterrupted tradition,[1] is nonetheless not essential to this definition. The granting authority can revoke the privilege (c.79), and if it was granted upon the approval of the authority, it is extinguished with the expiry of the person who granted it (c. 81).

Traditionally it has been understood that those privileges granted to physical persons can be either personal or real. They are personal if they are granted to subjects, *intuitu personae*—for being who they are, for their qualifications, merits, or specific circumstances. On the other hand, real privileges are those that, while benefiting a determined person, are obtained by virtue of being the successor of a post, an office, etc. The former remain with the person wherever he or she goes, while the latter depend on

1. A. VAN HOVE, *Commentarium Lovaniense in Codicem iuris canonici*, vol. I, t. V, *De privilegiis. De Dispensationibus* (Malines-Rome 1939), pp. 202–204.

maintaining the office, post, etc.[2] This understanding transfers to those cases in which the subject possesses the privilege by reason of his or her relationship to a juridical person. From the moment this relationship ceases, the application of the privilege to this person also ceases.

Personal privileges cannot be inherited.[3] They extend beyond the duration in office of the grantor of the privilege, but not beyond the life of the beneficiary. This prescription is in concordance with the character of the objective law that presents the privilege. The beneficiary cannot dispose of it without a dependence on the intervention of the granting authority.

The cases of complete destruction of the object (§ 3) are understood to include both material and juridical destruction.[4] For example, in c. 1212: the application of something for profane uses carries with it the juridical destruction of that thing and, therefore, the extinction of the privilege. The case of privileges that present both a personal and a real character simultaneously is not unthinkable. Thus, the example of the privilege granted to a domestic chapel is bound as much to the owner as to the thing, in this case, the home.[5]

2. A. VAN HOVE, *Commentarium...*, cit., pp. 253–254.
3. W. AYMANS-K. MÖRSDORF, *Kanonistisches Recht Lehrbuch Aufgrund des Codex Iuris Canonici*, I (Paderborn-Munich-Vienna-Zürich 1991), p. 267.
4. W. AYMANS-K. MÖRSDORF, *Kanonistisches Recht...*, cit., p. 267.
5. W. AYMANS-K. MÖRSDORF, *Kanonistisches Recht...*, cit., p. 268.

79 Privilegium cessat per revocationem competentis auctoritatis ad normam can. 47, firmo praescripto can. 81.

Without prejudice to can. 81, a privilege ceases by revocation on the part of the competent authority in accordance with can. 47.

SOURCES: cc. 60 § 1, 71; *CD* 28; *Paen* V; *ES* I, 18 § 1

CROSS REFERENCES: cc. 4, 93, 396 § 2, 509 § 1, 526 § 2

COMMENTARY

María J. Roca

Once the cessation of a privilege for intrinsic reasons was recorded in the prior canon, the extrinsic causes of cessation are indicated beginning with this canon. These causes are dependent, primarily and principally, on the will of the person who granted the privilege, and on circumstances that can motivate the renunciation of the beneficiary (c. 80 § 1).

The revocation is only effective from the moment it is legitimately communicated to the beneficiary. According to the *CIC*/1917, a just cause was required for the revocation to be legal. This was not, however, required for its validity.[1] It distinguished between privileges granted by remuneration—and among these, those that correspond to obligations of justice and of gratitude—and privileges granted by mere liberality.[2] Van Hove[3] supports that privileges compensatory by justice are irrevocable, with the exception of cases of harm to the public good, in which case compensation should be conceded. Since the *CIC* says nothing to this respect, should this doctrinal criterion be understood as applicable in the current discipline? In our view, yes. In keeping with the character of objective law of privilege and with the dependence that is protected with regard to the expiry of the person who conceded it, this doctrinal criterion also becomes applicable in the jurisprudence of the current *CIC*.

Revocation can be produced by a general ordinance, which not only extinguishes the existing privilege, but also impedes it from being granted in the future. In the same way, a general revocation without a clause

1. A. VAN HOVE, *Commentarium Lovaniense in Codicem iuris canonici*, vol. I, t. V, *De privilegiis. De Dispensationibus* (Malines-Rome 1939), pp. 216–225; M. CABREROS DE ANTA, *Comentarios al Código de Derecho canónico* (Madrid 1963), p. 256.
2. A. VAN HOVE, *Commentarium*..., cit., p. 223, citing Reiffenstuel.
3. Ibid., p. 222.

prohibiting future concession is possible. Finally, the privilege is susceptible to express revocation.

An interpretation of privilege that can be derived from the fact that the beneficiary does not actually obtain a benefit does not exist. In the same way, there is not a derogative or revocatory interpretation.

The reference made to c. 81 should be interpreted in the sense that, if the privilege is personal, and the person to whose exclusive benefit it was granted renounces it, the renunciation should always be accepted.

80 **§ 1. Nullum privilegium per renuntiationem cessat, nisi haec a competendi auctoritate fuerit accepta.**

§ 2. Privilegio in sui dumtaxat favorem concesso quaevis persona physica renuntiare potest.

§ 3. Privilegio concesso alicui personae iuridicae, aut ratione dignitatis loci vel rei, singulae personae renuntiare nequeunt; nec ipsi personae iuridicae integrum est privilegio sibi concesso renuntiare, si renuntiatio cedat in Ecclesiae praeiudicium.

§ 1. No privilege ceases by renunciation unless this has been accepted by the competent authority.

§ 2. Any physical person may renounce a privilege granted in his or her favour only.

§ 3. Individual persons cannot renounce a privilege granted to a juridical person, or granted by reason of the dignity of a place or thing. Nor can a juridical person renounce a privilege granted to it, if the renunciation would be prejudicial to the Church or to others.

SOURCES: § 1: c. 72 § 1
§ 2: c. 72 § 2
§ 3: c. 72 §§ 3 et 4

CROSS REFERENCES: —

COMMENTARY

María J. Roca

The terms of § 1 do not give rise to questions of interpretation. They extend to all types of privileges (personal and real, contrary to law or outside of the law, etc).

According to Van Hove,[1] the acceptance of a renunciation of privileges that are not burdensome for others is required for the validity of the renunciation by its very nature. The special objective law conceded through privilege to the beneficiary cannot be renounced by his or her own free will. In effect, the privilege *contra ius* exempts the beneficiary from the observance of the common law, whose obligation does not arise

1. A. VAN HOVE, *Commentarium Lovaniense in Codicem iuris canonici*, vol. I, t. V, *De privilegiis. De Dispensationibus* (Malines-Rome 1939), pp. 228–229.

without consent of the legislator. The privilege outside of the law grants, in itself, a power that cannot be eliminated without the consent of the legislator. A particular person is not competent to modify the objective law. As long as the renunciation has not been accepted by the authority, it remains a mere desire or proposal and, therefore, is always revocable.

No one can impose on himself or herself the power not to use a privilege, by his or her own free will, as long as the authority has not accepted the renunciation.[2] Acceptance can be made by a special act or by a general ordinance of the law.

Paragraph 3 introduces strong restrictions with respect to the norms relative to the capacity to act of juridical persons. That is, the renunciation of a privilege is not considered a simple juridical act. On one hand, the physical person, although possessing the legitimate representation of a juridical person, cannot renounce a privilege in his or her own name, such as when the privilege has been granted to the juridical person by reason of location or object. It is fitting here to take as understood those privileges that are typically real (indulgences granted to a sanctuary, a temple, etc.) and privileges conceded to a juridical person as a religious institution, a specific community, etc. On the other hand, the juridical person is limited in the possibility of renunciation when prejudice to the Church or to others is supposed, such as when a religious institute or specific community has been granted a privilege whose exercise redounds to the benefit of the Church.

With regard to the previous, it should be added that it is the bishop who can renounce a privilege granted to the diocese. The financial administrator or the bishop's vicar, on the other hand, do not have the capacity to renounce, although they would, in fact, be the people who have competence regarding the matters to which the privilege refers.

2. A. VAN HOVE, *Commentarium...*, cit., p. 229.

81 **Resoluto iure concedentis, privilegium non extinguitur, nisi datum fuerit cum clausula "ad beneplacitum nostrum" vel alia aequipollenti.**

A privilege is not extinguished on the expiry of the authority of the person who granted it, unless it was given with the clause 'at our pleasure' or another equivalent expression.

SOURCES: c. 73

CROSS REFERENCES: —

COMMENTARY

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The general affirmation of independence of the privilege with respect to the granting authority does not prevent the expiry of the privilege upon the death of the person who granted it in cases where the privilege has been granted with the clause "at our pleasure." Note that no limitation is established to the right of renunciation of the beneficiary of the privilege when this clause exists. Such a limitation is, however, foreseen for the expiry of the privilege. That is, the clause of "at our pleasure" does not imply a total reserve of the privilege at the will of the granting authority.

As Urrutia indicated,[1] *ad beneplacitum* can be declared without revoking the granting authority or by law. By the will of the legislator it is understood that *ad beneplacitum* ceases at the same moment that the office ceases. These privileges are not subject to the rules of negotiation of donation.[2] This addresses, once more, the idea that the privilege is an objective, not subjective, right.

1. F.J. Urrutia, *De normis generalibus. Adnotationes in Codicem: Liber I* (Rome 1983), p. 50.
2. A. van Hove, *Commentarium Lovaniense in Codicem iuris canonici*, vol. I, t. V, *De privilegiis. De Dispensationibus* (Malines-Rome 1939), p. 219.

82 **Per non usum vel per usum contrarium privilegium aliis haud onerosum non cessat; quod vero in aliorum gravamen cedit, amittitur, si accedat legitima praescriptio.**

A privilege which does not burden others does not lapse through non-use or contrary use; if it does cause an inconvenience for others, it is lost if lawful prescription intervenes.

SOURCES: c. 76

CROSS REFERENCES: —

COMMENTARY

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A privilege is considered burdensome if, while conceding a favor, it causes some burden on a third party (e.g., exemption of a tax, power to impose a tax or establish some prohibition).[1]

The form of the extinctive prescription appears in this canon. The rule that is foreseen in the Code emphasizes the favorable character of a privilege,[2] with preference to any other purely dogmatic criteria. If, regarding manners of acquiring privilege, we note that the lack of reference to the acquisitive prescription can be considered indicative of the nature of the objective right and not the subject of the privilege, the reference to an extinctive privilege in c. 82 points rather to the contrary criterion.

What happens in the case of the right that can only be obtained by apostolic privilege that, because it causes a burden to others, falls into disuse?

Here there appears to be a contradiction with c. 199, 2°. This canon undoubtedly refers as much to the acquisitive prescription as to the extinctive, since both appear to be mentioned in c. 197 while c. 199 does not establish any specifications in this respect. Canon 199, 2° declares rights that can only be obtained by apostolic privilege exempt from prescription. On the other hand, according to the tenor of c. 82, all privileges that inflict some burden on others can be lost by legitimate prescription.

1. F.J. URRUTIA, *De normis generalibus. Adnotationes in Codicem: Liber I* (Rome 1983), p. 50.

2. W. AYMANS-K. MÖRSDORF, *Kanonistisches Recht Lehrbuch Aufgrund des Codex Iuris Canonici*, I (Paderborn-Munich-Vienna-Zürich 1991), p. 267, clearly shows that the freedom of use is the fundamental prerequisite for privileges.

Which criterion should prevail: taking into consideration the authority with competence to concede the favor, or the burdensome character of the privilege on others?

The primary question that should be kept in mind is whether the restriction of c. 199, 2° refers to rights that can only be conceded by the Apostolic See, and not to cases which, in fact, have been conceded by it, but could also be granted by an inferior authority.

A solution to this lacuna in the law—which is here produced by the existence of two norms with contradictory consequences applicable to one case—would be primarily to consider the cause of the privilege. Certainly, in the canons that the *CIC* dedicates to privilege, reference is repeatedly made to the need for the authority to intervene for its existence (whether for its creation or its cessation). Later a theological criterion of interpretation appears that also addresses the nature of the objective rights of privilege. This states that the intervention of the public authority (that is, to c. 199, 2°) should be given priority over consideration of the burdensome character for others—that is, the present canon.

By remission of c. 197, in each country the norms of the state law regulating prescription should be applied.

Regarding the difference between *contrary use* and *disuse*, *disuse* is applied to affirmative privileges, when the benefiting conduct that permits the conceded privilege is not put into practice. *Contrary use* refers to negative privileges, when the beneficiary carries out an act that, by virtue of the privilege, could be omitted.[3]

3. W. AYMANS-K. MÖRSDORF, *Kanonistisches Recht...*, cit., p. 267.

83 **§ 1. Cessat privilegium elapso tempore vel expleto numero casuum pro quibus concessum fuit, firmo praescripto can. 142 § 2.**

§ 2. Cessat quoque, si temporis progressu rerum adiuncta ita iudicio auctoritatis competentis immutata sint, ut noxium evaserit aut eius usus illicitus fiat.

§ 1. Without prejudice to can. 142 § 2, a privilege ceases on the expiry of the time or the completion of the number of cases for which it was granted.

§ 2. It ceases also if in the judgement of the competent authority circumstances are so changed with the passage of time that it has become harmful, or that its use becomes unlawful.

SOURCES: § 1: c. 77
§ 2: c. 77

CROSS REFERENCES: cc. 1336 § 1, 2°, 1338 § 1

COMMENTARY

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This canon regulates the manner of cessation of a privilege. Paragraph 1 considers the expiration of a time limit. It does not address, therefore, a circumstance that is outside of the power of the granting authority, but rather the opposite. Here the submission of the privilege to the public authority is reaffirmed.

The precept to which the canon refers (c. 142 § 2) foresees that acts in the internal forum are valid even though, by oversight, they are carried out after the term of the concession has passed.

In § 2 the modification of circumstances is considered as a motivation to make the use of the privilege harmful or illegal. It is understood that that privilege becomes harmful when it results in damage to the public good, the recipient of the privilege or others. It is also harmful when the burden worsens considerably for those whom the privilege burdened at the moment of its constitution, so that under such circumstances the privilege would not have been granted.[1] It is reputed that the privilege

1. Cf.A. VAN HOVE, *Commentarium Lovaniense in Codicem iuris canonici*, vol. I, t. V, *De privilegiis. De Dispensationibus* (Malines-Rome 1939), p. 277.

becomes illegal when, for any reason, it contradicts the rules of positive law that have not been repealed through the concession of the privilege, the rules of divine law (positive or natural), and those of morality.[2] This group of circumstances, in the terms of Lombardía,[3] would imply *irrationality*. All the same, are all illegal privileges irrational? Yes, though not all irrational privileges are such on account of their illegality. In principle, the irrationality additionally considers the case of the proportionality of the means to the end. The advantages and disadvantages derived from privilege should protect in themselves a proportional relationship. The proportionality requires that the benefit surpass the inconveniences that could occur. In calculating the proportionality, not only should one keep in mind, abstractly, the gravity and the importance of the juridical benefits that enter into the equation, but also the degree of probability and the intensity with which they are protected or damaged.[4] That is, the end for which the privilege is conceded should be adequate for the means: the concession of the privilege.

Nonetheless it does not produce automatic cessation. The conceding authority must intervene in the verification of such circumstances. The use of privilege as long as the competent authority has not intervened may be illegal and result in the beneficiary incurring abuse (cf. c. 84). Once the cessation has been pronounced the privilege would be invalid.

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2. A. VAN HOVE, *Commentarium...*, cit., p. 278.
3. P. LOMBARDÍA, *Lecciones de Derecho canónico* (Madrid 1984), p. 151, understands rationality as, "congruence with divine positive and natural law, as well as harmony with the formalizing efficacy with the various moments of law."
4. Cf. T. MAUNZ-R. ZIPPELIUS, *Deutsches Staatsrecht*, 27th ed. (Munich 1988), pp. 93–94.

84 **Qui abutitur potestate sibi ex privilegio data, privilegio ipso privari meretur; quare, Ordinarius, frustra monito privilegiario, graviter abutentem privet privilegio quod ipse concessit; quod si privilegium concessum fuerit ab Apostolica Sede, eandem Ordinarius certiorem facere tenetur.**

A person who abuses a power given by a privilege deserves to be deprived of the privilege itself. Accordingly, after a warning which has been in vain, the Ordinary, if it was he who granted it, is to deprive the person of the privilege which he or she is gravely abusing; if the privilege has been granted by the Apostolic See, the Ordinary is obliged to make the matter known to it.

SOURCES: c. 78

CROSS REFERENCES: c. 1144

COMMENTARY

María J. Roca

1. *General questions*

The tenor of this canon speaks of the abuse of power. The simultaneous use of abuse and power is somewhat surprising, since the term abuse is customarily applied to rights, while the analogous situation in the case of power is more commonly called deviation of power.[1] Nonetheless, it remains a doctrinal question. According to other authors, however, the difference between the two abnormal uses of the law would be that the person who abuses the law simply violates it, while the person who defrauds the law in fact cheats it.[2] In any case, it appears clear to us that the term power is not used here in the technical sense of *power* of government—although this is also included. Rather it appears more accurate to refer to the advantageous situation obtained through the privilege. It is fitting to add another explanation by use of terms: at the present time—facing the maxim of common law that says: *tot modis committitur simulatio quot modis committitur fraus*—fraud and simulation are not identified.[3] Nonetheless, since all fraud involves deviant and anomalous behavior, it

1. M. LÓPEZ ALARCÓN, "El abuso de Derecho en el ordenamiento canónico," in *Ius Canonicum* 9 (1969), pp. 121–122.
2. J. GUASP, *Derecho* (Madrid 1972), p. 376
3. F. DE CASTRO Y BRAVO, *El negocio jurídico*, 2nd ed. (Madrid 1991), p. 375ff.

can be said that ordinarily fraud includes a concealment or simulation. Therefore—and regarding the exegesis of the canon discussed here—we consider that the term *abuse* is used in its broadest sense as anomalous use of a privilege, including the conduct that is fraudulent by obreption or subreption and situation of deviation of power.

The figure is integrated within abnormal juridical situations. That is, a judgment of failure of the juridical figure analyzed relative to its proper end, which reveals the elimination of that end for which the privilege was conceded (see commentary on c. 76: the normative principle of equality requires that the adopted *tertium comparationis* be adequate for the finality of the norm) and its substitution by another completely different end. Another manner by which this mutation of the end can proceed is suppression by the beneficiary of all that is fundamental to the concession, while maintaining the use of the privilege, but clearly because of another different purpose of the beneficiary. The end must be examined not only at the moment of the concession, but in the continuance of its effectiveness. Nonetheless, the simple cessation of the purpose of a privilege neither revokes the privilege, nor prohibits its use.[4] If the use is made illegal or irrational, the principles of c. 83 § 2 must be applied.

In summary, abuse should be considered if a beneficiary makes use of a privilege in a sense different or contrary to what was granted by the conceding authority, or when the beneficiary surpasses personal limits of the place or time to which the privilege was limited.[5] The privilege, of course, exists—if it was not impossible to abuse it—but it is not used according to its normal, exact and correct objective. This deviation, of which the abuse consists, must be a deviation of its proper objective or cause.

2. *Determination of abuse*

We can say that the condition of abuse depends on two essential factors, and an instrumental one:[6]

a) In the first place a law must exist that impedes the effectiveness of the result, if this is presented in a direct and clear manner. But, must this law also condemn the utilization of the twisted path that has been chosen? In our judgment, no.

4. A. VAN HOVE, *Commentarium Lovaniense in Codicem iuris canonici*, vol. I, t. V, *De privilegiis. De Dispensationibus* (Malines-Rome 1939), p. 286.

5. W. AYMANS-K. MÖRSDORF, *Kanonistisches Recht Lehrbuch Aufgrund des Codex Iuris Canonici*, I (Paderborn-Munich-Vienna-Zürich 1991), p. 265; F.J. URRUTIA, *De normis generalibus. Adnotationes in Codicem: Liber I* (Rome 1983), p. 51, conceives of the "utendo ad peccatum" as another special manner for the abuse of privilege to occur.

6. For this point, we follow the well-known explanation on abuse given by F. DE CASTRO Y BRAVO, *El negocio jurídico*..., cit., pp. 370–371.

One example is a privilege that concedes to its beneficiary the possibility that a matrimonial case be reviewed before the metropolitan tribunal, and not before the Tribunal of the Roman Rota. This may be done so that the evidence can be brought forth more easily. In this case, it would be abuse if the beneficiary used the privilege to obtain a sentence that, without adhering to the norms regarding efficacy of certain evidence, adhered more to the pleasure of the petitum formulated in the petition. In this case, c. 1608 § 3 would impede the efficacy of the result. It does not require that the same law or precept that impedes the efficacy of the result also condemn the utilization of the twisted path that was chosen: the abuse of the privilege. Canon 84 is necessary and sufficient.

b) In the second place, the conduct of the beneficiary of the privilege must merit the flaw of fraudulence. Does this imply that the conduct must be directed at the violation of law, apart from the fact of the harm produced for a third party? In our opinion, no.

Any voluntary conduct of the beneficiary of the privilege carried out with a purpose different from that for which the privilege was granted should be considered fraudulent. Given this conduct, we understand that a violation of the law of privilege itself is automatically produced. This conduct also produces a transgression of the principle of equality, which is guaranteed in situations of privilege through adjustment of the purpose for which the privilege was conceded. It is not required—although, logically, neither is it excluded—that in addition to this transgression of equality, another type of harm to others be produced as a condition *sine qua non* for the fraudulent conduct to be recognized. This *objective* consideration of the fraudulent conduct which validates the abuse of privilege allows that—as we will see later—the responsibility for the possible harm caused be completely subjective: by fraud or negligence.

c) Finally, *it is fitting to ask if the following procedure for* committing abuse must have some special characteristic. We consider, also in this case, that this is not necessary.

In this respect, the close relationship between abuse or fraud of privilege and the interpretation of the same does not go unnoticed. That is, the validation of a conduct, in order to determine whether abuse is found or not understood within the radius of action of the privilege, is a typically interpretive task. Upon discerning the conduct that includes just use of the privilege, those which are excluded are also determined. The manner chosen for committing the abuse will aggravate or diminish the severity of the competent authority in determining revocation, but in no case will the abuse become just use of the privilege.

3. *Juridical consequences of the abuse of privilege*

First of all it is necessary to understand that abuse of privilege should not be mistaken as a cause for cessation of the privilege, as in the prescription contained in c. 1331 § 2, 3°. This canon prohibits the person excommunicated by a *ferendae sententiae* excommunication or a declared *latae sententiae* excommunication from using privileges that had been conceded. Obviously, this prohibition is independent of just use or of abuse that the beneficiary would have made of his or her privileges.

a) *Revocation of the privilege*

One should ask, once there is a certainty of the abusive use of a privilege, whether its revocation is obligatory or optional.

If the beneficiary is a place, it is clear that the one responsible for the abuse is not the place itself, but the persons who are in some way attached to the place who commit the abuse. In this case it does not appear to us that the revocation is obligatory.

If someone abuses a privilege excessively, he or she acts invalidly, because no power is established that allows the person to act beyond the limits of the privilege conceded. However, the privilege is still not lost *ipso iure*.[7]

The authority conceding the privilege should evaluate the abuse in a distinct manner based on whether the proposal results in something that is in itself illicit (e.g., acquiring an immoral intention). Or, the authority should limit him or herself to search for a distinct efficacy for the purpose of the goal (to carry out more rapidly an act that would require, despite the existence of the privilege that was abused, a previous counsel).

b) *Reparation of the damage*

The person who abuses the particular juridical situation produced by the privilege is not only deserving of its privation, but in the tenor of what is established in c. 128, is also obligated to repair any harm caused. That is, the abusive act of the privilege gives rise to the action of reparation of harm. Therefore it is certain that in order for someone to benefit from the action of reparation of damages, the aforementioned c. 128 requires that the damage be caused by unlawful acts or fraud (addressing a subjective responsibility). The reparation for damages caused through abuse of a privilege must be assessed according to the result.

c) *Submitting the abuse to the proper regimen of the act*

The qualification of abuse or fraud requires that the true, discovered result remain subject to the norms that should be applicable, in accordance with their true nature, and to the sanctions imposed by the same. In some cases nullity of the act is assumed, in other eviction, relative inefficacy or rescission.

7. A. VAN HOVE, *Commentarium* ..., cit., p. 286.

CAPUT V
De dispensationibus

CHAPTER V
Dispensations

85 **Dispensatio, seu legis mere ecclesiasticae in casu particulari relaxatio, concedi potest ab iis qui potestate gaudent exsecutiva intra limites suae competentiae, necnon ab illis quibus potestas dispensandi explicite vel implicite competit sive ipso iure sive vi legitimae delegationis.**

A dispensation, that is, the relaxation of a merely ecclesiastical Law in a particular case, can be granted, within the limits of their competence, by those who have executive power, and by those who either explicitly or implicitly have the power of dispensing, whether by virtue of the law itself or by lawful delegation.

SOURCES: c. 80; SCHO *Normae*, 1 iul. 1931, 3; *EM* IV; SCEP Facul., 1 ian. 1971, 23

CROSS REFERENCES: cc. 35, 59, 75

COMMENTARY

Eduardo Baura

1. *Formation of the legal concept of dispensation*

Chapter V, the last of title IV, is dedicated to administrative acts corresponding to dispensation. That is, it addresses one of the institutions that provide flexibility to the strictness of law for the good of souls. The first canon of this chapter, although it does not contain any rule of conduct, but a definition of dispensation, has great juridical relevance, as we will see.

The Latin verb *dispensare* means to give or to concede by *weighing* (*pensare*, to weigh, to consider) each case separately, since the prefix *dis* implies distinction.[1] Since the dispensation does not deal with a simple giving, but rather a weighted giving, it has always conveyed throughout history the idea of a certain modification of the common rule.[2]

In canon law, the concept of dispensation was formed gradually. Until the ninth century, dispensation was understood as any exception to the law. During the ninth through the eleventh centuries, the concept of being a means of reconciling dispositions that appeared contradictory was added. For its part, the Decree of Gratian offers a broad definition of dispensation, whose elements are the relaxation of law and the cause determined by the mercy and utility of the Church.[3] Starting with the decretists, the modern concept began to develop, but with many oscillations and with distinct foundations.[4] In any case, the dispensation always assumes an exception to the general law, without being easily distinguished from other institutions directed at relaxing the strictness of the law (tolerance, benign interpretation, epikeia, etc.).

Until the twentieth century, no legal systematic regulation of dispensation had been presented. In fact, the *Corpus Iuris Canonici* contains no section related to this institution. Thus, in the first stage of the codification, dedicating a specific title to a dispensation was not considered. Nonetheless, dealing with a very relevant subject matter in practice (who can grant dispensation, of which laws, when, etc.), many bishops requested that dispensation be given a specific treatment. In the *Schema* of 1914, the title *De dispensationibus* appeared. This title, with few variations, was definitively codified in cc. 80–86 of the *CIC*/1917.[5]

Thus, with the codification, dispensation received for the first time in history a legal systematic regulation, that would permit this institution to be clearly identified without confusing it with other similar figures. This was especially true when the first canon dedicated to dispensation defined it, definitively fixing the concept (canonically).

The current *CIC* also expressly regulates dispensation and, similar to its precedent, begins with the definition. However, it should be noted that dispensation should not be confused with the act given by the competent authority, through which the dispensation is conceded. The *CIC*, upon including (in the new system of book I) cc. 85–93 within singular

1. Cf. M. CABREROS DE ANTA, *Derecho Canónico fundamental* (Madrid 1960), pp. 455–456.
2. Cf. J. BRYS, *De dispensatione in iure canonico praesertim apud decretistas et decretalistas usque ad medium saeculum decimum quartum* (Bruges-Vetteren 1925), pp. 1–2.
3. Cf. *C* 1, q. 7, c. 5; *C* 1, q. 7, c. 23.
4. Cf. A. VAN HOVE, *De privilegiis. De dispensationibus* (Malines-Rome 1939), pp. 296–304.
5. Cf. J. DURÁN, "La doctrina antecodicial sobre la dispensa y su influjo en el CIC de 1917," in *Excerpta e dissertationibus in iure canonico* 9 (1991), pp. 13–64.

administrative acts, has further outlined the juridical nature of dispensation. This all carries with it—and here we find the importance of this canon—that, strictly speaking, the cited canons can only refer directly to the figure defined in c. 85. They are not applicable to other concepts of dispensation given throughout the history of canon law, but not included in the *CIC*. Still, as was noted during the preparatory works of the current Code[6]—and contrary to what is sustained by some[7]—c. 85 possibly excludes some phenomena that the *CIC* itself calls "dispensation," for example, the dispensation of ratified and non-consummated marriage (cc. 1697ff).

2. *The definition of the CIC*

Now we look at the notion of dispensation established by c. 85: "legis mere ecclesiasticae in casu particulari relaxatio." Objectively, dispensation is a situation of relaxation of a law in a specific case. Subjectively, it is the juridical position of the person receiving the dispensation of being released from a law that permits the recipient to do or omit something that is prohibited or required by the law in most cases. The situation of ineffectiveness of the law in a specific case is produced through an optional act that forms the title by which the recipient of the dispensation can practice conduct different from what is typically accepted according to the law.

Legis relaxatio. Relaxation of the law consists, intrinsically, in the inefficacy of all proper effects of the norm: obligatory, irritant, disabling, penal, etc. In fact, the form, *legis obligationis relaxatio* that was once proposed in the preparatory works of the *CIC*,[8] was not admitted, since it restricted the scope of the dispensation. In any case, in the act of concession the exact object of the dispensation should be determined. This is because in many cases it addresses only the dispensation of a particular aspect of a law, which remains in force in everything else (e.g., when an impediment to marriage established in a specific canon is dispensed). In any case, the canon speaks *relaxatio* because it is not an actual repeal or abolition that produces the complete separation between the law and the person dispensed from it. Rather, it is only the cessation of the legal effects in a particular case. Thus, in cases of dispensations of successive applications, the relaxation ceases if the motivating cause disappears (c. 93).

Legis mere ecclesiasticae. Since the first moments of the elaboration of the new Code, there was a desire to add to the definition of c. 80 of the *CIC*/1917 that the objects of dispensation are only ecclesiastical laws. It

6. Cf. *Comm.* 19 (1987), pp. 72, 73 and 186.
7. Cf. V. De Paolis-A. Montan, in *Il diritto nel mistero della Chiesa* (Rome 1988), p. 317.
8. Cf. *Comm.* 19 (1987), p. 72.

appeared so in the revision of 1969[9] (although not all ecclesiastical laws are dispensable, as is clarified in the following canon). Therefore, other phenomena of benign application of the divine laws, such as release from obligations required by votes or judgments (cf. cc. 1194 and 1202),[10] can improperly receive the name of dispensation, but are not governed by cc. 85–93.

On the other hand, the object of dispensation can be broadened, understanding that "merely ecclesiastical law" is not only the law in a formal sense, but rather all general ecclesiastical norms. This includes customs and general administrative decrees.

In casu particulari. An essential note regarding dispensation is that the relaxation of the law be in a specific case. If it were not, we would be dealing with another type of institution (repeal, abolition, special favorable norm). The *CIC*/1917 said "in casu speciali" and the doctrine contained much discussion regarding the exact significance of this expression and its possible difference with the singular, particular or peculiar case (all expressions that are also found in other places in the *CIC*/1917). In any case, the doctrine admitted that dispensation could come in several forms. These are: *"simplex"* (if dispensed for only one person, physical or moral, for a single act), *"simplex cum tractu successivo"* (for one person, but without expiring after a single act), *"multiplex"* (directed at various persons with respect to a single act) and *"multiplex cum tractu successivo"* (for various subjects, without expiring after a single act).

Currently the term *particular case* appears for the first time in the *Schema* of 1980. Beyond the terminological discussions, we can affirm that the *particularity* that is mentioned as a definite element of dispensation is that which is opposed to generality or abstraction proper of the law.[11] Thus, a true dispensation must be conceded through a *singular* authoritative act, in which its efficacy is attached to a *determined* case, for a determined person or persons, for a specific cause. It may also be for a community, but in a particular situation. For example, it is fitting to dispense of the law of fasting for a person suffering from an illness (a dispensation that could be applied on one or many occasions). Or a dispensation can be granted to a whole community capable of receiving a law (e.g. a diocese), but only in a specific case. For example, the dispensation may be granted in a particular year because there has been a catastrophe. In summary, the particularity of the case does not come from the quantity of juridical situations affected by the dispensation, but rather from the type of determination—the specificity—of the dispensation that permits continued existence of the law, operating effectively in the community for which

9. Cf. *Comm.* 19 (1987), pp. 73–76.
10. Cf., in this sense, G. MICHIELS, *Normae Generales iuris canonici* (Paris-Tournai-Rome 1949), II, p. 676.
11. Cf. F. SUÁREZ, *De Legibus*, I, c. 6, no. 24.

it has been given. The particularity of the case must be attentively examined, since it is one of the requisites that legitimize the exercise of the power to dispense. When dealing with the relaxation of a law for an abstract or indeterminate situation, the corresponding legislative authority would be required.

3. *The act of granting the dispensation*

The notion of dispensation in the Code concludes by indicating the ecclesiastical authority that can concede it. The suspension of the law in a particular case, with the corresponding concession of a right to conduct oneself *contra legem*, can only be granted through an authoritative act. Canon 85 generically indicates who can grant dispensations, while the following canons legislate more specific norms. In accordance with this canon, the person who has executive power can grant the dispensation. It also foresees the hypothesis that the person who possesses the power of dispensation—at the fringe of this executive power—by proper law or by legitimate delegation can grant dispensations. This norm is in agreement with the systematic placement of the chapter dedicated to dispensation (title IV of book I, that is, among the singular administrative acts) and repeats what is put forth in cc. 35 and 59. These canons state that singular administrative acts, among which the rescript is found (with the person who should grant, among other things, a dispensation), are given by the person who has executive power, within the limits of his or her competence.

The act of concession will be, therefore, a singular administrative act, and, in the tenor of c. 59, will generally be made by rescript. A dispensation may be granted by word of mouth (cf. cc. 59 § 2 and 74), but it would be difficult to prove. The tacit concession of a dispensation is also possible, at least in theory, but should unequivocally manifest the existence of the authority's will to grant the dispensation. Its scope, then, in case of doubt, is interpreted strictly (c. 92). Now, the tacit dispensation cannot be identified with ignorance on the part of the authority regarding a specific fact (that, if it were known, would cause the dispensation) or with the pardon or tolerance of an illegitimate conduct that is not sanctioned.[12] In this case, it would be a manifestation of bad government, and would create problems of juridical certainty, to attempt to grant a dispensation through an authoritative act contrary to the legal obligation of the recipient, without expressly declaring the will to dispense and, therefore, without mentioning the just cause.

12. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd updated ed. (Pamplona 1993), p. 345; A. VAN HOVE, *De privilegiis...*, cit., pp. 431 and 432.

There has been an interesting doctrinal debate regarding the nature of the act of concession of a dispensation. Some consider it a proper legislative function,[13] others as a manifestation of the administrative function.[14] Without going deeply into this problem, it should be emphasized that the Code has chosen without doubt the concept of dispensation as within the scope of administrative function. It was thus affirmed during the preparatory works of the Code[15] and has thus remained fixed in the system and in the definitive wording. This entails overcoming the idea that dispensation is an act of disposal of the legislator, as if it were the *dominus* of the law. On the contrary, the Code includes in the scope of the administrative function the relaxation of human law, with just cause, in a specific case. Therefore, the one in administration does not act *contra legem*, since the same law foresees and regulates the administrative power of dispensation.

The fact that the administration has the legal capacity to grant dispensations does not necessarily mean that it is obligated to do so. That is, the concession of a dispensation by the authority is a discretional act (see commentary on c. 90).

In order to understand the function that dispensation develops within the juridical rule—that of an institution directed to facilitate justice in a particular case—and as it can be conceded through an administrative act, it is essential to take into consideration an essential element: the cause. This factor is addressed in c. 90, in addition to cc. 87, 88 and 93. With greater certainty the *Codex canonum Ecclesiarum orientalium* included the cause as a defining element of dispensation (c. 1536), as has been traditionally done, since the first strict definition of dispensation presented by Ruffino *(legis relaxatio causalis)*.[16]

4. *Forms analogous to dispensation*

It is useful, and important in doctrine, to note the differences that exist between dispensation and other similar forms.[17] As we have said, in reference to a specific case, dispensation is different from *repeal* (or *abolition*) of a law and the special law contrary to a more general law. All of these are produced through legislative acts. The person possessing executive power, on the other hand, grants dispensations through a singular administrative act.

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13. Cf., for example, P. LOMBARDÍA, "Legge, consuetudine ed atti amministrativi nel nuovo Codice di diritto canonico," in S. FERRARI (Ed.), *Il nuovo Codice di diritto canonico* (Bologna 1983), pp. 95–101.
14. Cf., for example, E. LABANDEIRA, *Tratado..., cit.*, pp. 346–349 and 328–337.
15. Cf. *Comm.* 19 (1987), pp. 184–186; 3 (1971), pp. 89–90; 6 (1974), p. 54.
16. Cf. S. BERLINGÒ, *La causa pastorale della dispensa* (Milan 1978), pp. 113–117.
17. Cf., for example, R. NAZ, "Dispense," in *Dictionnaire de droit canonique*, IV (Paris 1949), col. 1285.

Dispensation is also different from *license* because this is a requirement to carry out, validly or legally, some act in accordance with the law. Dispensation, on the other hand, supposes the suspension of an ordinance of law, authorizing the recipient to act contrary to the law. In *tolerance* the authority does not sanction the infraction of a law, while in *dispensation*, the recipient does not break the law. In a *pardon*, the authority acts as if he or she does not know of the infraction of law (in order to avoid greater harm), but without overcoming the obligatory nature of the law, or conceding any right to act against it. In the same way, dispensation is distinguished from absolution, which is the act of the authority that repeals the effects already produced by the breaking of a law. Although historically the word "dispensation" has been used to designate absolution (speaking of dispensations *post factum*),[18] currently dispensation is understood as making non-obligatory, in the future, a law that in a specific case produces no effect and, therefore, is not broken. For this reason, dispensation must be distinguished from *ratification* and from the *validation* of acts.[19] Thus, for example, sanation following a null marriage, although it affirms that the dispensation of an impediment is assumed, if it were done (c. 1161), cannot be properly identified with the dispensation addressed in c. 85.

Dispensation must be distinguished from other institutions that rectify the strictness of the law. It is different from benign interpretation of the law or *epikeia*. Epikeia is not an exemption from the obligation of law, but the interpretation, declaring that the will of the legislator is to exclude a particular case from the general hypothesis described literally by the law.[20] Neither should dispensation be confused with the assumption of *excuse* from the law (ignorance, impossibility, etc.). In these cases an act of the superior to change the law in a particular case is not necessary.[21]

Finally, dispensation must be distinguished from *privilege*. Since both privilege and dispensation are conceded through administrative acts and both grant a favorable juridical situation, some have affirmed that dispensation would be a type of privilege.[22] The traditional doctrine, on the other hand, has differentiated both institutions. Privilege cannot be *contra legem*, and has the tendency of a perpetual character, etc. Keeping in mind the regulation of the Code, it is evident that privilege has an ordinance distinct from that of dispensation. The authority that can concede it does not coincide with that foreseen for dispensation, the causes of cessation are different, etc. It would be possible to affirm that, from the perspective of the juridical situation created by dispensation and privilege, they are both

18. Cf. J. BRYS, *De dispensatione...*, cit., pp. 106–107.
19. Cf. G. MICHIELS, *Normae Generales...*, cit., II, p. 677.
20. Cf. V. DEL GIUDICE, *Privilegio, dispensa ed epicheia nel diritto canonico* (Perugia 1926), pp. 48–55.
21. Cf. X. WERNZ-P. VIDAL, *Ius Canonicum*, I: *Normae Generales* (Rome 1938), p. 463.
22. Cf. E. LABANDEIRA, *Tratado...*, *cit.*, pp. 345–346.

in the same family: a particular legitimate position, different from the general regulation.

In summary, in accordance with the definition of this canon, it can be concluded that dispensation is, from the objective point of view, a situation of inefficacy of a merely ecclesiastical legal provision. It deals with a specific case with a just cause, produced by an administrative act given equitably (generally through rescript) by the competent executive authority. From the subjective perspective, dispensation is the juridical position of being released from a law, whose title is the administrative act that granted it.

86 Dispensationi obnoxiae non sunt leges quatenus ea definiunt, quae institutorum aut actuum iuridicorum essentialiter sunt constitutiva.

In so far as laws define those elements which are essentially constitutive of institutes or of juridical acts, they are not subject to dispensation.

SOURCES: *EM* IV

CROSS REFERENCES: c. 124

COMMENTARY

Eduardo Baura

This canon completes the definition given by the previous one, specifying the object of a dispensation. Effectively, only merely ecclesiastical laws are dispensable, but of these, those called constitutive laws are excluded. Constitutive laws would be those that define the essential constitutive elements of juridical acts or institutes. Specifically, c. 86 does not introduce a new precept, but rather has an explicative value, since an exception to a norm that defines the *essence* of juridical acts and institutes is contrary to the nature of things.

The laws of which this canon speaks are of human ecclesiastical law, which regulate the distinct legal types of juridical acts and institutes. In the broad sense used in this canon, the expression *juridical institute* alludes to those basic forms of the juridical organization. They are standardized through a group of rules that deal with the same matter. The following can be considered juridical institutions: the parish, the institute of consecrated life, ecclesiastical office, the association, dispensation itself, etc. The juridical act is any external act arising from human will with the intention of reaching a juridical result. It can originate in the exercise of power or in private autonomy. Juridical acts include the administrative decree, the contract, the vote, the sentence, etc.

Although they have a human origin, both institutions and juridical acts consist of some elements that define their essence, in such a way that if one of these elements is missing, there would be no institution or juridical act, but something different, with different juridical consequences. For example, if in the profession of a vow nothing is promised, or the promise is not directed to God, the act can be a distinct act of piety or a judgment, but not a vow. It must be concluded, therefore, that a norm, like c. 1191 § 1, which defines the essential elements of the vow, is indispensable. In the

same way, the necessity to promulgate the law (c. 7) cannot be dispensed, nor can the entrusting of a community of faithful to a parish priest (c. 515), nor can the passing of the time to speak of a prescription, etc. The essential constitutive elements of acts and institutes are identified by jurisprudence and by doctrine, since the majority of them are not specified in laws (precisely because they are essential).

The dispensation of an essential element would be a manifestation of juridical nominalism, since it would be the equivalent of conceding the *nomen iuris* to acts or institutions that are essentially something else. Such a situation would carry a notable prejudice to security and, in any case, would lack motive—the good of souls—to concede the dispensation.[1]

Perhaps because this limit to dispensation is so clear, the *CIC*/1917 did not contain a similar canon. The current text comes from the *Motu proprio De Episcoporum muneribus* IV, which was the first norm that introduced, in general, the power of diocesan bishops to dispense the universal laws. Upon changing the ordinance of dispensation, it appears that the universal legislator wanted to protect the canonical order from possible abuse with this norm that, although obvious, is useful. In effect, at no time was there doubt recalling it in the *CIC*.

Finally, it is useful to note that the constitutive laws must not be confused with invalidating (and incapacitating) laws. The latter cannot protect a constitutive element, but simply comply with the free decision of the legislator to sanction with nullity the lack of certain requirements (e.g., when a determined form *ad validitatum* is required for the completion of an act). Invalidating and incapacitating laws can be repealed if they do not protect constitutive elements and also dispensed. There is also a question regarding whether, although not expressly declared, constitutive laws produce invalidating effects, since the rule of c. 10 is not necessary for the nullity of an act dealing in some way with its essential constitutive elements.[2]

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1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd updated ed. (Pamplona 1993), pp. 340–341.
2. Cf., for example., G. MICHIELS, *Normae Generales iuris canonici* (Paris-Tournai-Rome 1949), I, p. 341.

87 **§ 1. Episcopus dioecesanus fideles, quoties id ad eorundem spirituale bonum conferre iudicet, dispensare valet in legibus disciplinaribus tam universalibus quam particularibus pro suo territorio vel suis subditis a suprema Ecclesiae auctoritate latis, non tamen in legibus processualibus aut poenalibus, nec in iis quarum dispensatio Apostolicae Sedis aliive auctoritati specialiter reservatur.**

§ 2. *Si difficilis* sit recursus ad Sanctam Sedem et simul in mora sit periculum gravis damni, Ordinarius quicumque dispensare valet in iisdem legibus, etiam si dispensatio reservatur Sanctae Sedi, dummodo agatur de dispensatione quam ipsa in iisdem adiunctis concedere solet, firmo praescripto can. 291.

§ 1. Whenever he judges that it contributes to their spiritual welfare, the diocesan bishop can dispense the faithful from disciplinary laws, both universal laws and those particular Laws made by the supreme ecclesiastical authority for his territory or his subjects. He cannot dispense from procedural laws or from penal laws, nor from those whose dispensation is specially reserved to the Apostolic See or to some other authority.

§ 2. If recourse to the Holy See is difficult, and at the same time there is danger of grave harm in delay, any Ordinary can dispense from these laws, even if the dispensation is reserved to the Holy See, provided the dispensation is one which the Holy See customarily grants in the same circumstances, and without prejudice to can. 291.

SOURCES: § 1: *CD* 8b; *EM* II–IX; Princ. 4
§ 2: c. 81; CodCom Resp. V, 12 nov. 1922; SCEEA Ind., 19 nov. 1941 (*AAS* 33 [1941] 516–517); Secr. St. *Notif.*, 1 ian. 1942; CodCom Resp. I, 27 iul. 1942 (*AAS* 34 [1942] 241); CodCom Resp. B/I, 26 iun. 1947 (*AAS* 39 [1947] 374); CodCom Resp. I, 26 ian. 1949 (*AAS* 41 [1949] 158); *CAd* I, 13; SCDF Decl., 26 iun. 1972, IV (*AAS* 64 [1972] 642); SCDF Normae, 14 oct. 1980, art. 1 § 2

CROSS REFERENCES: cc. 14, 291, 595, 1014, 1031, 1047, 1078, 1079, 1080, 1165, 1203, 1245, 1698

COMMENTARY

Eduardo Baura

Canon 87 considers in its two distinct paragraphs two different hypotheses. The first addresses the ordinary power of diocesan bishops, while the second refers to the power of ordinaries in a special case. They have in common the fact that both cases address laws given by the supreme authority.[1] We will comment separately on these two regulations.

1. *The ordinary and the proper power of the diocesan bishop* (§ 1)

Paragraph 1 of the canon contains a radical change from c. 81 of the *CIC*/1917. However it cannot be absolutely declared whether or not bishops throughout history had the power to dispense universal laws.[2] The fact is that c. 81 *CIC*/1917 established as a norm that ordinaries inferior to the Roman Pontiff could not dispense general laws of the Church, unless such powers had been conceded. The current principle is the contrary: diocesan bishops can dispense, unless the Apostolic See has reserved the possibility of dispensation in a specific matter.

The text of § 1 substantially recalls the principle proclaimed in *Christus Dominus*, 8b and responds to *Principles* 5 and 6 of the reform of the Code (cf. *Preface* of *CIC*). Thus, it passes from the system of faculties to the system of reserve. The reason for the change must be found in the doctrine of Vatican Council II regarding the episcopacy.[3] On one hand, *Lumen gentium* 27 recognizes the power of bishops to govern the particular churches that are in their jurisdiction as vicars and delegates of Christ, not as vicars of the Pope. Consequently, bishops possess all the juridical power (proper, ordinary and immediate) necessary to exercise the pastoral function in the portions of the people of God which belong to them, including the possibility of dispensation of universal laws (*CD* 8). On the other hand, the episcopal power must be exercised in communion with the episcopal College, whose head is the Roman Pontiff, supreme guarantor of the ecclesiastical communion. This implies that the Pope can

1. Cf. *Comm.* 23 (1991), p. 44.
2. Cf., for example, A. Van Hove, *De privilegiis. De dispensationibus* (Malines-Rome 1939), pp. 331–338 and G. Michiels, *Normae Generales iuris canonici* (Paris-Tournai-Rome 1949), II, pp. 6948–704.
3. Cf., for example, G. Philips, *L'Église et son mystère au II Concile du Vatican. Histoire, texte et commentaire de la Constitution "Lumen Gentium,"* I (Paris 1967), pp. 221–357.

reserve to himself determined institutions that are especially delicate, reserving the power of dispensation in these matters.[4]

Since the *CIC* views dispensation as something proper to the administrative function, it establishes that it is conceded by an authority with executive power (c. 85), without the obligation to identify himself with the author of the law. Therefore, it can be affirmed that the power of the diocesan bishop to dispense universal laws—that are governed by the rules of the executive power—is a part of the proper and immediate ordinary power that comes with the government of the diocese. In summary, the ordinance of c. 87 § 1, is the result of two principles: the recognition of the proper power of the diocesan bishop in his diocese, on one hand, and on the other, the view of dispensation as a matter of administrative function.

The subject of recognition of this power is principally the diocesan bishop. Now, this power must also be extended to those that c. 381 § 2 expressly equates to the diocesan bishop because they preside over a community of faithful of the type addressed in c. 368: territorial prelature, territorial abbacy, vicariate apostolic, prefecture apostolic and apostolic administration. Among these prelates, military ordinaries must also be included, as these are also expressly equated to the diocesan bishop (cf. *SMC* I § 1 and II § 1). Prelates of personal prelatures must also be recognized with the power to dispense universal laws, in the scope of their jurisdiction, since, although their comparison with the diocesan bishop is not explicitly stated in the *CIC*, it should be deduced. In effect, while the power of governance that some of the mentioned ordinaries possess has a theological root different from that of the diocesan bishop, the reason for the scope of their executive power is the same. That is, the necessity to possess all executive power, ordinary and proper, save for what is excepted by law, in order to exercise the proper function of principality in the part of the people of God with whom they are entrusted.

The power of the diocesan bishop to dispense universal laws is executive, ordinary and proper and, as such, may be delegated by virtue of c. 137 § 1, as much for an act as for most cases in general. On the other hand, the power of dispensation of universal laws is not possessed *ipso iure* by vicars general and episcopal vicars, since, although they do possess all the executive power that corresponds by law to the diocesan bishop (c. 479), in this matter c. 134 § 3 applies. This applicable canon states that all that is attributed *nominatim* to the diocesan bishop in the scope of executive power is understood to belong only to the bishop and his equivalents, excluding the vicar general and episcopal vicar, except by special mandate. In the hypothesis of c. 87 § 1, the power of dispensation is attributed personally to the diocesan bishop by reason of his proper

4. Cf. L. BUIJS, "De potestate episcoporum dispensandi," in *Periodica* 64 (1967), pp. 88–115, 456–484 and 597–639; C. HEITZMANN, *La potestad de dispensar de las leyes universales* (Rome 1989), *passim*, especially pp. 324 and 325.

power, which has been recognized by law pertaining to his governing function in the diocese. Effectively, the episcopal responsibility to make valid any legislation emanating from the supreme authority corresponds to whoever presides over a group of the people of God. At the same time, this person, with just cause, may dispense the application of said legislation in specific cases.[5]

In reference to the object of the dispensation, the canon speaks of disciplinary laws given by the supreme authority. Specifically, the adjective disciplinary adds nothing to the concept of the merely ecclesiastical law,[6] since it excludes only laws referring to faith and morals,[7] which are not merely ecclesiastical. What characterizes the laws that are discussed in this canon is that the author is the supreme authority. Thus, we speak here of universal laws in the broad sense (given by the universal authority), but, in reality, their scope may be universal or particular.

Nonetheless, procedural and penal laws remain excluded from the bishop's power of dispensation. The *Motu proprioDe Episcoporum muneribus* IV, upon application of the criterion of *Christus Dominus* 8, specified that the laws "ad processus spectantes, cum ad iurium defensionem sint constitutae" are not objects of the power of dispensation foreseen in the conciliar document.[8] On the other hand, the penal laws are those that precisely explain the most precious goods for the Church in the most effective manner possible, threatening with punishment the conduct that is contrary to such good. Evidently, it is very rare that there be just cause (a spiritual good of the faithful) that demands the suitability of legitimizing, in a specific case, a conduct, which the law classifies as a crime for all other cases. It is understood, then, why the supreme authority has reserved dispensation for himself in these matters.

In addition to the reserve of procedural and penal laws, the Apostolic See can, as the canon declares, reserve to itself or to another authority the power to dispense a specific law. In fact, the *CIC* reserves to the Holy See the dispensations of the following matters: priestly celibacy (c. 291); the obligation to associate at least two other consecrating bishops at an episcopal ordination (c. 1014); the age required for the presbyterate and diaconate when the time would be more than one year (c. 1031); the irregularities and impediments to receive the sacred orders

5. Cf. J. OTADUY, "La relación entre el derecho universal y el particular. A propósito de la Ap. Const. 'Pastor Bonus'," in *Ius Canonicum* 30 (1990), pp. 467–492, especially 475 and 476.
6. Cf. *Comm.* 23 (1991), pp. 44 and 45.
7. Cf., for example, A. VERMEERSH-I. CREUSEN, *Epitome Iuris Canonici*, I (Malines-Rome 1963), p. 96.
8. Cf. J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 431–477, especially 435–445.

foreseen in c. 1047, and matrimonial impediments of order (c. 1087), of a public perpetual vow of chastity in a religious institute of pontifical right (c. 1088) and of crime (c. 1078 § 2).

Canon 87, on mentioning reservations, speaks of the specifically reserved. Without prejudice to the pontifical power to reserve, the principle that governs this matter is that it pertains to the bishop, with proper power, to dispense the laws for all the faithful in his jurisdiction, including those that have been given by the supreme authority. Since the power of the bishop to dispense is executive ordinary power, it must be broadly interpreted, in the tenor of c. 138, despite the strict criterion established in c. 92 (that refers to the power of dispensation "conceded for a specific case"). The reservation has, then, an exceptional character, and as such, must be strictly interpreted. In summary, the reservations (although the supreme authority can establish all those that are deemed appropriate) must be strictly interpreted, while the power of the diocesan bishop is interpreted broadly.

For all this, there is no doubt that the word *specialiter* of the canon includes that the reservation must be expressly established. Some doctrinal sector, nonetheless, has considered the hypothesis of the implicit reservation to explain two real interpretations.[9] One of these declares that in the tenor of c.87 § 1 the diocesan bishop cannot dispense the form of matrimony.[10] The other affirms (without explicit reference to c. 87) that the diocesan bishop cannot dispense the prescription of c. 767 § 1, which reserves the homily to a priest or deacon.[11] In the case of the form of matrimony, it appears clear that the dicastery that has provided the act, qualified as interpretive of c. 87, has in reality established a new reservation (that would appear explicitly in *Motu proprio De Episcoporum munerius* IX, 17, but was not recognized in the *CIC*).[12] In the case of the homily, it should be taken into consideration that whether or not we address a constitutive law that considers it essential that the homily be preached by an ordained

9. Cf. A.M. ABATE, "La forma della celebrazione del matrimonio nel Nuovo Codice di Diritto Canonico," in *Apollinaris* 59 (1986), p. 171; F. AZNAR GIL, "Comentario a las respuestas de la Comisión de intérpretes de July 5, 1985. De la dispensa de la forma canónica del matrimonio," in *Revista Española de Derecho Canónico* 41 (1985), p. 509; J.A. FUENTES, "Respuestas de la C. P. para la interpretación auténtica del CIC, de fecha June 20, 1987," in *Ius Canonicum* 28 (1988), p. 634; F.J. URRUTIA, "Responsa Pontificiae Commissionis Codicis Iuris Canonici Authentice Interpretando," in *Periodica* 74 (1985), p. 628.

10. Cf. *AAS* 77 (1985), p. 771.

11. Cf. *AAS* 79 (1987), p. 1249.

12. In this sense, L. MADERO, "Resposta da Pontificia Commissão para interpretação do Codigo," in *Direito e Pastoral* 2 (1988), pp. 272–283 and J.T. MARTÍN DE AGAR, "La dispensa de la forma en una respuesta de la Comisión de intérpretes," in *Ius Canonicum* 26 (1986), pp. 306–308.

faithful (without prejudice to other explanations of the word of God that can very well be done by the laity).[13] If it were this way, it would no longer address a restriction to the power of the bishop, the declaration that the ordinance of c. 767 § 1 is absolutely indispensable (c. 86). However, there are those that reject this explanation and also speak in this case of a new reservation.[14]

2. *Dispensation in an urgent case* (§ 2)

Paragraph 2 considers, as we have said, a different case. The object of the dispensation is always the same—laws given by the supreme authority—but the subject of the power is not only the diocesan bishop, but any ordinary seeing the urgency of the case.

The expression "any ordinary" takes in all the subjects indicated in c. 134 § 1. That is, all those that exercise functions of government with ordinary executive power (proper or vicariate) in the jurisdictional structures of the Church, as well as, regarding its members, the major superiors of clerical religious institutes and societies of apostolic life of pontifical right.

In order to arrive at the case described in c. 87 § 2, two general requirements are necessary (difficulty in recourse to the Holy See and grave danger of harm in delay), and a third requirement for the case of reserved dispensations (which are customarily conceded in the same circumstances). Naturally, it is the responsibility of the same ordinary to prudently determine whether these requisites are present. Since the dispensation must be conceded through a singular administrative act, anyone who thinks that the ordinary was mistaken in determining that the case was urgent may challenge the administrative act on this basis according to the general rules of recourse against administrative acts. In any case, if there were doubts regarding the urgency of a case, it would similarly be appropriate to apply the norm of c. 90 § 2, which, in the case of doubt regarding the sufficiency of its reason, establishes that the dispensation conceded is valid and legal.

Difficulty in obtaining recourse does not mean that it is impossible to do so. The difficulty may come from lack of time, or the need to employ extraordinary means. With the practice some criteria were developed. Thus, it is considered that the ordinary means of communication is the

13. Cf. G. DALLA TORRE, "La collaborazione dei laici alle funzioni sacerdotale, profetica e regale dei ministri sacri," in *Monitor Ecclesiasticus* 109 (1984), p. 148; G. FELICIANI, "La prédication des laïcs dans le code," in *L'année canonique* 31 (1988), p. 129; J.A. FUENTES, "Respuestas de la C. P....," cit., pp. 629–632.

14. Cf., for example, F.J. URRUTIA, "Responsa Pontificiae Commissionis Codicis Iuris Canonici Authentice Interpretando," in *Periodica* 77 (1988), p. 624.

public postal service, while the telegraph or telephone are considered extraordinary,[15] not so much due to difficulty in employing them, but rather because of the lack of security in being able to protect the proper reservations. On the other hand, a case is not considered urgent when recourse can be directed through the pontifical legate.[16]

Grave danger of harm is in relation to the reason for the dispensation and the spiritual well-being that it should produce. In any case, in these cases it is not enough that the normal reason for the dispensation is given. Rather, the danger of grave harm is also required in the case where concession of the dispensation is delayed. In speaking of danger of harm, the case where the harm has already been produced is excluded. The nature of the damage can be of any type: material, spiritual, private or public.

In the case of urgency described, any ordinary can also dispense the laws given by the supreme authority that are reserved to the Holy See. In this case, another obvious requirement is added: that in the same circumstances the Holy See would generally concede the dispensation. In order to determine this requisite, the ordinary would have to follow the practice of the Roman Curia. In any case, the fact that it is reserved, especially in the actual discipline, indicates the will to require an especially grave reason to dispense in the matter. And, in reference to the dispensation of priestly celibacy, it should be kept in mind that c. 87, due to the remission contained in c. 291, maintains the reservation to the Holy See without admitting the exception in the case of urgency.

15. Cf. CPI, *Responsio* no. 5, November 12, 1922, in *AAS* 14 (1922), p. 662; c. 1079 § 4 of the *CIC*.

16. Cf. SECR. ST., *Notificatio*, January 1, 1942, in X. OCHOA, *Leges Ecclesiae post Codicem iuris canonici editae*, II, col. 2108, no. 1657; CPI, *Responsio* no. I, June 26, 1947, in *AAS* 39 (1947), p. 374.

88 **Ordinarius loci in legibus dioecesanis atque, quoties id ad fidelium bonum conferre iudicet, in legibus a Concilio plenario vel provinciali aut ab Episcoporum conferentia latis dispensare valet.**

The local Ordinary can dispense from diocesan laws and, whenever he judges that it contributes to the spiritual welfare of the faithful, from laws made by a plenary or a provincial Council or by the Bishops' Conference.

SOURCES: c. 82

CROSS REFERENCES: c. 134, 445, 455

COMMENTARY

Eduardo Baura

In this canon the discipline of the *CIC*/1917 (c. 82) is substantially recorded: that the particular laws—not given by the supreme authority—can be dispensed by all local ordinaries.

Local ordinary is understood as all those listed in c. 134 § 2—that is, those who have executive ordinary power (proper or vicarious) in a community of the faithful pertaining to the hierarchical structure of the Church. The fact that the local ordinary recognizes the power to dispense from the law is another consequence of the conception of the dispensation as an object of administrative function. That is, dispensation of laws for the benefit of the faithful in their own community corresponds to the ordinary administration of a diocese (or of an equivalent community of the faithful). This falls to the person who has competence and is charged with the ordinary government of this community (cf. c. 479). The power to dispense these laws may be delegated in the tenor of c. 137 § 1, since it forms a part of the normal competence of the regular power of the local ordinary. This occurs without prejudice that the particular legislator may reserve, for important reasons, the authority to dispense a specific rule (cf. c. 479 § 1).

The object of the power of dispensation is, in the case of this canon, all particular laws that have not been given by the supreme authority. That is, it applies to laws given by the diocesan bishop, by the particular council or by the bishops' conference. It is fitting to consider whether this canon speaks of law in the broad sense, since, leaving aside the debate regarding whether or not bishops' conferences have proper legislative power, it appears that this canon does not exclude the possibility of

dispensation of administrative norms given by the bishops' conference. This is because the power of the local ordinary must be interpreted in the broad sense (c. 138) and nothing prevents this case from being applied to the rule of law that states "*cui licet quod est plus, licet utique quod est minus*" (*VI reg.* LIII).

In the canon discussed here, no type of particular law is excluded from the power of dispensation of the local ordinary. Therefore, in theory, the local ordinary should be able to dispense both procedural and penal laws.[1] Nonetheless, in practice this does not have much relevance because, as there are very few particular penal or procedural laws,[2] it is difficult to give just cause for their dispensation. Naturally this always addresses merely ecclesiastical, not constitutive, laws (cf. c. 86).

In the case of dispensation of laws of particular councils and Bishops' Conferences, c. 88 requires that the local ordinary judge whether it really demands the good of the faithful. Needless to say, this is a general requirement for all dispensation, and not only for this case. Until the *Schema* of 1977, the preceding clause regarding the dispensation of these laws stated: "in casu tantum particulari," which is also essential to all dispensations. We can conclude that the legislator, without arriving at an adequate formulation, has attempted to protect these laws especially, by invoking a major consideration of the cause at the time of their dispensation, although this is difficult to verify in practice.

1. Cf. V. DE PAOLIS-A. MONTAN, in *Il diritto nel mistero della Chiesa* (Rome 1988), p. 321.
2. Cf. J. LLOBELL, "Centralizzazione normativa processuale e modifica dei titoli di competenza nelle cause di nullità matrimoniale," in *Ius Ecclesiae* 3 (1991), pp. 441–445.

89 Parochus aliique presbyteri aut diaconi a lege universali et particulari dispensare non valent, nisi haec potestas ipsis expresse concessa sit.

Parish priests and other priests or deacons cannot dispense from universal or particular Law unless this power is expressly granted to them.

SOURCES: c. 83

CROSS REFERENCES: cc. 1079, 1080, 1081, 1196, 1203, 1245

COMMENTARY

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We have seen how the power of dispensation forms part of the power of the executive ordinance. Therefore, the provision of this canon can be deduced from the remaining norms regarding dispensation, since a person who does not have the authentic power of governance in the Church also does not possess the power of dispensation. Nonetheless, the reason for this canon to exist is to clarify that not even in extreme cases—which are precisely those that demand dispensation—in which recourse to the competent authority is difficult, can sacred ministers dispense laws. This clarification was also present in the previous *CIC* (c. 83) and counters the doctrine of some ancient authors who accepted the possibility that in the most common cases parish priests could grant dispensations.[1]

The previous Code spoke only of parish priests, while the current one has added mention of other priests and deacons. In the case of parish priests, some doubt could, in effect, arise, since they are responsible for the care of souls—as the pastor proper, but under the authority of the diocesan bishop—over the community of the faithful with which they are entrusted (cc. 515 § 1 and 519). However, it is reasonable to consider that their function is not a power function. In any case, the reason that the legislator makes this allusion to parish priests and to other priests and deacons is always the same. That is, it addresses possible urgent cases that could arise, principally at the moment of administration of the sacraments, although in the case of deacons this is much less likely.

In any case, the canon does not exclude the possibility that the aforementioned subjects may be expressly granted the power to dispense. In reference to this case, c. 83 of the *CIC*/1917 used the expression *faculty*,

1. Cf., for example, J. D'ANNIBALE, *Summula Theologiae Moralis*, Pars I (Rome 1888), pp. 218 and 219.

while the current canon speaks of *power*. Independent of the terminology used, the power to dispense in this case is always by concession. Such concession can come from the law itself or by delegation. In most cases, the power must be strictly interpreted, in the tenor of c. 92, as it addresses a power conceded for a specific case.

The current *CIC* conceded the power to dispense the form of marriage and all impediments of ecclesiastical law, except what arises from the sacred order of presbyter (c. 1079 §§ 1 and 2), to the parish priest, the sacred minister duly delegated and the priest or deacon performing marriage. This occurs only under the specific circumstances addressed in c. 1116 § 2, which include danger of death and inability to reach the local ordinary. Paragraph 3 of c. 1079 establishes that in danger of death the confessor possesses the power of dispensation for the internal forum of occult impediments. Canon 1080 also concedes to the previously mentioned sacred ministers the power to dispense from some impediments in the so-called *casus perplexus*.

In addition to the faculties recognized in cc. 1196 and 1203 of dispensation of vows and oaths (see commentary on c. 85), c. 1245 grants to the parish priest the authority to dispense an obligation to observe a holy day or of penance. This must be exercised in accordance with the prescription of the diocesan bishop. By virtue of their comparison with the parish priest, the following also have this authority: the quasi-parish priest (c. 516), the deacon addressed in c. 517 § 2, the parochial administrator (c. 540 § 1), and the military chaplain (*SMC* VII). In addition, the same c. 1245 concedes the identical authority to the superior of a religious institute or of a society of apostolic life, if they are clerical of pontifical right, with respect to their proper subjects and to others that live day and night in the house.

90 **§ 1. A lege ecclesiastica ne dispensetur sine iusta et rationabili causa, habita ratione adiuctorum casus et gravitatis legis a qua dispensatur; alias dispensatio illicita est, nisi ab ipso legislatore eiusve superiore data sit, etiam invalida.**

§ 2. Dispensatio in dubio de sufficientia causae valide et licite conceditur.

§ 1. A dispensation from an ecclesiastical Law is not to be given without a just and reasonable cause, taking into account the circumstances of the case and the importance of the law from which the dispensation is given; otherwise the dispensation is unlawful and, unless given by the legislator or his superior, it is also invalid.

§ 2. A dispensation given in doubt about the sufficiency of its reason is valid and lawful.

SOURCES: § 1: c. 84 § 1; SCHO *Normae*, 1 iul. 1931, 3; *CD* 8b; *EM* VII; SCDF *Normae*, 13 ian. 1971, II/3b (*AAS* 63 [1971] 304); SCDF Decl., 26 iun. 1972, II (*AAS* 64 [1972] 642); SCDF Litt. circ., 14 oct. 1980, 5 (*AAS* 72 [1980] 1134); SCDF *Normae*, 14 oct. 1980, 2 et 3
§ 2: c. 84 § 2

CROSS REFERENCES: cc. 14, 63

COMMENTARY

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1. *Notion of the just and reasonable cause*

The motivating cause of a dispensation is that which impels the suspension of the efficacy of the law in a specific case, in order to achieve an equitable result in the singular case. The cause is, in effect, the element that turns the dispensation into a perfecting institution of the law. It is, therefore, far from being a factor destructive of the established disciplinary order, resulting from an arbitrary act. It is in the validation of the cause that the juridical sensibility of the authority must be weighed, so that the concession or denial will be a prudent, equitable act.

It is not easy to give an exact notion of a cause for dispensation, since it is presented under different aspects in concrete cases, and its validation will always consist of prudent judgment. The *CIC* does not give

a definition. Canon 87, nonetheless, speaks of the spiritual good of the faithful as cause for granting a dispensation (cf. *CD* 8b; *EM* VIII). Canon 88 refers only to *fidelium bonum*. The *CCEO*, in its c. 1536 § 2, points out a notion of cause: "bonum spirituale christifidelium est iusta et rationabilis causa." For its part c. 90, upon establishing the need for cause, qualifies it with the adjectives "just and reasonable" and adds an allusion to the consideration of the circumstances of the case and the gravity of the law that will be dispensed.

Therefore, the dispensation must always seek the good of the faithful for whose benefit it is conceded, and must depart from the presumption that following the law supposes the good of the faithful. It is difficult to trace a net separation between spiritual and unconditional good. What is clear is that a dispensation cannot harm the good of souls. That the dispensation be *just* means that it cannot damage any juridical good (of society, or of the rights of individuals). On the other hand, *reasonable* cause means that there should be harmony between the reason for the dispensation and the proper rationality of the law, in proportion to the circumstances of the case and the gravity of the law.[1] The dispensation, in summary, should not be considered a break in the order claimed by the law for the common good, but rather an exception that does not affect the general rationale of the law. Thus, instances of dispensation and of benign interpretation (epikeia) of the law have sometimes been considered very similar.[2]

Canon 90 offers two parameters for judging the rationality of the cause: the circumstances of the case and the gravity of the law that will be dispensed. One aspect of the rationality of the cause will be, in effect, a proportional relationship between the circumstances of the case that justifies an exception to the law, and the gravity of the juridical good protected by the law that will be dispensed.

The *CIC* does not properly contain restrictive causes for dispensation (canonical causes), except the ordinance of c. 14. This canon considers it a just cause for the ordinary to dispense the obligation of a law for which there is a doubt of fact. In some cases, especially when another authority has been conceded the authority to dispense, circumstances should be described that concur in order to give reasonable cause for the dispensation.[3]

There are circumstances that directly foster dispensation of the law. This may occur when following the law entails an especially onerous discomfort (e.g., when, due to physical weakness, it is best to dispense of the law of fasting), or when the dispensation may produce a greater good (e.g.

1. Cf. P. LOMBARDÍA, commentary on c. 90, in *Pamplona Com*, p. 109.
2. Cf. V. DEL GIUDICE, *Privilegio, dispensa ed epicheia nel diritto canonico* (Perugia 1926), pp. 48–55.
3. Cf., for example, SCHO, *Normae* July 1, 1931, in X. OCHOA, *Leges Ecclesiae post Codicem iuris canonici editae*, I, col. 1329, no. 1030.

dispensation of the obligation to attend Mass in order to care for an ill person). On other occasions, the dispensation may be advisable although there is no circumstance that directly opposes following the law, but where its relaxation may result in some good (achieving the reconciliation of a person or preventing a more grave transgression of law, etc.).[4] In these last cases the rationality and the justice of the cause should be appraised more attentively, to avoid confusing the dispensation with a mere relaxation of the discipline in detriment to the spiritual good of the faithful.

It is customary to speak of public and private causes, according to the type of good that is postulated. In the discipline of the first centuries of the Church, only dispensation for a public purpose was admitted. Starting in the ninth century, the private good and the faithful began to be taken into account.[5] One author holds that all dispensation is founded in the public interest and, therefore, the ecclesiastical authority would have not only the power, but also the obligation to grant it when the necessary requirements are fulfilled.[6] Be that as it may, the dispensation will benefit first the person receiving it in a specific case. However, if a just and reasonable cause exists, it will not carry any harm to the community, but rather it will indirectly enrich the community through the well-being of one or more of its members.

2. *Necessity of the cause*

In reference to the obligation of the authority to grant a dispensation, we must keep in mind that the cause, in itself sufficient to excuse compliance with the law, is never required. In such a case, application of the laws corresponding to the excuse and, where applicable, declaring that such a circumstance has occurred would be sufficient. But on the fringe of this case, necessary or obligatory dispensation for various causes are also discussed, among which the most considered case is that in which a precept foresees that the dispensation will be granted if requested and if determined circumstances are present.[7] There are authors that have also put forth the possibility that causes exist which make the dispensation necessary or obligatory. In this case, there is no recognition of a right to the dispensation, but rather an affirmation of the moral obligation of the superior to concede it.[8] It appears clear that the granting of a dispensation

4. Cf. G. MICHIELS, *Normae Generales iuris canonici* (Paris-Tournai-Rome 1949), II, pp. 742–744.
5. Cf. A. VAN HOVE, *De privilegiis. De dispensationibus* (Malines-Rome 1939), p. 418.
6. Cf. P. FEDELE, "Dispensa (diritto canonico)," in *Enciclopedia del Diritto*, vol. XIII (Milan 1964), p. 180.
7. Cf. F. SUÁREZ, *De legibus*, VI, c. 18, nos. 19–22.
8. Cf. A. VAN HOVE, *De privilegiis*..., cit., p. 427.

is an equitable act, which assumes the harmonizing, in a specific case, of justice with other virtues[9]—primarily with charity. Dispensation, therefore, is more or less necessary for reasons of equity, but it becomes practically impossible to determine exactly when a just act is necessary. From that we can affirm that the act of granting a dispensation pertains to the discretion of the competent authority. Now, discretion does not mean in some arbitrary manner. (This would occur in the case where the dispensation of a determined subject is declined, while being granted for the same or a lesser reason for another. Another example would be when the cause for the dispensation is the convenience of the authority that would not comply with the obligation to safeguard the discipline, etc.) On the other hand, upon administratively granting or denying a dispensation, it is always possible to request the dispensation of another authority within the boundary limited by c. 65, and even to appeal against the act of granting or denial in the tenor of c. 1732ff.

Canon 90 considers the case of dispensation without reason, stating that if it were conceded by an authority other than the legislator or his superior it is invalid and, in all cases, illicit. Legislator is understood here as the authority that gave the law that is the object of the dispensation (and, naturally, his successor). Thus, some legislators are not considered as such when dealing with the dispensation of a law enacted by their superior (e.g., the diocesan bishop with respect to universal laws).

It should be noted that in addition to the effective cause that justifies relaxation of a law, the authority must also, in fact, have adequate knowledge of the cause. Regarding this theme, the prescriptions regarding obreption and subreption (cf. c. 63) must also be kept in mind.

In spite of some very harsh admonitions regarding dispensations without cause,[10] traditional canonical doctrine has admitted its validity when the dispensation comes from the legislator.[11] This arises from a voluntarist conception of the law, in which the legislator is considered as the *dominus* of the norm, by which the law can be freely dispensed. In every case, it has always been noted that when a cause is lacking there is no "*dispensatio sed dissipatio*," since distributive justice is harmed and, perhaps, so is the subject dispensed. The "*relaxatio legis*" cannot be conceded purely arbitrarily or voluntarily, but rather it must be in response to the rationality of the law.

9. Cf. J. HERVADA, *Coloquios propedéuticos de Derecho Canónico* (Pamplona 1990), pp. 81–87.
10. Cf., for example, COUNCIL OF TRENT, *Sess.* XXV, Decr. *De reformatione generali*, ch. XVIII.
11. Cf. G. MICHIELS, *Normae Generales*..., cit., II, p. 740.

The validity of the dispensation without cause has ultimately caused a certain perplexity in the doctrine. There are those that see here a singular norm and not an administrative act,[12] since it is an action that obtains a result *contra legem* "without legal legitimacy". Nonetheless, it must be kept in mind that the act by which the dispensation is granted is always a singular administrative act. It should not be forgotten that in the Church all those that have legislative power also have executive power, and when a legislator concedes the relaxation of a law in a particular case, he is exercising an administrative function. Thus it is very fitting to affirm that, in questioning the cause of dispensation, the problem does not come in terms of validity, but rather legitimacy.[13] In effect, the act that contains a dispensation, although one with legislative power has granted it, is subject to the system of juridical control of administrative acts. That is, the competent authority can rescind the illegitimate administrative act that conceded a dispensation.

3. *The case of doubt regarding the cause*

Paragraph 2 of c. 90 contains a norm that seeks to give security in the juridical world. When there is doubt regarding the sufficiency of the cause, a conceded dispensation is valid and lawful. Some authors stress the fact that the canon speaks of sufficiency of the cause, not of its existence,[14] while others consider the possibility to apply this precept also when there is doubt regarding the existence of the cause.

12. Cf. P. LOMBARDÍA, "Legge, consuetudine ed atti amministrativi nel nuovo Codice di diritto canonico," in S. FERRARI (Ed.), *Il nuovo Codice di diritto canonico* (Bologna 1983), pp. 98–101.
13. Cf. S. BERLINGÒ, *La causa pastorale della dispensa* (Milan 1978), pp. 407–410.
14. Cf., for example, A. VERMEERSH-I. CREUSEN, *Epitome Iuris Canonici*, I (Malines-Rome 1963), p. 181; M. A CORONATA, *Institutiones Iuris Canonici*, I (Turin 1928), p. 112.

91 **Qui gaudet potestate dispensandi eam exercere valet, etiam extra territorium exsistens, in subditos, licet a territorio absentes, atque, nisi contrarium expresse statuatur, in peregrinos quoque in territorio actu degentes, necnon erga seipsum.**

In respect of their subjects, even if these are outside the territory, those who have the power of dispensing can exercise it even if they themselves are outside their territory; unless the contrary is expressly provided, they can exercise it also in respect of *peregrini* actually present in the territory; they can exercise it too in respect of themselves.

SOURCES: c. 201 § § 1 et 3; SCEC Resp. I–IV, 24 iul. 1948

CROSS REFERENCES: cc. 100, 136

COMMENTARY

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This canon addresses the *subject* of a dispensation. The concession of a dispensation is an act of jurisdiction, and as such it must follow the general rules of competency. In effect, the ordinance of the current canon substantially recalls the more generic rule of c. 136. This canon establishes that the executive power can be exercised, although one is outside of his or her jurisdiction, over the proper subjects, even when they are outside their territory (if the nature of the case, or the provisions of law, do not indicate otherwise). This power can also be exercised over *peregrini* that actually dwell in the territory. Those persons are subjects who pertain to a personal jurisdiction with respect to the personal ordinary, and those that have domicile or quasi-domicile and *vagus* (c. 107 § § 1 and 2) with respect to the local ordinary, always in the scope of their respective competencies. The *peregrini* are not, in principle, subjects of the local ordinaries. However, for the concept of the transient or *peregrinus* the following must be added to c. 100: the faithful who are found outside of their domicile or quasi-domicile which they still maintain.

For the *peregrini*, nonetheless, c. 136 admits the competency of the person who has executive power in a place, if it deals with the execution of universal and particular laws that are obligatory for them according to the norm of c. 13 § 2, 2°. That is, it deals with the laws of the territory that seek to take care of public order, determine the formalities that must be observed in the acts, or refer to immovable objects situated in the territory.

Canon 136 excludes, therefore, competency over the *peregrini* with respect to personal laws to which they are subject, and to the particular laws of the territory whose transgression causes harm in their own territory. Canon 91 does not contain this exception and, as it is more specific than c. 136, it can be thought to prevail over this. In addition, executive power must be broadly interpreted (c. 138). Nonetheless, apart from the case of territorial laws that are obligatory because their transgression would cause harm (and, therefore, it would be difficult to find a just cause for their dispensation), the same c. 91, upon establishing that dispensation should also be granted to transients, contains the clause "*nisi contrarium expresse statuatur.*" Both c. 136 and c. 13 § 2, 1° provide that the aforementioned laws are not under the competency of the territorial ordinary. Nonetheless, nothing would prevent them from being applied in an urgent case, similar to what is laid out in c. 87 § 2 regarding laws given by the supreme authority.

It is clear, then, that dispensation can be granted only to an authority's subjects. It is fitting to consider, nonetheless, that a person may benefit indirectly from a dispensation granted by someone who is not the competent superior. This is the case of a dispensation granted to one of the faithful that dissolves a legal bond that equally affected someone else[1] (this can occur, for example, in the dispensation of the matrimonial impediment of consanguinity).

Canon 91 has no precedent in the *CIC*/1917, but was considered very useful to include in the current Code[2] in order to counter the doctrinal discussions that had taken place regarding this matter during the codification of the Pio-Benedictine Code. To resolve the question, the authors appealed to c. 201 §§ 1 and 3 of the *CIC*/1917, whose ordinances were similar to the current c. 136 in reference to proper subjects. The practice also broadened competency to non-subjects,[3] but this was one of the controversial matters in the doctrine.[4]

Another of the most studied themes was the possibility that the superior could grant a dispensation to himself from the obligation of a law. It was common to say that a superior could dispense himself of a law, since by virtue of c. 201 § 3 of the *CIC*/1917, the voluntary jurisdiction could be exercised to his or her own benefit. Nonetheless the doctrine was inclined to reject the possibility of the dispensation of a law by oneself because it was considered that the legislator, when giving a law, cannot be obligated

1. Cf., for example, B. OJETTI, *Synopsis rerum moralium et Iuris Pontificii*, I (Prati 1904), p. 555.
2. Cf. *Comm.* 19 (1987), p. 191.
3. Cf. SCEC, *Responsio* July 24, 1948, in X. OCHOA, *Leges Ecclesiae post Codicem iuris canonici editae*, II, col. 2507, no. 2003.
4. Cf., for example, G. MICHIELS, *Normae Generales iuris canonici*, II (Paris-Tournai-Rome 1949), pp. 729–735.

by the same law. In reality, the defect of this reasoning is precisely in the posing of the problem, when one can observe[5] a voluntarist conception of the law which must be overcome.

Currently, then, the discipline of the Code remains clear, in terms of proper subjects, *peregrini*, the superior himself or herself that grants the dispensation.

5. Cf., for example, X. WERNZ-P. VIDAL, *Ius Canonicum*, I: *Normae Generales* (Rome 1938), pp. 472 and 473; A. VAN HOVE, *De privilegiis. De dispensationibus* (Malines-Rome 1939), pp. 399–402.

92 Strictae subest interpretationi non solum dispensatio ad normam can. 36 § 1, sed ipsamet potestas dispensandi ad certum casum concessa.

A strict interpretation is to be given not only to a dispensation in accordance with can. 36 § 1, but also to the very power of dispensing granted for a specific case.

SOURCES: c. 85

CROSS REFERENCES: cc. 36, 138

COMMENTARY

Eduardo Baura

This canon refers to the interpretation of a dispensation (or better, to the act of its concession) and to the power of dispensation granted for a specific case. Canon 92 contains, in reality, a specific application to the case of dispensation of two general principles proclaimed in cc. 36 and 138 and is nearly identical to c. 85 *CIC*/1917.

1. The canon establishes, in the first place, that a dispensation must be interpreted strictly, in the tenor of c. 36 § 1. This lies down as a precept that the administrative act, when it is contrary to a law in favor of individuals—as is obviously the case in dispensation—must be interpreted strictly. Therefore, the same principle established in c. 18 for laws that contain exceptions to more general laws prevails. That is, *in case of doubt*, the observance of a general law must be favored, instead of its exception. The factor that requires a strict interpretation in case of doubt is, in summary, the character of an exception to the law, proper to dispensation.

Now, strict interpretation should be understood correctly: as a type of explanatory interpretation that is carried out in case of doubt. This is confirmed by the reference to c. 36 (of which, although this explicit reference may not exist, it should be noted that the act of granting a dispensation is an administrative act). Canon 36, in effect, provides that the administrative act must be understood, in the first place, according to the proper meaning of the words and the common manner of speaking. Only in case of doubt must an explanatory interpretation be added (which may be broad or strict). Canon 36 also imposes strict interpretation for the case of an administrative act contrary to a law in favor of individuals (this is the case in dispensation).

Keep in mind, also, that *strict* interpretation must not be confused with what is commonly called *restrictive* interpretation. The first is a type of explanatory interpretation that, in case of doubt, chooses, among various possible meanings of the words, the most restrictive (e.g., when the term "lay" is interpreted as the faithful who are neither ordained nor consecrated, excluding those faithful who are consecrated but not ordained). The second, on the other hand, does not consist merely of an explanation of words, but forces their literal meaning, giving a more restrictive sense, considering that the will of the author of the interpreted act was not expressed correctly. (*magis dixit quam voluit*; e.g., when it is interpreted that where the act stated "faithful" it should have said "clergy"). Naturally, the law can indicate that specific acts and norms be interpreted strictly (the penal laws, acts that contain an exception to the law, etc.), but not require a restrictive interpretation, since this supposes a correction to the literal tenor of the interpreted act.

It is clear, then, that in the case of doubt, a choice must be made between possible interpretations that are merely explanatory, and those that are stricter, in favor of the law. This is contrary to the opinion of some authors who maintain that such strict interpretation should be carried out only in some cases.[1] This does not prevent the similar application of the principle of c. 77, that is, that dispensation really acquires some benefit to the recipient. In any case, as is evident, any extensive interpretation remains rejected. That is, any interpretation that goes beyond the literal sense of the words, broadening the dispensation to other subjects or other obligations of law or other cases not explicitly outlined in the act of concession.

2. Canon 92 also establishes that the power to dispense, conceded for a specific case, must also be interpreted strictly. The clarifications made above regarding the interpretation of the act of granting the dispensation apply here as well. The granting for a specific case means that the power to dispense is given to a specific subject or regarding a specific matter and this must be subject to strict interpretation.

Apart from this, in order to correctly understand this canon, here we must resort to the most general principles, that is, we must consider what is stated in c. 138. Thus, although the act of concession of the power to dispense for a specific case must be strictly interpreted, it is understood that the person who has this power (for a specific case) is also given everything necessary to exercise this power. None of this prevents, by virtue of the cited c. 138, the ordinary power of dispensation, as well as the power delegated in general for all cases ought to be interpreted broadly.

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1. Cf., for example, M. CABREROS DE ANTA, *Derecho Canónico fundamental* (Madrid 1960), pp. 475–476.

93 Dispensatio quae tractum habet successivum cessat iisdem modis quibus privilegium, necnon certa ac totali cessatione causae motivae.

A dispensation capable of successive applications ceases in the same way as a privilege. It also ceases by the certain and complete cessation of the motivating reason.

SOURCES: c. 86

CROSS REFERENCES: c. 46, 47, 78, 79, 80, 81, 82, 83, 84

COMMENTARY

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This last canon dedicated to dispensation deals with its cessation, and makes reference only to dispensation of successive applications as being possibly problematic in this area.

The dispensation of successive applications is that which, by virtue of the release from a law, allows the realization of more than one act contrary to the dispensed law (e.g., extending dispensation of the law of abstinence of meat during lent for each Friday of the same season). On the other hand, a dispensation that applies to a single act is called a simple dispensation (e.g., dispensation of an impediment to receiving priestly ordination ceases with the ordination).

Canon 93 stipulates that dispensation of successive applications ceases in the same way as privilege. Thus, the dispensation would cease due to several factors. These include the death of the recipient (c. 78 § 2), renunciation accepted by the competent authority (c. 80 § 1) and revocation by the competent authority in accordance with what is provided in c. 47 (cf. c. 79). Naturally, a just cause is required for such revocation, since, although the concession of a dispensation is discretionary, its revocation is not, as it is assumed to be an authentic right of the passive subject. Abuse of the dispensation, in accordance with c. 84, would be considered just cause for the revocation of a dispensation.

As the doctrine commonly points out,[1] a dispensation would also cease for the other reasons noted in the case of privilege, although this occurs less frequently in the case of dispensation. Specifically, these include

1. Cf., for example, A. VAN HOVE, *De privilegiis. De dispensationibus* (Malines-Rome 1939), pp. 455–456.

the passing of a designated time period or reaching the number of cases for which the dispensation was granted (c. 83); cessation of the authority of the person who conceded the dispensation, but only if it was granted with the clause "at our pleasure" or another similar clause (cc. 81 and 46); destruction of the thing or the place, if the dispensation had this real reference, lack of use, and consequently legitimate prescription, if the dispensation puts a burden on others (which would be difficult to reconcile with the just cause the dispensation should have).

In addition to the causes of cessation common with privilege, the dispensation of successive applications ceases with the certain and total disappearance of the motivating cause. This idea is also similar to what is considered for privilege in c. 83 § 2, but the statement of c. 93 is much more emphatic. Here we face a consequence of the importance of the essential element of the cause for dispensation, making the point of one of the differences between this institution and privilege.

The current canon points out that the cessation of the cause must be certain and complete. It is not sufficient, then, for only one of the motives that induced the dispensation to disappear. Nor is it sufficient for the gravity of the circumstances to lighten. In the same way, the cessation must be certain and, therefore, if there is doubt, the dispensation remains in force and can be lawfully used. It is important that such certainly exist, since the cessation of a dispensation does not require in itself an explicit declaration from the authority.

Canon 93 directly addresses the cessation of a dispensation with successive applications, without explicitly referring to simple dispensation. The authors that commented on c. 86 of the *CIC*/1917 (identical to the current c. 93) debated whether, in the case of cessation of the cause motivating a dispensation after it has been used, the dispensation also would cease. Naturally, if by virtue of the dispensation some acts have already been executed, even though the dispensation as such would not have had an effect, the rights acquired by the passive subject of the dispensation must be respected. In the case where no acquired rights or expectation of rights are harmed, c. 93 would have to be applied extensively. Thus, the cessation of the dispensation due to cessation of the cause would be affirmed, also keeping in mind the essentiality of the cause as a constitutive element of the institution of dispensation.

TITULUS V
De statutis et ordinibus

TITLE V
Statutes and Ordinances

INTRODUCTION

Andrea Bettetini

This title addresses two matters that, although they were already used in the heart of the ecclesial juridical order, were not considered in the preceding *CIC*: statutes and ordinances.

The reason the legislator considered it suitable to include these canons in the new Code must be sought primarily in the fundamental requirement for every subject and in every juridical system, of knowing in the most certain manner possible the substance and effects of an act. Also, in effect, through the formalization of the norms regarding statutes and ordinances, one can now act with the certainty that derives from understanding both the underlying substantial reality in these terms and their juridical efficacy.[1]

Statutes and *ordinances* are acts that constitute expressions of regulatory and statutory power, and contain general and impersonal norms aimed at moderating the conduct of certain subjects of law within entities of personal or foundational nature (cf. c. 115). Specifically, the statute is a document that contains the norms regarding the structure, organization and functioning of these entities. On the other hand, the ordinance is the act that contains the norms that must be observed in meetings of persons of celebrations indicated by the ecclesiastical authority or convoked by the faithful.

Statutes and ordinances are, therefore, administrative norms that, as such, are as different from singular administrative acts as from general decrees and instructions. They are distinguished from singular administrative acts based on a material criterion. The reason of the content of the act, in effect, contrasts declarations that will a general and impersonal efficacy

1. Cf. *Comm.* 9 (1977), p. 234.

(ordinances and statutes) to decisions that have a singular recipient (single administrative act). Nor are statutes and ordinances identified—this time according to a criterion that is not material, but functional—with general executory decrees and the instructions addressed in cc. 31-34. In effect, the function of the latter acts of administrative nature is, exactly, to execute an existing law, determining the specific manner of its observance and application. On the other hand, *statutes* or *ordinances*—while also being subordinate, and as we will see, to the principle of legality—constitute a non-executory, but independent, normative system of other laws. This concept can be expressed in another way by stating that they are normatively speaking secondary acts with respect to a primary law.[2]

As we anticipated above, the ordinances addressed by this title, given their administrative nature, are subordinate to the principle of legality. Beginning with the text of the canons it can be proven that the legislator understood this principle in a triple sense.

a) The first is the proper and general sense of non-contradiction with respect to a law, and of coherence of each act with previous legal ordinances with the goal of possible successive judicial control. In effect, for a major and more complete protection of the subjective juridical position of the faithful, a legislative foundation is considered necessary for those acts that can establish—and in fact do establish—effective norms *erga omnes*. This is also true for those acts that establish innovative norms of ordering (as is the case of statutes and ordinances in the measure to which they contain distinct or even new norms with respect to the general law: cf., for example, c. 119).

b) In addition to this certain sense of the principle, cc. 94 and 95 reveal a second meaning. This is the sense that they place in the law for the foundation of authority of the specific statutory and regulatory power to determined entities. This foundation is set even in the absence of both a specific standard parameter of coherence and verification of the substantial legitimacy to which we referred under letter a) above. Stated in another way: the legislative foundation assumes relevance also as a mere granting of power to a subject, without indication of criteria and goals (in this respect, the doctrine and the legislation admit statutory norms not only *infra*, but also *extra* or *praeter legem*).[3]

c) In reference exclusively to the statutes, c. 94 § 3 reveals an ulterior meaning of the concept of legality. In effect, this last ordinance foresees that these administrative standards of general character can be edited or promulgated by subjects endowed with legislative power. In this case the statutes are really lawsthat are governed completely by the norms of the

2. Cf. for an extensive treatment of this issue, E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd updated ed. (Pamplona 1993), pp. 250-259.

3. Cf. cc. 119, 167, 176, and, in doctrine, E. LABANDEIRA, *Tratado...*, cit. pp. 257-259.

canons (7–22) that involve laws. The value of these norms in the scope of the hierarchy of origins will vary according to the subject to which they have been given and promulgated. Thus, for example, the statutes of a personal Prelature, that are *ab Apostolica Sede conditis* (c. 295 § 1) constitute a pontifical law of universal scope, while those of a pastoral council, in the tenor of c. 513 § 1 *ab Episcopo dantur*, are acts of particular legislation. Naturally, the fact that the statutory ordinances have been materially created by the authority endowed with legislative power, proper or delegated, has little importance to these effects. Neither does the fact that this authority assumes and sanctions, acts and documents written by other subjects, as the proper interested entity, thus making them proper. What is important is that the statutory standard be adopted by the universal or particular legislative authority and proposed by this authority according to the anticipated forms of promulgation and publication. It is known, in effect, that in canon law promulgation and puboication coincide in a single act (cf. c. 7). The statutes merely *approved* by the competent authority are not legal in nature (cf. cc. 117; 314; 322 § 2, etc.).[4]

Finally, before moving on to the commentary of the canons, we must emphasize that in the center of the preparatory works the study and discussion of the current c. 94 regarding *statutes* were more articulated, while the approval of the successive canon regarding *ordinances* provoked fewer problems.

Specifically, we point out that in the different phases of elaboration of c. 94 there was a successive broadening of the active and passive subjects of the statutory ordinances. In reference to subjects endowed with statutory authority, it was first considered that these could only be juridical persons and associations.[5] Later, it was considered suitable to broaden the number of authorities endowed with the autonomous authority necessary to confer statutes, identifying them in a general manner with the *universitates personarum* and the *universitates rerum*.[6] This was done primarily in consideration of the fact that entities that are non-associative in nature exist in the Church that are nonetheless governed through statutes (such as Bishops' Conferences, chapters of canons, and military ordinaries), as well as subjects lacking personality, like non-recognized associations.

Similarly, concerning subjects that are recipients of the statutes, and with specific reference to the *universitates personarum*, there was an early proposal that acts relative to the functioning and organization of the entity itself were binding only for the faithful that formed a part of it.[7] How-

4. Cf. G. Lo Castro, *Le prelature personali. Profili giuridici* (Milan 1988), pp. 114–116; Spanish translation: *Las prelaturas personales. Perfiles jurídicos* (Pamplona 1991); French translation: *Les prélatures personnelles* (Brusells 1993).
5. *Comm.* 3 (1971), p. 93.
6. *Comm.* 14 (1982), pp. 138–139.
7. *Comm.* 3 (1971), p. 93.

ever, based on the observation of a consultant that some associations can include also non-baptized persons, it was decided that the term *christifidelis* be substituted for the broader expression, *person*. This term indicated the human person as such, independent of having received baptism:[8] "*Statutis universitatis personarum obligantur solae personae...*" (c. 94 § 2).

8. *Comm.* 20 (1988), pp. 110–111.

94 **§ 1. Statuta, sensu proprio, sunt ordinationes quae in universitatibus sive personarum sive rerum ad normam iuris conduntur, et quibus definiuntur earundem finis, constitutio, regimen atque agendi rationes.**

§ 2. Statutis universitatis personarum obligantur solae personae quae legitime eiusdem membra sunt; statutis rerum universitatis, ii qui eiusdem moderamen curant.

§ 3. Quae statutorum praescripta vi potestatis legislativae condita et promulgata sunt, reguntur praescriptis canonum de legibus.

§ 1. Statutes properly so called are regulations which are established in accordance with the law in aggregates of persons or of things, whereby the purpose, constitution, governance and manner of acting of these bodies are defined.

§ 2. The statutes of an aggregate of persons bind only those persons who are lawfully members of it; the statutes of an aggregate of things bind those who direct it.

§ 3. The provisions of statutes which are established and promulgated by virtue of legislative power, are regulated by the provisions of the canons concerning laws.

SOURCES: § 1: cc. 101 § 2, 395 § 4, 397, 410, 411 § 2, 416, 417 § 2, 418 § 1, 422 § 2, 1376 § 2; *DSD* 5, 56; SCSUS Instr. *Sacra Congregatio*, 12 iun. 1931, 1: 3°a; 3, Appendix II, (*AAS* 23 [1931] 264, 283–284); *UR* 8; *CD* 38: 2, 3; *GE* 11; SCCE Normae 20 maii 1968, Introductio; *SapChr* 7; SCCE *Ordinationes*, 29 apr. 1979, art. 6, Appendix I ad art. 6 (*AAS* 71 [1979] 501, 518–519)
§ 2: c. 410 § 1

CROSS REFERENCES: cc. 7–22

COMMENTARY

Andrea Bettetini

The term *statute* designates, materially, the standards concerning the organization and functioning of an entity or a subject, and, formally, the documents that contain these standards. On the other hand, the legis-

lator has explicitly excluded from regulation by c. 94 statutes understood as laws emanating from a legislator who is not the supreme authority. This meaning is also known as law (cf., for example, c. 548 § 1, in reference to the *diocesan statutes*).

Further, the difference effected by the same c. 94 between the norms of activity and organization, those addressed in the first two paragraphs, and the statutes addressed in the third paragraph, has substantial importance, in that the moment of application of the law or right is affected. The norms addressed in the third paragraph, in effect, and different from the previous two paragraphs, have the nature and force of law, and are subject to all the regulations addressed in cc. 7–22.[1]

This diverse system of the two categories of statutes has importance in both the effects of specifying the source of their obligation and the hermeneutic approximation as, ultimately, in possible judicial control.

The foundation of the obligatory character of statutes like those addressed in the last paragraph of the canon reside in the sovereignty of the legislator, in his or her *potestas regiminis*. These statutes constitute a norm that is special in certain aspects. They present new rules, different, or in any case specific, with respect to the general law, and they are placed at a level of hierarchy of sources proper to the legislative act with which the statute is sanctioned. To such end, it is fitting to indicate that c. 94 subjects the statutes promulgated by virtue of the generically considered legislative power to the proper discipline of the laws. Therefore laws that are not only the *statutes* given through a formal legislative act, but also sanctioned with an act that can be assimilated by the law, such as a general decree, must also be considered an expression of the legislation delegated by c. 29 and the following canons.

The supposition considered in c. 94 §§ 1–2, as opposed to the norms addressed in § 3, does not constitute an expression of sovereignty, but rather autonomy, understood as recognized normative power or, in some cases, attributing primary ordinance to derived subjects.[2] Therefore, the source of obligation of the statute, remaining firm in its formal and substantial subjection to the law, must be found, in this case, in the autonomous regulatory power of the entity itself.

In reference to the interpretation of the statutes considered in § 3, attention should be paid to cc. 16–21. Whenever these normative acts contain norms that are not included, or are considered in a different manner in the general law, they should always be strictly interpreted (c. 18) in

1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd updated ed. (Pamplona 1993), pp. 255–256; T. I. JIMÉNEZ URRESTI, commentary on c. 94, in *Salamanca Com.*

2. See M. S. GIANNINI, "Autonomia (teoria generale e diritto pubblico)," in *Enciclopedia del diritto*, vol. IV (Milan 1959), pp. 356–366.

light of the principles derived from the same statutory norms of the act they examine. On the other hand, strict interpretation is always imposed in reference to the aforementioned ordinances in the statutes considered in the first two paragraphs, which must be considered special norms when referring to a single entity.

Also in reference to the control of statutes by way of the judiciary, the diverse juridical nature of the two matters is relevant. It is noted, first of all, that in the canonical order, contrary to the secular, explicit and impartial jurisdictional recourse is lacking for the appraisal of the legitimacy of general norms and, especially, norms of an administrative nature, such as those addressed in this title.[3] Concerning specifically the statutory norms considered in the last paragraph of the canon (statutes that we have defined as normative), we consider that, on the request of the interested parties, recourse to the PCILT is possible, according to article158 of the Constitution *Pastor Bonus*. This recourse was classified by the doctrine as improper hierarchical recourse because it is not to be resolved by the hierarchical superior of the author of the opposed norm or act.[4] The existence and nature of law of these acts are derived totally and solely from their issuance or sanction by the ordinary legislative authority or by delegation. Thus, we also consider that the normative statutes can, as presupposed acts, be attacked before the ordinary judge, together with and subordinate to the legislative act that promulgated them.

The statutes addressed in the first two paragraphs, given their clearly administrative nature, can be challenged, on the other hand, only jointly with the specific administrative act of application: with the hierarchical recourse regulated in cc. 1732–1739, or with contentious recourse before the Apostolic Signatura anticipated in c. 1445 § 2 for the resolution of administrative controversies.

3. Cf. R. Bertolino, *La tutela dei diritti nella Chiesa. Dal vecchio al nuovo codice di diritto canonico* (Turin 1983), pp. 150–157; G. Lo Castro, *Il soggetto e i suoi diritti nell'ordinamento canonico* (Milan 1985), pp. 216–220; E. Labandeira, *Tratado...*, cit., pp. 262–266.

4. Cf. E. Labandeira, *Tratado...*, cit., p. 266.

95 **§ 1. Ordines sunt regulae seu normae quae servari debent in personarum conventibus, sive ab auctoritate ecclesiastica indictis sive a christifidelibus libere convocatis, necnon aliis in celebrationibus, et quibus definiuntur quae ad constitutionem, moderamen et rerum agendarum rationes pertinent.**

§ 2. In conventibus celebrationibusve, ii regulis ordinis tenentur, qui in iisdem partem habent.

§ 1. Ordinances are rules or norms to be observed both in assemblies of persons, whether these assemblies are convened by ecclesiastical authority or are freely convoked by Christ's faithful, and in other celebrations: they define those matters which concern their constitution, direction and agenda.

§ 2. In assemblies or celebrations, those who take part are bound by these rules of ordinance.

SOURCES: § 1: Ioannes PP. XXIII, mp *Appropinquante Concilio*, 6 aug. 1962 (*AAS* 54 [1962] 609–631); Secr. St. Normae, 13 sep. 1963; Paulus PP. VI, Normae, 2 iul. 1964; Se c Rescr., 8 dec. 1966 (*AAS* 59 [1967] 91–103); CPAC Rescr., 24 iun. 1969 (*AAS* 61 [1969] 525– 539); CPAC Rescr., 20 aug. 1971 (*AAS* 63 [1971] 702–704)
§ 2: Ioannes PP. XXIII, mp *Appropinquante Concilio*, 6 aug. 1962 (*AAS* 54 [1962] 611)

CROSS REFERENCES: cc. 309, 441, 442 § 1

COMMENTARY

Andrea Bettetini

This canon considers only those regulations that must be observed in meetings (synods, elections, etc.) and in celebrations (rituals of the sacraments and sacramentals, etc.). Therefore, they do not control either the regulation of development of laws or ordinances that instruct the functioning and the internal organization of some organs that can also assume the qualification of normative sources. The recent RGCR, promulgated according to the proper forms of the law through its publication in *AAS*, constitutes an example of this last case.

The obligatory force of *ordinances* resides in the autonomous normative power recognized by the ordering to the organs that dictate them, and

in the law, which cannot be contradicted in any case (c. 309). It is legitimate for the authority endowed with executive authority to dictate and sanction them, in general. Some regulations are reserved to specific types of subjects. Thus, only the Roman Pontiff is competent to establish ordinances that regulate the development of the ecumenical council.[1] The bishop of Rome or the ecumenical council is exclusively competent to approve the rituals of the sacraments, in reference to their validity (c. 841). The Bishops' Conference is the only authority that can establish the ordinance of plenary council (c. 441), as the metropolitan is the only legitimate subject to determine the *ordo agendi* of the provincial council (c. 442 § 1).

The regulatory ordinances of an assembly oblige all subjects that take part in the meeting for which they have been adopted (c. 95 § 2) and do not have any efficacy outside of the same group.

As occurs for statutes that are not normative (c. 94 § 3), the law does not anticipate a direct jurisdictional control for ordinances. Nonetheless, an indirect control of *ordinances* is considered possible.[2] In effect, they can be challenged when an administrative act applicable to them determines the direct harm of an individual interest. In this case, the specific party that is actually harmed can legitimately appeal the administrative act of application, together with and subordinate to what will be appraised as the legitimacy of the ordinance. In the tenor of the law, the harmed party can oppose the decision in a hierarchical route, or in a jurisdictional route before the *Sectio altera* of the Apostolic Signatura.

1. Canon 338 § 2: cf. *AAS* 54 (1962), pp. 609–631 and 63 (1971), pp. 702–704.
2. Cf., for a useful comparison with civil law, A. ROMANO, "Osservazioni sull'impugnativa dei regolamenti," in *Rivista trimestrale di diritto pubblico* (1955), pp. 950ff; L. CARLASSARE, "Regolamento (diritto costituzionale)," in *Enciclopedia del diritto*, vol. 39 (Milan 1988), pp. 632–636.

TITULUS VI
De personis physicis et iuridicis

TITLE VI
Physical and Juridical Persons

INTRODUCTION

Gaetano Lo Castro

1. *The person in philosophical and theological speculation*

"Person" is an expression that has a long tradition in Christian philosophical and theological speculation. "Subiectum sui iuris, quod sit principium elicitivum actionis et centrum ultimum attributionis"; the idea of person as hypostasis (substance, "that which is underneath," to which the all, of which it is composed, can be referred), has occupied a notable place in the reflections on the trinitarian ministry (to represent the Father, the Son, and the Holy Spirit in their real reciprocal distinction, diversity in unity),[1] and regarding the Word made flesh (one person, the divine person of the Son of God, with two natures, the divine and the human).[2]

In anthropology developed in a metaphysical context so elevated as the one we speak of, "person" ("*rationalis naturae individua substantia*")[3] would also have designated the human person, endowed—though of a form analogous to God—with spiritual attributes that make him or her suitable to be considered the only one among living creatures to be the ultimate point of reference for all reality.

2. *The person in law*

In law the use of the term "person" is very old, although it would be dangerous to state that it has always expressed the richness of the idea made clear by Christian philosophy and theology.

1. Cf. *S. Th.*, I, q. 29, a. 3.
2. Ibid., III, q. 2, a. 3.
3. Cf. ibid., I, qq. 75–83, and *CG* l. II.

In Roman law it was already spoken of as "*ius, quod ad personas pertinet*,"[4] to indicate that the law referred to the condition of human beings. Although it could have had better or worse fate, such a term does not seem to have ever been marginalized by juridical conceptualization until arriving at a meaning to indicate, through translation in times closer to ours, of something other than men, that is, other points of imputation for juridical purposes, the so-called juridical persons.

In contrast, the special use of the concept of person for the construction of the juridical system is much more recent and coincides with the work of codification in several areas of Western civilization. In effect, in modern legal systems "person" indicates a formal juridical classification that the legal system attributes to or affords those subject to law; in other words, the manner with which the subject, generally, is presented in law, acting as the principal actor of the juridical experience.

In this manner, a tendential equivalence between juridical subjectivity and juridical personality has come to be established. And not only that: modern secular juridical science, coming from a rationalist and illuminist culture, likewise under the impulse of centralizing movements of power, which moved the core of the juridical phenomenon from experience (juridical) to production (normative), had observed the need for a systematic construction of the legal system around an ordering principle, which sometimes was situated in the norms (as the only acts considered suitable to produce juridical effects) and others in the subjects. As is well known, the reasons of power prevailed: the ultimate point of reference for juridical experience is not man (the subject of law par excellence), but the norm. Moreover, it is the norm (to be more precise, the power that decrees it) that dictates the conditions allowing a subject to exist in law: "person" would have ideally condensed said conditions and designated the subject in law, such that, only that to which the condition of person has been attributed in a duly manner by positive law could be classified as such in the legal system. To conclude: the recognition of the classification as a person is no longer tied to any metaphysical attribute which allows having *a priori* that classification and to claim it in a specific juridical experience, but depends only on the free and arbitrary will of the legislator.

Thus, an evolution in the meaning of the term took place (a frequent occurrence, on the other hand, in linguistics) and, indirectly, of the very phenomenon represented by that term: its distinctive features, instead of being obtained from the objective datum by means of a procedure of abstraction, whose strength depends on the cultural development of a social context, are now, however, determined and attributed by authority. Therefore, if "person," in the old Roman law, could indicate the human being on a level of abstraction that would exceed every particular specification

4. GAI I, 8. Cf. B. ALBANESE, "Persona (storia). a) Diritto romano," in *Enciclopedia del Diritto*, XXXIII (Milan 1983), p. 169.

(sex, age, citizenship, census, etc.), it could have also indicated, on a more elevated level of abstraction, those complex social phenomena that share with the human condition the fact of becoming ultimate points of attribution; and, lastly, by a sort of heterogenesis of its purposes of usage, it would have indicated (and it still does) a classification dictated by the legislator, which can perfectly coincide with the metaphysical exigencies of the being and can respect them, but which can equally not coincide, since its basis is not situated in those exigencies.

3. *The person and the codification of canon law in the CIC/1917*

Canon law remained outside these vicissitudes of juridical culture until, towards the end of the last century and the beginnings of the present century, the demands of codification prevailed. But once it was considered opportune to adopt the reasons that had inspired it in the temporal legal systems (and, first, the idea that the law was constructed in a rational system, by normative will, around a few fundamental concepts among those that the subject in law had) the canonical legislator resorted to the idea of "person," pursuant to the meaning that had been accorded to it by modern secular juridical science. The ambivalent and equivocal use of that term in the *CIC*/1917 is precisely, among many others, one of the most significant symptoms of the break with the oldest cultural tradition that the work of codification involved.

The legislator of the Church, still without distancing himself completely from the inspiring motives of that tradition, begins by showing, with the title of book II (*De Personis*), that he conceives the person as a conceptual expression of a reality that transcends any specifically ecclesial classification; an expression tending to encompass *pure ac simpliciter* in a higher degree of abstraction, and to represent the phenomena of subjectivity in the Church, pursuant to the manner stated in canon law, but likewise outside of it. Before it could even be addressed, clerics, religious, and laymen, to whom the three parts of the mentioned book II are devoted, must be understood as "persons," which expressed a correct metaphysical vision of the problem, though after the legislator had not taken some of their consequences, especially those (like the principle of equality) that, even being implicit in the legal system, would have been desired to have been made explicit in some way.

But afterwards, in the introductory canons of book II, the same legislator of 1917, reflecting on contemporary secular culture, came to understand the person as a formal classification that the legal system attributed and afforded to subjects in law, likewise to regulate them in their lives and their juridical operational capacity. With baptism an individual is constituted a "person" in the Church, with all the rights and duties proper to Christians (c. 87); and converted into a "moral person," a subject in law, an entity established by means of a formal act of ecclesiastical authority.

Thus it happened that, while no conclusion was drawn on the juridical plane from the idea of "person" which emerged from the title of book II of the *CIC*, the concept of person in the meaning expressed by contemporary secular juridical science, ended up prevailing in the *modus argumentandi et loquendi* of canonical doctrine. This was an unsuitable concept both for accommodating the metaphysical exigencies of the human being (considered individually and collectively) as the original element of reference and connection of the juridical order (not a mere object of juridical regulation), and to appropriately conceptually individuate the function of the person in the Church, for terms better capable of embodying the more specific aspects: *faithful, cleric, lay, religious.*

4. *The person in juridical science following the first codification and in the CIC*

Juridical science subsequent to the first codification, in addition to looking for a more nearly correct delineation of the relationship among the idea of person (a more elevated conceptual abstraction of the human person), that of *Christ's faithful* (the fruit of a process of abstraction restricted to the interior of the religious dimension) and those of the layperson, cleric, and religious (drafted with reference to the function *in Ecclesia et in mundo* of the baptized), a delineation capable of encompassing and fixing, in relation to each one of the levels of discourse, the multiple juridical exigencies, was arranged in a distinct meaning, yet disputable in certain aspects.

That juridical science, and following in its wake, the legislator of the present Code, has accentuated even more the formal aspect of "person," as a classification conferred by the canonical order to subjects in law. Both have disregarded—for having considered it irrelevant to the law, lacking in juridical consequences and exigencies on its own plane—the metaphysical idea of person that emerged from the former Roman law which persisted in universal juridical culture until the dawn of modern times. Carrying the weight—as it was, on the other hand, necessary and proper to do—regarding the concept of Christ's faithful and regarding its multiple ecclesial specifications, they have totally left without resolution, like a shadow, the relationship between that concept and the concept of person, both considered and regulated in the various books of the revised Code (book I and book II), as if they did not have reciprocal ties.

It could be true that in book I a conceptual representation more aimed at the exigencies of juridical technique has now been adopted, and in book II, a representation more sensitive to theological aspects. But these diverse ways of approaching the issue of subjectivity cannot be opposed, since they are complementary to each other, because they have in common the represented object. Perhaps, in a juridical setting, the multiple position and conditions that the subject can assume or present in being and action,

and their related exigencies, can be diversified (and juridical norms must make reference to those positions and those exigencies, since otherwise they would be lacking in content.)

Thus, while all this seems to have happened with the norms regarding Christ's faithful and regarding their various ecclesial conditions contained in book II of the Code, it turns out, however, to be less evident in the regulations dealing with persons, especially regarding physical persons, of title VI in book I. This does not mean, however, that what has remained implicit or unclear in the dictated regulations cannot be made explicit and clarified by juridical science. Thus, it does not mean, for example, that appropriate emphasis cannot or should not be given to the principle of juridical equality—tied to the idea of person and dependent on it—attributable to all the faithful in the Church independent of their specific ecclesial condition, so as to extract from it operative consequences in canonical juridical experience, as well as in secular experience (by distinguishing it from the principle of equality in rank, which is dealt with by c. 208, and from the legal effects that are granted to it). Nor that they cannot or should not delineate the relationships between one or another conceptual representation ("person" and "one of Christ's Faithful"), in search of an intimate harmony between them, so that a person is not denied—following several diffused convictions, regarding which there have been extensive debates—the juridical aspects of freedom in the Church (even on religious subjects), or not allowed the subjectivity of a non-baptized person, by virtue of not being well understood, not well explained exigencies of a theological nature, or else because of an excessive emphasis on the formal aspects of the law.[5]

It would not be correct to entirely attribute the insufficiencies of juridical science to the work of codification, but it must be admitted that such codification, since it covers the issue of subjectivity in rigid formal schemes, has had a certain responsibility for solutions that seem *ictu oculi* not at all satisfactory.[6]

5. *The modifications of the CIC regarding persons*

The treatment of physical and juridical persons contained in the introductory canons of book II of *CIC*/1917, occupies in the present Code two different chapters (devoted to the "canonical condition of physical

5. Cf. on this aspect G. Lo Castro, *Il soggetto e i suoi diritti nell'ordinamento canonico* (Milan 1985), ch. V.

6. Cf., for a more extensive treatment of themes dealt with and for bibliographical references, G. Lo Castro, *Il soggetto...*, cit.; idem, *Personalità morale e soggettività giuridica nel diritto canonico* (Milan 1974); cf. for a quick overview and updated bibliography, H. Schnizer, "Das neue Gesetzbuch und das vergessene Gotteshaus," in *Recht und Geschichte. Festschrift H. Baltl, hrsg. H. Valentinitsch* (Graz 1988), pp. 463ff.

persons" and to "juridical persons") of title VI of book I. Juridical acts, which the *CIC*/1917 regulated in the same normative context of physical and juridical persons, are the subject of an independent title (title VII) in the present Code.

Several norms of the former *CIC* have disappeared: thus, the provision regarding "pubescence" (c. 88 § 2); the norm that prohibited clerics to induce the faithful to change rites (c. 98 § 2); the provision that made moral persons equivalent to minors (c. 100 § 3); and the norms regarding precedence (c. 106).

The subject, while conserving as a whole the original physiognomy, is regulated in different ways in several parts (it might be sufficient to compare it to the computation of degrees of affinity). Some provisions are totally new in the *CIC*: those which refer to the domicile of religious (c. 103); the norm regarding adoptive children (c. 110); and the norms relative to public juridical persons (cc. 116–118).

The twelve canons devoted to physical persons in the *CIC*/1917 have been converted into seventeen; the four that regulated juridical persons have become eleven in the present Code. Likewise the norms regarding juridical acts have increased (from three to five), and among them is the totally new norm that provides the principle of responsibility for damages (c. 128), important both on the theoretical plane (for a theoretical construction of rights and duties of the faithful), and in practice, for the important consequences that the norm can bring, in a more balanced vision of the problems of justice (see commentary on title VII of book I).

CAPUT I
De personarum physicarum condicione canonica

CHAPTER I
The Canonical Status of Physical Persons

96 **Baptismo homo Ecclesiae Christi incorporatur et in eadem constituitur persona, cum officiis et iuribus quae christianis, attenta quidem eorum condicione, sunt propria, quatenus in ecclesiastica sunt communione et nisi obstet lata legitima sanctio.**

By baptism one is incorporated into the Church of Christ and constituted a person in it, with the duties and the rights which, in accordance with each one's status, are proper to christians, in so far as they are in ecclesiastical communion and unless a lawfully issued sanction intervenes.

SOURCES: c. 87; SCHO Resp. I, 27 ian. 1928 (*AAS* 20 [1928] 75); SCHO Decr. *In generali consessu*, 15 ian. 1940 (*AAS* 32 [1940] 52); *MC* pp. 203–204; *LG*, 11, 14; *UR* 3, 4; *AG* 7; OBP 4

CROSS REFERENCES: cc. 11, 204–206, 208, 223 § 2, 751, 844, 864, 871, 1476

COMMENTARY

Amadeo de Fuenmayor

1. This first canon relative to the "canonical status of physical persons," is the basic precept on the subject, in that it defines the acquisition of *juridical personality in the Church.*

Its text comes from the Draft of the Fundamental Law of the Church (c. 5 § 2), and corresponds to c. 87 of the *CIC*/1917.[1] In both canons *who is*

1. The debate on the notion of person within canon law occasioned, while the *CIC*/1917 was in effect, a vast bibliography, a listing of which can be consulted in A. DEL PORTILLO, *Fieles y laicos en la Iglesia* (Pamplona 1991), p. 270, note 34. A report on and critique of the various interpretations which took c. 87 *CIC*/1917 as their starting point can be found in P. LOMBARDÍA, "Derecho divino y persona física en el ordenamiento canónico," in *Temis* 7 (1960), pp. 189ff.

a *person in the Church* is addressed; who is the protagonist in the juridical order of the Church, by being the subject that the norms of the canonical system primarily and preeminently refer to; who has a juridical position *within the Church*, by having been incorporated into it by means of baptism.[2] Another canon, c. 204, also deals with this incorporation, which in § 1 proclaims: "Christ's Faithful are those who, since they are incorporated into Christ through baptism, are constituted the people of God, and ... they are called to fulfill the mission which God entrusted to the Church in the world." The canon itself takes care to point out in § 2, with words taken from *Lumen gentium* 8: "this Church, constituted and ordered as a society in this world, subsists in the Catholic Church, governed by the successor of Peter and by the bishops in communion with him."

The purpose of these two canons is different, although both contemplate incorporation into the Church as an effect of baptism, and refer to the juridical position within the Church of the baptized person. Canon 96 contemplates the static juridical position of a member of the Church in order to introduce the treatment—in cc. 97 to 112—of certain circumstances that influence the juridical status of the physical person: age, use of reason, territory, relationship, rite. Canon 204, which utilizes the concept of Christ's faithful, serves as an introductory text to consider, in the following canons, the dynamic juridical position of a member of the Church, and in this perspective the obligations and rights of all the faithful.[3]

2. Pursuant to c. 96, "by baptism one is incorporated into the Church of Christ and constituted a person in it." This is incorporation through the sacrament of baptism, which must be lawfully administered (c. 849). This constitutive effect of baptism consists in the baptized person's becoming invested immediately with the quality of *person in the Church*, "with the rights and duties that are proper to Christians," states c. 96. The baptized person, by acquiring the status of a member of the community to which he or she is incorporated, obtains a personality that offers two facets: being the holder of several rights inherent to the status of a faithful; and becoming subject to the juridical duties and to the responsibility that corresponds to that status.

The canon adds: "in accordance with each one's status, in so far as they are in ecclesiastical communion and unless a lawfully issued sanction intervenes." This is a clarification that has three factors in mind:

a) "in accordance with each one's status." The faithful have several rights and duties common to all Christians, pursuant to the principle of equality; and because of the principle of variety, there is a diversity of

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2. Cf. J. HERVADA, "Persona, Derecho y Justicia," in *Vetera et Nova. Cuestiones de Derecho Canónico y afines (1958–1991)*, I (Pamplona 1991), pp. 707ff.

3. Regarding the relationship between the notions of the person and those of the *christifidelis* in the new Code, cf. G. LO CASTRO, *Il soggetto e i suoi diritti nell'ordinamento canonico* (Milan 1985); and by the same author, "Condizione del fedele e concettualizzazione giuridica," in *Ius Ecclesiae* 3 (1991), pp. 3–32.

regimes or juridical bonds according to the juridical situations or juridical states inside the legal system of the Church. "Flowing from their rebirth in Christ—states c. 208—there is a genuine equality of dignity and action among all of Christ's faithful. Because of this equality they all contribute, each according to his or her own condition and office, to the building up of the Body of Christ."

b) To exercise the ownership of those rights and duties proper to Christians, the baptized person must be in communion with the Church. According to the statement of c. 205, transcribing a text from Vatican Council II (*LG*, 14 b), "they are in full communion with the Catholic Church, in this world, baptized persons who join with Christ inside the visible structure of the Church, namely, through the bonds of profession of faith, sacraments, and ecclesiastical governance."

c) Canon 96 adds that those rights and duties of the Christian can be affected by a "lawfully issued sanction." Within these sanctions, excommunication has special importance (c. 1331) and the interdict (c. 1332). The remaining sanctions only imply the suspension of certain rights, prohibitions, and specific privations. The term "sanction lawfully issued" includes—besides penal sanctions—those that can be imposed by the law or a competent superior, keeping in mind the provisions of 232 § 2: "it is for the ecclesiastical authority to regulate, in aid of the common good, the exercise of rights proper to the faithful."

3. Regarding the juridical position of non-Catholic baptized, the *CIC* has posed a change of perspective in respect to the criteria prior to Vatican II.[4] In accordance with the spirit of the Decree *Unitatis redintegratio* of November 21, 1964 regarding ecumenism, the *CIC* makes mention of the "Churches and ecclesial communities that are not in full communion with the Catholic Church" (cc. 908 and 933), a mention that means recognition—*de iure* and not only *de facto*—of these organizations. In principle, a baptism administered in those ecclesiastical communities is considered valid (c. 869 § 2). These non-Catholic faithful are considered members of their respective communities (cf. e.g., c. 874 § 2), and not of the Catholic Church, for which they are not subject to "merely ecclesiastical law," since such laws only "obligate those baptized into the Catholic Church and those who have been received into it" (c. 11). Besides the norms regarding the traditional issue of mixed marriages (c. 1124; with special mention of such form when a Catholic party contracts marriage "with another non-Catholic of Oriental rite": c. 1127 § 1), other canons make reference to those "ecclesial communities" (cc. 364, 6°; 463 § 3; 908; 933; 1183, 3°). Cf. also the norms of c. 844 regarding *communicatio in sacris*, which speaks of (in § 4) "other Christians not in full communion with the Catholic Church."

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4. Cf. J. ARIAS, "Bases doctrinales para una nueva configuración jurídica de los cristianos separados," in *Ius Canonicum* 8 (1968), pp. 19–120.

4. Regarding those not baptized, the canonical system does not recognize them as persons *in Ecclesia*, but it does consider them as persons (persons *extra Ecclesiam*). Canon 96 does not concern itself with them. But the *CIC* does address them in several places. Thus, c. 383 § 4 exhorts the diocesan bishop, in his pastoral function, "to consider the non-baptized as commended to him in the Lord, so that the charity of Christ, of which the bishop must be witness to all, may shine also on them."

There are numerous canons that refer directly or indirectly to non-baptized.[5] The canonical legal system takes them into consideration for different reasons: *a*) because every person is in a way connected with the Church (cf. e.g., cc. 748 § 1 and 771 § 2); *b*) because a non-baptized person has voluntarily done an act that put him or her into a relationship with the Church (on matrimonial subjects: cc. 1086, 1142; on voluntarily accepting the status of catechumen: cc. 206, 788, 865 § 1); *c*) they are afforded the ability to plead before the ecclesiastical courts (c. 1476).

5. Cf. P. LOMBARDÍA, "Infieles," in *Nueva Enciclopedia Jurídica*, XII (Barcelona 1965), pp. 516ff.

97 **§ 1. Persona quae duodevigesimum aetatis annum explevit, maior est; infra hanc aetatem, minor.**

§ 2. Minor, ante plenum septennium, dicitur infans et censetur *non sui compos*, expleto autem septennio, usum rationis habere praesumitur.

§ 1. A person who has completed the eighteenth year of age, has attained majority; below this age, a person is a minor.

§ 2. A minor who has not completed the seventh year of age is called an infant and is considered incapable of personal responsibility; on completion of the seventh year, however, the minor is presumed to have the use of reason.

SOURCES: § 1: c. 88 § 1
§ 2: c. 88 § 3; OBP 1

CROSS REFERENCES: cc. 11, 98, 99

COMMENTARY

Amadeo de Fuenmayor

1. Age is one of the circumstances that influence the juridical status of a physical person. The present canon points out a basic age, a general limit to begin *the age of majority*, which states the transfer from incapacity to capacity to act. A person's life is separated into the *age of minority*, which involves submission to the authority of a parent or guardian, and *majority*, which determines the moment in which a person becomes a being *sui iuris*.

Besides this prescription of a general character, there are numerous canons that require a specific age for the validity or legality of certain acts or the exercise of certain functions. Likewise, in other canons, a certain age is contemplated for the exercises of various rights and for the exoneration of certain duties.

The Code establishes three categories of persons based on age: adult, minor, and infant. Puberty has been suppressed as a legal category, which in the former legislation had few recognized effects; now the term is used only one time (in c. 1096 § 2), but without stating, as did the *CIC*/1917 (c. 88 § 2), a set age, different for the man (14 years old) than for the woman (12 years old).

2. Pursuant to the current c. 97 § 1, "a person who has completed the eighteenth year of age, has attained majority; below this age, a person is a minor." In the *CIC*/1917, the age of majority occurred on reaching twenty-one years. Now it has been reduced to eighteen years of age in accord with the general criterion of civil legislation or laws.

Canon 203 is applied in the computation of age.

Canons 1481 § 3 and 1646 § 3 refer to minors in general, namely, those who have not completed 18 years of age.

"A minor who has not completed the seventh year of age is called an infant and is considered (*censetur*) incapable of personal responsibility" (97 § 2). It is a presumption *iuris et de iure*, which does not allow contrary proof. The norm is justified for reasons of juridical certainty. An infant—although in fact having use of reason—is exempt from observing merely ecclesiastical laws, namely, the canonical laws of human law, unless expressly provided otherwise (c. 11).

At seven years old the minor is presumed (*praesumitur*) to have use of reason (c. 97 § 2). It is a presumption *iuris tantum*, which allows contrary proof.

3. The Code also utilizes various general terms—without specifying age—which must be understood in their usual meaning or traditional sense: age of discretion (around 7 years, more or less: c. 891); advanced age (more than 60 years: c. 1252); elderly (so advanced in age that it is equivalent to being sickly: cc. 919 § 3, 930 § 1); and neophyte (baptized as an adult: cc. 101 § 1, 789, 1042, 3°).

98 **§ 1. Persona maior plenum habet suorum iurium exercitium.**

§ 2. Persona minor in exercitio suorum iurium potestati obnoxia manet parentum vel tutorum, iis exceptis in quibus minores lege divina aut iure canonico ab eorum potestate exempti sunt; ad constitutionem tutorum eorumque potestatem quod attinet, serventur praescripta iuris civilis, nisi iure canonico aliud caveatur, aut Episcopus dioecesanus in certibus casibus iusta de causa per nominationem alius tutoris providendum aestimaverit.

§ 1. A person who has attained majority has the full exercise of his or her rights.

§ 2. In the exercise of rights a minor remains subject to parents or guardians, except for those matters in which by divine or by canon law minors are exempt from such authority. In regard to the appointment of guardians and the determination of their powers, the provisions of civil law are to be observed, unless it is otherwise provided in canon law or unless, in specific cases and for a just reason, the diocesan bishop has decided that the matter is to be catered for by the appointment of another guardian.

SOURCES: § 1: c. 89
§ 2: cc. 89, 1648, 1650, 1651

CROSS REFERENCES: cc. 97, 99, 124, 1478, 1508 § 3, 1578 § § 1 et 3, 1521

COMMENTARY

Amadeo de Fuenmayor

1. Canon 97 has presented the principal distinction between persons according to age: adults and minors, including within minority, infants—namely, those younger than 7 years old—who are considered not to have the use of reason.

These three legal concepts serve to determine, in general terms (in cc. 98 and 99), the capacity of physical persons to exercise their own rights, which is a specific modality of the capacity to act.

2. Considering the status of physical persons, the doctrine distinguishes two fundamental notions: juridical capacity and capacity to act.

Juridical capacity is the aptitude of the person to possess rights and obligations, that is, to be the title-holder of juridical standing. All physical persons have this capacity, since they have the status of subjects, with independence of the activity that they can carry out by themselves in the juridical world.

The capacity to act is the aptitude of the person to carry out juridical acts. This capacity admits different modalities, according to the nature of the acts involved: transactional capacity (to carry out by oneself juridically lawful acts); procedural capacity (to act and respond personally in trials); and criminal capacity (to hold the person responsible). The capacity to act is not an attribute of every person, because it is connected with the degree of his psychological maturity.

The distinction between juridical capacity and capacity to act allows one to understand that a person can have rights without the ability to exercise them personally.

3. Canon 98, which we now comment on, speaks of the adult and the minor, with reference in the two cases to "the exercise of *their rights*." Both are holders of rights, but while the adult "has full exercise of his rights" (c. 98 § 1), "the minor person is subject to the power of parents or guardians in the exercise of his rights" (c. 98 § 2).

In summary, we can say that, for the exercise of their rights, adults have *sui iuris* full capacity; and minors are subject to the authority of others (parents or guardians), who are their legal representatives. Nevertheless, these are two rules of a general character which do not exhaust all the cases that the Code contemplates in relation to the capacity of persons regarding their respective ages.

4. Regarding "transactional capacity"—a capacity to perform juridically lawful acts—the general rule of c. 124 § 1 exists, which requires a juridical act "be performed by someone who is legally capable" ("ut a *persona habili* sit positus") for it to be valid. This capacity (*habilitas*) does not always require majority; thus, to contract matrimony a lesser age is enough (16 for the man and 14 for the woman: 1083 and 1057 § 1); and a greater age (21 years) for perpetual religious profession (c. 658,1°); 23 years to receive the diaconate (c. 1031 § 1); 25 for admission to the priesthood (c. 1031 § 1), to the permanent diaconate for celibate persons (c. 1031 § 2) and for perpetual or definitive incorporation into a secular institute (c. 723 § 3); 35 for the permanent diaconate of married persons (c. 1031 § 2).

5. Likewise, there are exceptions to the general rule that establishes subjection of the minor person "to the authority of parents or guardians in the exercise of their rights." Canon 98 § 2, which formulates this requirement, adds, "except for those matters in which by divine or by canon law

minors are exempt from such authority." Thus, it refers to the choice of one's state of life (c. 219); or the choice of one's own rite upon receiving baptism: the age of 14 is sufficient (c. 111 § 2), which also is sufficient to return to the prior Latin rite (c. 112 § 1, 3°). A minor can contract matrimony without the participation of parents or guardians (c. 1071 § 1, 6°; and if 14 years old, a person may sue and respond in spiritual causes and those connected thereto (c. 1478 § 3).

6. Canon 98 § 2, in contrast to its predecessor (c. 89 *CIC*/1917), which was limited to citation of guardians without any other specification, provides that "in regard to the appointment of guardians and the determination of their powers, the provisions of civil law are to be observed." Thus it is provided that the entire governance of guardianship is referred to the civil law (its constitution, content, modification, and extinction); but a dual exception is added: *a*) "unless it is otherwise provided in canon law," an exception already stated in a general way in c. 22; and *b*) "or unless, in specific cases and for a just reason, the diocesan bishop has decided that the matter is to be catered for by the appointment of another guardian."

Strictly speaking—as has been noted—"the legislator has provided the possibility that the diocesan bishop, with just reason, appoint a curator for certain juridical acts with relevance *in foro Ecclesia*." It becomes difficult to imagine a minor with two guardians: one "civil" and the other "canonical." The appointment of a new guardian for one who already has one "*ex lege civili*" could be an inexhaustible source of conflicts. Therefore it seems that, in c. 98 § 2, the legislator intended to refer, rather, to the appointment of a curator by the bishop.[1] The provisions of c. 1479 seem to lead to this conclusion, making specific the generally established procedural competence stated in c. 98 § 2. "When the civil authority has designated a guardian or curator, the latter can be admitted by an ecclesiastical judge, after consulting, if possible, the diocesan bishop of the person to whom the guardian or curator has been given; but if there is no such guardian or curator, or it is not seen fit to admit the one appointed, the judge is to appoint a guardian or curator for the case." It is clear that the legislator has intended that the appointment of a guardian or curator referred to in cc. 98 § 2 and 1479 have a specific character for a specified case.

7. It is fitting to ask what is the capacity of an emancipated minor in canon law. The question was presented in the drafting work of the present Code by a Bishops' Conference. (See commentary on c. 99 regarding the issue.)

1. Cf. J. MIÑAMBRES, *La remisión de la ley canónica al Derecho civil* (Rome 1992), pp. 171–172.

99 Quicumque usu rationis habitu caret, censetur non sui compos et infantibus assimilatur.

Whoever habitually lacks the use of reason is considered as incapable of personal responsibility and is regarded as an infant.

SOURCES: c. 88 § 3

CROSS REFERENCES: cc. 97 § 2, 98 § 2, 1478, 1550 § 1

COMMENTARY

Amadeo de Fuenmayor

1. This canon deals with whoever habitually lacks the use of reason, that is, one who is permanently afflicted by mental illness. Such a person is considered not to be in possession of self (*"censetur non sui compos"*), and therefore subject to guardianship. This presumption of incapacity is *iuris and de iure*, and admits no evidence to the contrary. The person is treated as an infant, "even in regard to baptism" (852 § 2).

Those who lack the use of reason can appear before a court through their parents, guardians, or curators (c. 1478 § 1).

Those who habitually lack the use of reason are considered incapable of committing crime (c. 1322).

Those who lack the *sufficient* use of reason are incapable of contracting matrimony (c. 1095, 1°; cf. also cc. 1105 § 4 and 1680). Only those who have the *appropriate* use of reason can make a vow (c. 1191 § 2).

2. Besides the incapacity of an adult who habitually lacks the use of reason, other circumstances also exist that concern the capacity of adults to act. Canon 1478 § 4 refers to two of them: "Those barred from the administration of their goods and those of infirm mind can themselves stand before the court only to respond concerning their own offenses, or by order of the judge. In other matters they must plead and respond through their curators." This norm assumes that the person in question has been partially incapacitated. Regarding the constitution of a curatorship and the authority of the curator, it will be done, in these cases, pursuant to the civil law of the party's country, by analogy to the provisions of c. 98 § 2, but keeping in mind the prescriptions of c. 1479.

Canon 1550 § 1 also refers to the mentally infirm, which establishes a norm likewise applicable to minors less than fourteen years of age: they are not allowed to be witnesses, except when a judge states in a decree that to hear them would be appropriate.

3. Regarding the capacity to act of emancipated minors, it is important to examine the allusion to them made by c. 105 § 1: "a minor who is lawfully emancipated in accordance with the civil law can also acquire domicile of his own." It is fitting to ask if the legislator has intended to receive in its entirety the civil law regarding the capacity of an emancipated minor to act, or if he has only provided, as the sole effect of emancipation, the possibility of the minor's having his own domicile.

From the literal text of the canon, it seems that the legislation has not intended to incorporate the civil laws that regulate emancipation into the canon law. The revisionary work on the Code, where this issue was presented, also supports this. Specifically in the *coetus* "De personis physicis et iuridicis," session of October 16, 1979, the Secretary referred to the suggestion of a Bishops' Conference about the "maioritas limitata" (*emancipatio*), and opined that it is unacceptable "because it would introduce into the Code another institute that is unnecessary because in procedural law a norm exists that contemplates the incapacity of acting of those who do not have the use of reason." This opinion is shared by all the consultors.[1]

Certainly it was not necessary to make the civil regime regarding an emancipated minor a part of canon law, and it does not seem that it was important to obtain in the canonical system an analogous treatment. A minor lawfully emancipated pursuant to civil law, in any case becomes free of parental authority and guardianship, but his capacity can remain limited, and even require the participation of a curator for certain acts. The question has been well resolved in the *CIC*, with several norms relative to minors who have reached fourteen years of age: they are capable to "freely choose to be baptized either in the Latin Church or in another autonomous ritual Church; in which case the person belongs to the Church which he or she has chosen" (c. 111 § 2). A person's procedural capacity is specified in c. 1478 § 3: "in cases concerning spiritual matters and matters linked with the spiritual, if the minors have attained the use of reason, they can petition and respond without the consent of parents or guardians; indeed, if they have completed their fourteenth year, they can stand before the court on their own behalf; otherwise, they do so through a curator appointed by the judge."

1. Cf. *Comm.* 12 (1980), p. 64.

100 **Persona dicitur: "incola", in loco ubi est eius domicilium; "advena", in loco ubi quasi-domicilium habet; "peregrinus", si versetur extra domicilium et quasi-domicilium quod adhuc retinet; "vagus", si nullibi domicilium habeat vel quasi-domicilium.**

A person is said to be: an *incola*, in the place where he or she has a domicile; an *advena*, in the place of quasi-domicile; a *peregrinus*, if away from the domicile or quasi-domicile which is still retained; a *vagus*, if the person has nowhere a domicile or quasi-domicile.

SOURCES: c. 91

CROSS REFERENCES: cc. 13, 91, 101–107, 136, 1071 § 1, 1°, 1115, 1196, 1° and 1409 § 1

COMMENTARY

Amadeo de Fuenmayor

Canons 100 through 107 contemplate, from a general perspective, a physical person's connections with a certain territory that imply different legal effects. The law of the Church has minted three concepts to refer to local relationships: place of origin (c. 101), domicile, and quasi-domicile (cc. 102 through 107).

Canon 100 presents the terminology to designate—keeping in mind the notions of domicile and quasi-domicile—a situation which a person has with respect to a place. A person who has domicile in that place is called *incola* (resident). *Advena* (temporary resident) is a person who has quasi-domicile in that place; *peregrinus* (traveler or pilgrim), is one who is outside his or her domicile or quasi-domicile which is still retained; and *vagus* (transient) is a person who lacks a domicile and quasi-domicile. The term *advena* is found only in c. 100; it is not used again in other places in the Code. The word *incola* is employed in a broad sense to refer to the inhabitants of a place, in cc. 475 § 2 and 1302 § 3. The adjective *vago* applied to a cleric is utilized in its traditional canonical meaning: "acephalous or wandering cleric" (c. 265).

To determine the scope of application of certain laws, reference is made to the status of *peregrini* (c. 13 § 2) and *vagi* (c. 13 § 3).

Peregrini are also taken into consideration when regulating the extent of authority to issue dispensations (cc. 91 and 1196, 1°); and in determining the personal and spatial scope of executive authority (c. 136).

Special reference is made to *vagi* when dealing with a place of origin (c. 101 § 2); when determining a parish priest and local ordinary (c. 107 § 2); when requiring the permission of the local ordinary to assist at weddings of *vagi* (c. 1071 § 1, 1°); and on setting its place of celebration (c. 1115). Procedural law determines the *vagi's* forum (c. 1409 § 1).

101 **§ 1. Locus originis filii, etiam neophyti, est ille in quo cum filius natus est, domicilium, aut, eo deficiente, quasi-domicilium habuerunt parentes vel, si parentes non habuerint idem domicilium vel quasi-domicilium, mater.**

§ 2. Si agatur de filio vagorum, locus originis est ipsemet nativitatis locus; si de exposito, est locus in quo inventus est.

§ 1. The place of origin of a child, and even of a neophyte, is that in which the parents had a domicile or, lacking that, a quasi-domicile when the child was born; if the parents did not have the same domicile or quasi-domicile, it is that of the mother.

§ 2. In the case of a child of *vagi*, the place of origin is the actual place of birth; in the case of a foundling, it is the place where it was found.

SOURCES: § 1: c. 90 § 1; CodCom Resp., 26 nov. 1922 (*AAS* 15 [1923] 128)
§ 2: c. 90 § 2

CROSS REFERENCES: cc. 97–100, 104, 870

COMMENTARY

Amadeo de Fuenmayor

1. Place of origin is a canonical notion received from Roman Law that, in principle, does not point to the actual place where the person was born. It is a juridical concept that takes into consideration, as a general criterion, the domicile of the parents when the child was born, since it is a point of reference from local situation more stable than the material fact of the birth, which could have occurred in a place to which neither the child nor his parents have any stable relationship. In exceptional cases—when the domicile of the parents cannot be taken into consideration—the place of origin is determined by the place of birth (the case of children of *vagi*) or where the "foundling child" was found. With regard to a person's place of origin, it is said, for example, that the person is a native of a city, or of a diocese.

This juridical idea was received into the *CIC*/1917, though with scarce importance. The norms to determine the place of origin of persons are found in c. 90, which contemplates different cases.

The *CIC*/1917 utilized this notion in another two canons (544 § 2 and 956): in both, place of origin is taken into consideration as one of the personal circumstances to which one turns—together with other factors—to set the respective regulations. Canon 544 § 2 asked that the ordinary of origin be informed of anyone who wanted to be admitted to the novitiate, for the purpose of becoming familiar with the person's family history. Letters of recommendation are also required from the local ordinaries where the aspirant had resided for a time.

Of great importance was the question regulated in c. 956 of the former Code. Departing from the general norm (c. 955 § 1) that "each one must be ordained by his own bishop or with lawful mitigating documents from him," c. 956 established that "regarding the ordination of seculars, his own bishop is the bishop of the diocese where the ordained has his domicile and origin at the same time, or simple domicile without origin; but in the latter case the ordained must reinforce his intention to perpetually remain in the diocese with an oath." This was a matter of assuring that the cleric fulfilled his obligation of residing in the diocese: for which reason the oath of the ordained was required, except when he was ordained for his diocese of origin because it was presumed that each person had a certain propensity to live and die in his native territory or country.

2. In the revisionary work for the Code the appropriateness of preserving the prescriptions regarding place of origin was put in doubt. Early on, the *coetus studiorum* thought that this legal idea should be preserved without changing the text of c. 90, because of the importance it had with regard to the ordination of seculars, in determining the proper bishop, pursuant to the provisions of c. 956 of the *CIC*/1917.[1] And this was the criterion followed in the *Schema* of 1977.[2] But in the session of December 17, 1979, the *coetus* considered it necessary to change that canon,[3] by substantially following the text prepared by a Bishops' Conference.

As a general principle, c. 90 had established that the place of origin of a child, even of a neophyte, was where the father—or, if the child was illegitimate or if the father had died, that of the mother—had domicile or quasi-domicile. The text that is now proposed determines, as place of origin, the domicile or quasi-domicile of the parents, or where the mother had such domicile or quasi-domicile, if the parents did not have the same domicile or quasi-domicile. The posthumous case is no longer contemplated; reference to the illegitimacy of a child is suppressed, following the criterion adopted in the revision in other places of the Code, as for example in the *Schema* of the sacraments; and the new regulations regarding the common domicile of the couple is taken into consideration. The text

1. Cf. *Comm.* 6 (1974) p. 95.
2. Code Commission, *Schema canonum Libri II de Populo Dei* (Typis polyglottis Vaticanis 1977), p. 24.
3. Cf. *Comm.* 12 (1980), p. 64.

that is now proposed—in which § 2 of c. 90 is preserved, relative to the place of origin of a child of *vagi* and of a "foundling child"—appears in the *Schema* of 1980 and passes entirely to the *CIC* as c. 101.

It seemed that, by preserving the old c. 90 with the indicated slight modifications, the revision of the prescription relative to place of origin would have been finished. Nevertheless, the suppression of the norms that formerly used this juridical notion caused the consequent disappearance of its importance in the new Code. The norm of the former c. 544 § 2 was not accepted; and the criterion of c. 956 was profoundly revised, since "regarding the ordination of deacons of those who desire to ascribe to the secular clergy, the proper bishop is the bishop of the diocese where the ordained has his domicile, or the bishop of the diocese in and to which the ordained has decided to devote himself." This is what c. 1016 *CIC* provides, without the slightest reference to place of origin. Reference to place of origin is not found in any other canon.

In view of the Code's silence, one would ask if place of origin retains any canonical value. It is fitting to wonder if this notion can be utilized in the future in any canonical legislation—universal or particular—to refer to the natives of a certain territory, by making express mention of c. 101. And it is also appropriate to wonder if, as happened while the *CIC*/1917 was in effect, the idea can be a valid element in the interpretation of certain clauses of statutes, foundations, wills, etc., which reserve rights or privileges to the native of a certain place. But, in those cases, one would have to turn, according to the nature of the respective clause, to various elements of interpretation, while keeping in mind that the term "native" can be employed in another sense, to mean simply the place of birth.

102 **§ 1. Domicilium acquiritur ea in territorio alicuius paroeciae aut saltem dioecesis commoratione, quae aut coniuncta sit cum animo ibi perpetuo manendi si nihil inde avocet, aut ad quinquennium completum sit protracta.**

§ 2. Quasi-domicilium acquiritur ea commoratione in territorio alicuius paroeciae aut saltem dioecesis, quae aut coniuncta sit cum animo ibi manendi saltem per tres menses si nihil inde avocet, aut ad tres menses reapse sit protracta.

§ 3. Domicilium vel quasi-domicilium in territorio paroeciae dicitur paroeciale; in territorio dioecesis, etsi non in parochia, dioecesanum.

§ 1. Domicile is acquired by residence in the territory of a parish, or at least of a diocese, which is either linked to the intention of remaining there permanently if nothing should occasion its withdrawal, or in fact protracted for a full five years.

§ 2. Quasi-domicile is acquired by residence in the territory of a parish, or at least of a diocese, which is either linked to the intention of remaining there for three months if nothing should occasion its withdrawal, or in fact protracted for three months.

§ 3. Domicile or quasi-domicile in the territory of a parish is called parochial; in the territory of a diocese, even if not in a parish, it is called diocesan.

SOURCES: § 1: c.92 § 1
§ 2: c. 92 § 2
§ 3: c. 92 § 3; *SCCong* Instr. *Sollemne semper*, 23 apr. 1951, III (*AAS* 43 [1951] 563)

CROSS REFERENCES: cc. 100, 103–107

COMMENTARY

Amadeo de Fuenmayor

1. Domicile and quasi-domicile constitute the juridical base of a person; they are the place that the law considers a person's juridical center, by reason of his real residence or the one determined by law. Therefore, there are real domiciles and quasi-domiciles, and others are legal, also called necessary, because the law imposes them: for example, the domicile of the

dean and the assistant dean of the College of Cardinals (c. 352 § 4); also the domicile of the members of religious institutes and societies of apostolic life (c. 103 § 1). Some of these legal domiciles are called relative or derived because they are subordinated to those of other persons along with whom they exist or upon whom they depend (minors and those lawfully subject to a guardianship or curatorship: c. 105).

Since the place of reference can be a parish or diocese, a difference is made between parochial domicile or quasi-domicile and diocesan domicile or quasi-domicile. For these purposes, the parish is comparable to the quasi-parish (c. 516); as the diocese is to the territorial prelature, territorial abbey, apostolic vicariate, apostolic prefecture, and firmly established apostolic administration (c. 368). A diocesan domicile or quasi-domicile can be had without having, in that territory, a parochial domicile or quasi-domicile (c. 102 § 3). Ordinarily, a person has a parochial domicile due to living in a parish. Simultaneously, the person has a diocesan domicile, which is the domicile of the diocese where the parish is located. In the case of a person's lacking a parochial domicile or quasi-domicile, but having a diocesan domicile or quasi-domicile, the parish priest of where the person actually resides is the person's parish priest (c. 107 § 3).

In relation to domicile and quasi-domicile, the persons receive the nomenclature stated in c. 100.

Quasi-domicile—an institution typically canonical—coincides with domicile in that it endows a physical person with a stable place. Both cause, in principle, the same effects (c. 107); therefore it is said that the quasi-domicile has a supplementary character; and both are lost for the same reasons (c. 106). Nevertheless, in some cases domicile has its own effects, which likewise are not derived from quasi-domicile (e.g., cc. 967 § 2, 1016, 1552 § 1); and several more serious requirements must be met to acquire it because it supposes a greater stability in the place. Some subjects can acquire their own quasi-domicile—thus, minors who are no longer infants—but they can acquire their own domicile only if they are also lawfully emancipated pursuant to the civil law (c. 105 § 1).

2. The various legal systems regarding domicile are characterized by the ways of acquiring and losing it; and according to the purposes that are derived from domicile.

The canonical system regarding domicile was inspired for centuries by the Roman concept of this institution, which notably influenced the different civil legislations. That inspiration split into two points of great importance, with the introduction of two innovations: the concept of quasi-domicile, fashioned by the canonists, which had its roots in the Council of Trent and was confirmed in the *CIC*/1917; and the introduction, also in the *CIC*/1917, of a new way of acquiring domicile, by making it sufficient therefore to have a prolonged residence for ten years.

Since the Glossae, the Romanist conception has applied the doctrine of the *possessio* to domicile, by distinguishing its material element or *corpus* and its formal element or *animus*. For the acquisition of domicile, according to traditional doctrine, the conjunction of two elements is required: the intention of residing in a place (*animus*); and the fact of residing there (*corpus*). Of these two elements, *animus* is considered essential. Constant and prolonged residence was not enough, the intention to stay permanently in the place was required (*animus ibi perpetuo commorandi*); and merely a change in residence did not determine the loss of domicile, for it was preserved by mere *animus* (if *animus revertendi* existed). In any case, intention was the decisive element.

Regarding domicile, the question of right and the question of fact have been traditionally distinguished (as they are now also distinguished). The requirements for domicile and its respective value is a question of right; while it is "*quaestio facti*," for the consideration of the one who judges whether those requirements exist or not in specific cases (residence, habituality, *corpus*, *animus*). But the methods of proof have historically influenced the evolution of the requirements. Through presumptions one arrives at establishing a new manner of acquiring voluntary domicile.

To prove *animus* (the intention of remaining) there was the need to resort on occasion to evidence or presumptions, considering it implicit in the *corpus*, which was a secondary element, but easier to prove. One of those presumptions would traditionally achieve a special meaning. Roman law had created a presumption of domicile in the case of students, based on their residency for ten years, if they had continued residing in the same place after their studies. In the canonical forum, by virtue of doctrine and jurisprudence, this ten year presumption would be applied to every person, becoming accepted as a presumption *iuris et de iure*; and without contradiction, it would be received into the *CIC*/1917 as one of the ways to acquire voluntary domicile.

3. This background permits the determination of the scope of the methods of acquiring voluntary domicile and quasi-domicile. The present Code (in c. 1032 §§ 1 and 2) has incorporated the provisions of the prior Code (c. 92 §§ 1 and 2), with the only modification being the reduction of the time of residence.

a) Real domicile is acquired by residence in the territory of a parish (parochial domicile) or, at least, of a diocese (diocesan domicile) by two different methods, which have different requirements, but always demand, as a given, one that is common to both: a material element is always required, a qualified residence, namely, the physical residence of the subject, qualified by habituality.

In any case, the *commoratio* in the territory is required, not for temporary reasons, "per modum visitantis, vel intinerantis," but firmly and habitually, "per modum inhabitantis," with stability proper to the other inhabitants.

This feature of habituality can be considered in relation to a future or past domicile. In the former case, it is required that, together with the fact of being settled in the place, the subject has the intention of remaining there perpetually ("*cum animo ibi perpetuo manendi*"). This *intentio permanendi* is required without prejudice to the possibility of changing residence for sudden circumstances, *si nihil inde avocet*; it is required, "if nothing forbids it," according to a famous clause received from the Roman law. Pursuant to this first method, real domicile is acquired from the moment these two elements are found: residence in a place, at least begun in fact, and the intention to remain there permanently, if there is no impediment.

b) A second method of acquiring real domicile does not require the intention of the subject; and is limited to consideration of the habituality of residency regarding a past domicile. Domicile is acquired through residency in one place for five full years, even though the person never had an intention of staying there perpetually. In the former Code ten years were required, a period of time that has been reduced in view of the great mobility that people have in modern life. Residency is enough as long as it is habitual and *morally* continuous, with habitual permanence that permits moderate interruptions.

c) Real quasi-domicile is acquired—pursuant to c. 102 § 2—like real domicile, with fewer requirements: " by residence in the territory of a parish, or at least of a diocese, which is either linked to the intention of remaining there at least three months if nothing should occasion its withdrawal, or in fact protracted for three months." The duration has also been reduced, which the prior Code had set as "the greater part of a year."

103 **Sodales institutorum religiosorum et societatum vitæ apostolicae domicilium acquirunt in loco ubi sita est domus cui adscribuntur; quasi-domicilium in domo ubi, ad normam can. 102 § 2, commorantur.**

Members of religious institutes and of societies of apostolic life acquire a domicile in the place where the house to which they belong is situated. They acquire a quasi-domicile in the house in which, in accordance with can. 102 § 2, they reside.

SOURCES: —

CROSS REFERENCES: cc. 665 § 1, 740

COMMENTARY

Amadeo de Fuenmayor

The *CIC*/1917 did not contain any specific norm regarding the domicile of religious. This silence kept its interpreters supplied with a great range of solutions, without any gaining a majority consensus. This led to the introduction into the Code of the regulations contained in c. 103, which were added to the *Schemata* in 1981.[1]

"Members of religious institutes and of societies of apostolic life acquire a domicile in the place where the house to which they belong is situated."

This concerns legal domicile, derived from *life in common*, characteristic of these institutes (c. 607 § 2) and these societies (c. 731 § 1), which is stated for religious in the phrase "to reside in their own religious house" (c. 665 § 1) and for the members of the societies in the phrase "to live in the house or in the lawfully constituted community" (c. 740). Subsequent assignment to a different house implies a change of domicile. In any case, the time that the assignment lasts is irrelevant.

Regarding quasi-domicile, c. 103 provides that they acquire it "in the house in which, in accordance with can. 102 § 2, they reside" that is, with the intention of living there for three months if there is no impediment or if the residency has lasted, in fact, for three months.

Compatible with this legal domicile is acquisition of another voluntary domicile (pursuant to c. 102 § 1), when a religious or member of the society is lawfully absent and remains in another place for five years. This

1. Cf. *Comm.* 14 (1982), p. 141.

is the case, for example, of an ill person's residing in a sanitarium. If he or she were to have become insane (c. 689 § 3), that person would have the domicile and quasi-domicile of their guardian (c. 105 § 2).

The rules of this c. 103 are not applied to novices, for not having yet reached the status of being a member of the institute or society, though they might already live in one of their houses. Likewise, it is not applied to the members of secular institutes, for they are not obligated to live communally (cf. c. 714). In both cases, domicile and quasi-domicile are acquired according to common norms.

104 Coniuges commune habeant domicilium vel quasi-domicilium; legitima separationis ratione vel alia iusta de causa, uterque habere potest proprium domicilium vel quasi-domicilium.

Spouses are to have a common domicile or quasi-domicile. By reason of lawful separation or for some other just reason, each may have his or her own domicile or quasi-domicile.

SOURCES: c. 93; CodCom Resp. I, 14 iul. 1922 (*AAS* 14 [1922] 526); *PrM* 6 § 2

CROSS REFERENCES: cc. 1151, 1152 § 3, 1153 § 2, 1155, 1676, 1697

COMMENTARY

Amadeo de Fuenmayor

1. The biggest innovation introduced into the regulations regarding domicile is found in c. 104, which has replaced the prescriptions of c. 93 *CIC*/1917 regarding the domicile of a married woman. The revision has been profound and is a consequence of the *principle of equality* that the legislator incorporates into c. 1135: "each spouse has an equal obligation and right to whatever pertains to the partnership of conjugal life."

Canon 93 of the *CIC*/1917 treated the domicile of a wife not lawfully separated from her husband as a necessary domicile imposed by law, together with the necessary domicile of an insane person or of a minor. The three of them were the object of a special guardianship for which there were necessarily preserved, respectively, the domicile of the husband and the curator of the person to whose authority the minor was subject.

The assimilation of the three cases led to recognizing (c. 93 § 2 *CIC*/1917) the possibility of acquiring proper quasi-domicile: a minor after infancy; and a wife not lawfully separated from her husband. Likewise a wife was afforded the possibility of acquiring domicile if she were lawfully separated. But the discipline regarding this issue was so rigid that, even in the case of her being maliciously abandoned by her husband, a wife could not acquire her own domicile except after having obtained a perpetual or indefinite separation from an ecclesiastical judge.[1]

1. Cf. CPI, July 14, 1922, in *AAS* 14 (1922), p. 526.

2. The new regulation of the domicile of a married woman is a consequence of the criterion adopted by the legislator about marital authority and the duty of cohabitation of the husband and wife.

By not sanctioning marital authority—to assure the principle of equality—the old norms, which took for granted that authority (cc. 1112 and 1129 § 2 *CIC*/1917) disappear from the Code; or they were suitably recast (c. 90 § 1 *CIC*/1917 regarding place of origin; and c. 98 § 4 *CIC*/1917 regarding the wife's changing to the rite of the husband).

Regarding the duty of cohabitation, the legislator has pondered its great importance and obtained its protection with different norms. Thus, it is reflected in c. 104, which establishes common domicile or quasi-domicile as a duty of both parties, even though it is added that each one of them can have his or her own domicile or quasi-domicile, in case of a lawful separation or other just reason.

3. The process that has led to the text of c. 104 is very interesting because it reveals the criteria that have inspired reformation of a married woman's domicile; the various formulations that were tried in order to incorporate in this canonical principle of equality between husband and wife; and the efforts to protect common domicile in the new situation created by not sanctioning marital authority.

Early on, starting from the community of life that must exist between husband and wife and that must be regulated by mutual consent, the resolving of the question by resorting to the expedient of presumptions was considered. It is presumed that the wife has the domicile of her husband. This domicile is considered not to be legal or necessary domicile, but voluntary and freely chosen by the wife. Such presumption is *iuris tantum*, for which she can have her own domicile or quasi-domicile. Thus, it was agreed in the session of 1974 of the *coetus De personis physicis et iuridicis.*[2] *And this was the criterion adopted in the Schema* of 1977.[3]

In the session of the *coetus* held on October 17, 1979 numerous observations were received regarding the *Schema* of 1977 and were examined, agreeing that not just the wife was discussed; in suppressing the presumption of domicile of the husband; and in stating that both the wife and husband can have their own separate domiciles, they added "for just reason," to protect conjugal community. After a full discussion it was agreed to affirm the existence of *common domicile*, without alluding to a method to determine it, but by saying that husband and wife *must have* a common domicile or quasi-domicile. With this change, the text of the *Schema* of 1980 is arrived at,[4] which would pass into the Code as c. 104.

2. Cf. *Comm.* 6 (1974), p. 96.
3. Cf. *Schema*... 1977, c. 9, p. 25.
4. Cf. *Schema*... 1980, c. 103, p. 20.

The question of the domicile of a married woman had also been the object of study in the heart of the *coetus De quaestionibus specialibus Libri II*, in their sessions of May 5/6, 1967.[5] Of particular interest are the discussions that were had concerning the pastoral importance that the husband and wife's observance of the duty of cohabitation has; and, for that purpose, the existence in fact of a conjugal or familiar domicile, that is, a common domicile, compatible with the possibility of each one's simultaneously acquiring a separate domicile or quasi-domicile.

Throughout the study, the necessity for the couple's mutual consent to select a domicile was examined and the exigency of this requirement was avoided, though it was stated that familial stability depended in large part on the common election of the domicile. Likewise excluded was the opportunity of allowing the criteria that rule in many civil legal systems that, in order to resolve a disagreement between husband and wife, they can resort to a judge at the behest of one or both to establish domicile.

4. With this background the scope of c. 104 can be stated, which has revised the regulations of the *CIC*/1917.

Domicile of a married woman is gone as a legal domicile depending on the domicile of the husband. In its place, the new canon limits itself to declaring the "duty of husband and wife of having a common domicile or quasi-domicile," that is to say, a domicile for the wife and for the husband, in equality.

This common domicile has its limits: "By reason of lawful separation or for some other just reason, each may have his or her own domicile or quasi-domicile."

In the case of lawful separation, community of life and conjugal cohabitation cease (c. 1151ff), because of which the couple can have their own separate domicile or quasi-domicile.

If there is "another just reason" (temporary emigration, professional reasons, illness, etc.), each can have their own domicile or quasi-domicile, without excluding their maintaining the common domicile or quasi-domicile.

The legislator shows in numerous places of the Code his great preoccupation for avoiding the separation of husband and wife and to achieve the reestablishment of common life. Normalcy is to be reestablished through the return to cohabitation. And it is also desired to avoid the serious risk that separation could be the road leading to divorce. One of the reasons allowed today by most civil laws to grant a divorce is separation, not only judicial, but also separation in fact.

5. Cf. *Comm.* 21 (1989), pp. 43–48.

5. Canon 104 only speaks of the duty that the couple has to maintain a common domicile or quasi-domicile, without indicating the routes to reestablish cohabitation in case of a break. These routes are in the canons that regulate pastoral action with which the Church cares for the faithful in their marital crises. A brief reference to them will be sufficient.

Canon 1695 provides that before accepting a case of separation and as long as there is hope for success, the judge must employ pastoral means so that the couple reconcile and be induced to reestablish conjugal community, if it has been in fact interrupted. In c. 1676 an analogous requirement is placed on the ecclesiastical judge before accepting a case of annulment.[6]

Canon 1692 §§ 2 and 3 contemplate several cases in which, with the prior authorization of the diocesan bishop of the place of the couple's residency, they can put the case for separation in the civil forum. This requirement presents the bishop the opportunity to assure that pastoral means are employed by him or by his delegates, so that the couple reconcile and reestablish common life.

In three instances in several other canons (1152 § 3, 1153 § 2, and 1155), the legislator insists on reconciliation and the reestablishment of conjugal life, in order to render effective the right and duty that husband and wife have, pursuant to c. 1151, to maintain cohabitation unless excused for a lawful reason.

6. Cf. C. DE DIEGO-LORA, "Medidas pastorales en las causas de separación conyugal," in *Ius Canonicum* 25 (1985), pp. 209ff.

105 **§ 1. Minor necessario retinet domicilium et quasi-domicilium illius, cuius potestati subicitur. Infantia egressus potest etiam quasi-domicilium proprium acquirere; atque legitime ad normam iuris civilis emancipatus, etiam proprium domicilium.**

§ 2. Quicumque alia ratione quam minoritate, in tutelam vel curatelam legitime traditus est alterius, domicilium et quasi-domicilium habet tutoris vel curatoris.

§ 1. A minor necessarily retains the domicile or quasi-domicile of the person to whose authority the minor is subject. A minor who is no longer an infant can acquire a quasi-domicile of his or her own and, if lawfully emancipated in accordance with the civil law, a domicile also.

§ 2. One who for a reason other than minority is lawfully entrusted to the guardianship or tutelage of another, has the domicile and quasi-domicile of the guardian or curator.

SOURCES: § 1: c. 93
§ 2: c. 93 § 1

CROSS REFERENCES: cc. 97, 98, 99, 1479

COMMENTARY

Amadeo de Fuenmayor

This canon, which regulates the domicile and quasi-domicile of minors and of persons lawfully subject to a guardianship or tutelage, incorporates c. 93 of the *CIC*/1917, with several innovations.[1]

The law assigns as a *necessary* domicile or quasi-domicile to minors and incapacitated persons the domicile or quasi-domicile of the subject upon whom the former depends. These domiciles and quasi-domiciles arise, end, or change with the situation that determines personal dependency. The former are derived from the latter.

Paragraph 1 of this canon refers to a minor (namely, one who has not completed the 18th year: c. 97 § 1), and establishes a general rule, with two complementary norms. In principle, "a minor necessarily retains the domicile or quasi-domicile of the person to whose authority the minor is subject": he or she has the domicile and quasi-domicile of parents or

1. Cf. *Comm.* 6 (1974), p. 96; ibid. 9 (1977), p. 238 and 21 (1989), p. 49.

guardians (cf. c. 98 § 2). In adoptions, the domicile and quasi-domicile will be those of the person or persons who have adopted the minor (cf. c. 110). If from the application of these criteria there result several different, lawful domiciles or quasi-domiciles, juridical relevance can be accorded to any of them, given the breadth with which the Code regulates, in general, when referring to domicile and quasi-domicile.

"A minor who is no longer an infant can acquire a quasi-domicile of his or her *own*," that is, different from a legal quasi-domicile which is not lost, because the minor continues being a minor. It is a question of a real quasi-domicile that is acquired pursuant to c. 102 § 2, when a child older than seven years resides in places different from the domicile of parents or guardians, for reasons of study, to attend to health, or for other reasonable circumstances.

The canon refers to another case, which constitutes an innovation with respect to the *CIC*/1917: a minor "who is no longer an infant can acquire a quasi-domicile of his or her own and, if lawfully emancipated in accordance with the civil law, a domicile also." The legislator, with this new norm introduced into c. 105 § 1, did not want to receive the civil law regarding the capacity of a minor to act in its entirety (see commentary on c. 99). He has mentioned emancipation obtained pursuant to civil law to merely declare, as the only effect of that situation in the canonical forum, the possibility of acquiring a proper domicile by any of the methods established in c. 102 § 1. The acquisition of this proper domicile will determine the loss of legal domicile and quasi-domicile because emancipation terminates a minor's dependence on parents or guardian.

Pursuant to c. 105 § 2, "one who for a reason other than minority is lawfully entrusted to the guardianship or tutelage of another, has the domicile and quasi-domicile of the guardian or curator." Canon 93 of the *CIC*/1917 contemplated the case of an insane person (*amens*) and spoke only of domicile. Now the norm is expanded to all incapacitated persons lawfully subject to guardianship or tutelage, to whom also is attributed their legal quasi-domicile.

Whoever might be in each case the guardian or curator of these incapacitated persons, is a question that, in principle, is referred to the civil law, pursuant to the provisions of c. 98 § 2, which must be harmonized with the norm of c. 1479, which regulates the subsidiary appointment of a specific guardian or curator, in the charge of an ecclesiastical judge, for a specific case.

106 Domicilium et quasi-domicilium amittitur discessione a loco cum animo non revertendi, salvo praescripto can. 105.

Domicile or quasi-domicile is lost by departure from the place with the intention of not returning, without prejudice to the provisions of can. 105.

SOURCES: c. 95

CROSS REFERENCES: cc. 102–107

COMMENTARY

Amadeo de Fuenmayor

1. Canon 106 incorporates the text of c. 95 of the *CIC*/1917, with only a numerical change of the canon relative to minors. It contains a general rule, applicable to proper domiciles and quasi-domiciles, and an exception in reference to legal necessary or derived domiciles.

Proper domicile—also called elective, voluntary, or real—is lost "by departure from the place with the intention of not returning." It is required that the following two circumstances occur together: the act of physically abandoning the place and the intention, that is, the will or purpose, of not returning to it. A change of residence does not cause, in itself, the loss of domicile if an intention to return exists (*animus revertendi*). Likewise the intention of not remaining to the place is not sufficient if, in fact, one does remain.

Elective quasi-domicile is also lost "by departure from the place with the intention of not returning." It does not matter that the absence from the place of the quasi-domicile is relatively prolonged, as long as the intention to return survives.

2. Canon 106 adds: "without prejudice to the provisions of c. 105." The former c. 95 *CIC*/1917 said: "except for the provisions of c. 93." What does this exception mean? It seems clear that the legislator is indicating that the loss of legal or necessary domicile and quasi-domicile of a minor and of persons lawfully subject to tutelage or guardianship (to which c. 105 refers) are not included in the norm relative to the loss of elective or voluntary domicile and quasi-domicile. A minor or incapacitated person loses legal domicile as a consequence of its being lost to the person to whose authority the minor or incapacitated person is lawfully subject, because such domicile or quasi-domicile is derived according to that of the principals. Domicile or quasi-domicile is also lost upon the disappearance

of the circumstance to which the law linked its acquisition (minority, guardianship, or tutelage).

By making an exception for the provisions of c. 105, the legislator has confirmed that "a minor who is no longer an infant can acquire a quasi-domicile of his or her own and, if lawfully emancipated in accordance with the civil law, a domicile also." Loss in both cases will occur pursuant to the general norm of c. 106 (dealing with proper domicile and quasi-domicile), that is, "by departure from the place with the intention of not returning."

3. Nothing is said about the quasi-domicile and domicile of the members of religious institutes and societies of apostolic life. It seems that the legislator forgot about them by incorporating into c. 105 the provisions of former c. 95. If he had had them in mind he would have included them in the exception, together with c. 105 and c. 103, which regulate those cases, which are contemplated for the first time in the present Code.

A distinction must be made (see commentary on c. 103) between: *a*) legal domicile of these persons derived from *common life*; *b*) their possible voluntary quasi-domicile; and *c*) possible voluntary domicile acquired by them without losing legal domicile. Regarding legal domicile, loss occurs only as a consequence of definitive separation from the religious institute or society of apostolic life. Voluntary quasi-domicile and domicile will be lost "by departure from the place with the intention of not returning."

4. In contrast to place of origin, domicile is not something unchangeable: it can be changed, lost, or duplicated.

In general terms, the voluntary domicile of a person can change to voluntary quasi-domicile if the latter's conditions are preserved. And proper voluntary or elective domicile or quasi-domicile can be preserved for those who were held as a legal or derived domicile or quasi-domicile. That is the case, for example, of persons who reach majority and continue residing in the domicile of their parents or guardians.

The possibility of several domiciles or simultaneous quasi-domiciles can occur in various cases, several expressly provided for by the legislator and others as a consequence of the norms that regulate the acquisition or loss of domicile and quasi-domicile in general terms.

Thus, a married couple can have a common domicile or quasi-domicile and each, for a just reason, can have a simultaneous proper domicile or quasi-domicile (c. 104). Minors who are no longer infants can acquire their own quasi-domicile without losing legal quasi-domicile (c. 105 § 1).

There can be several voluntary domiciles belonging to one person: because of residency for five years in one place, there existing the intention of returning to the place where the person previously had legal domicile; or because of prolonged residency for five years in different places, such that the person stays in both for a time, according to the requirements of work, studies, etc.

A person can now have several voluntary quasi-domiciles simultaneously because of residency in a different place for three months (c. 102 § 2). In the *CIC*/1917 it was common doctrine that excluded this possibility because no one could live the greater part of a year in two different places (c. 92 § 2 *CIC*/1917).

The simultaneity of several domiciles or quasi-domiciles in persons *sui iuris* are duplicated, as legal domiciles or quasi-domiciles, due to persons to whom they are subject.

107 **§ 1. Tum per domicilium tum per quasi-domicilium suum quisque parochum et Ordinarium sortitur.**

§ 2. Proprius vagi parochus vel Ordinarius est parochus vel Ordinarius loci in quo vagus actu commoratur.

§ 3. Illius quoque qui non habet nisi domicilium vel quasi-domicilinm dioecesanum, parochus proprius est parochus loci in quo actu commoratur.

§ 1. Both through domicile and through quasi-domicile everyone acquires his or her own parish priest and Ordinary.

§ 2. The proper parish priest or Ordinary of a vagus is the parish priest or local Ordinary where the vagus is actually residing.

§ 3. The proper parish priest of one who has only a diocesan domicile or quasi-domicile is the parish priest of the place where that person is actually residing.

SOURCES: § 1: c. 94 § 1; *SCCong* 9 iun. 1923 (*AAS* 17 [1923] 508–510); *EM* VII
§ 2: c. 94 § 2
§ 3: c. 94 § 3

CROSS REFERENCES: cc. 100, 106, 372 § 2, 518, 1110

COMMENTARY

Amadeo de Fuenmayor

1. This canon, which reproduces c. 94 of the *CIC*/1917 with only small grammatical changes, regulates the principal effect derived from domicile and quasi-domicile: the determination of a proper parish priest and ordinary, while keeping in mind the various situations of persons in relation to domicile and quasi-domicile (cf. c. 100). Moreover, as we will see later, the norms of the Code are numerous that attribute other certain juridical effects to domicile and quasi-domicile.

2. Canon 107 contemplates three cases for the determination of a proper parish priest and ordinary.

a) Paragraph 1 states a general rule: "Both through domicile and through quasi-domicile everyone acquires his or her own parish priest and Ordinary"; that is, by the person's belonging as a parishioner to parish or as diocesan to a diocese. Such belonging is determined by a territorial

criterion, through the connection of the physical person to a certain territory, by means of habitual residence in the respective parish or diocese.

b) Paragraph 2 contemplates the case of a vagus—having no domicile or quasi-domicile anywhere—and attributes to the person as a proper parish priest and ordinary, those of the place where the vagus is at present.

c) Paragraph 3 regulates the case of a person who only has a diocesan domicile or quasi-domicile, without having acquired a parochial or diocesan domicile. The proper parish priest is that of the place where the person presently lives. The proper ordinary is that of the diocese where the person has domicile or quasi-domicile (c. 107 § 1).

3. In the case of a plurality of domiciles or quasi-domiciles (see commentary on c. 106), a member of Christ's faithful has several different proper parish priests and ordinaries contemporaneously. Unless otherwise provided by a legal norm or custom in specific cases, the person—or lawful representative, if it concerns a minor or incapacitated person—can freely choose any of them. In principle, none of those several proper ordinaries and parish priests has preference over any other, as well it might be because of domicile than for quasi-domicile.

4. The proper ordinary and parish priest spoken of in c. 107 are the local diocesan ordinary and parish priest, determined by the connection of the faithful with the respective territory (in which they have a domicile, quasi-domicile, or mere residence). Nevertheless, in certain cases, for the determination of a proper ordinary and parish priest, other personal circumstances come into play, for example the rite or language of the faithful: the connection in these cases is established with a personal diocese (c. 372 § 2) or with a personal parish (c. 518). (Regarding assistance at weddings by a personal parish priest or Ordinary, cf. c. 1110.)

5. Besides c. 107, there are numerous norms in the Code that take into consideration both domicile and quasi-domicile and that attribute to them identical juridical importance:

a) for judicial purposes: cc. 1408, 1409 § 2, 1413 § 2, 1504, 4°, 1673, 2°, and 1699.

b) regarding other purposes: cc. 12 § 3, 498 § 2, 971 and 1115.

6. Other norms of the Code take into consideration only domicile, without making reference to quasi-domicile:

a) for judicial purposes:

— Canon 1552 § 1 (when testimony is offered, the domicile of the witnesses must be stated). Canon 1671 § 1 *CIC*/1917 contained the same precept. The criterion also appears in the Instruction of the SCDS *Provida Mater Ecclesia* of August 15, 1936 (regarding marriage nullity cases) whose article125 § 1 required the domicile of the witnesses to be indicated, "by

designating the city, street, and house number."[1] Domicile serves, better than quasi-domicile, to facilitate the issuance of summons by the judge and so that the opposing party can recognize the witness without mistaking the person and provide information about the person's credibility.

— Canon 1673, 3° and 4° (in marriage nullity cases, the tribunal where the complaining party has his domicile is the competent tribunal, while the judicial vicar of the domicile of the defendant must give his consent).

In the preparatory work for the new Code it was proposed that the competent tribunal also be where the complaining party had a domicile or *quasi-domicile*, but this proposal was not accepted.[2]

b) For other purposes:

— Canon 967 § 2 (those who have the faculty of hearing confession by permission of the local ordinary where they have their domicile, also have that faculty in any other place). The *Schema* of 1980 included the case of permission by the local ordinary of the quasi-domicile, but it was considered advisable to suppress the mention of quasi-domicile, "since it deals with a residence insufficient for one who has received the faculty to exercise it in another place."[3] Also, c. 975 only talks about domicile, which is a complement of c. 967 § 2.

— Canon 1016 (the proper bishop for the ordination of one who wants to join the secular clergy: the bishop of the diocese where the ordained has his domicile. Quasi-domicile is not included in this case, following the same criterion of c. 956 of the *CIC*/1917).

7. The Code presents no norm in which juridical importance is given to quasi-domicile in isolation: it is always considered together with domicile, as its alternative, as indicated. And a case exists in which residence for a month is taken as an alternative to domicile and quasi-domicile as established in c. 1115, with the criterion introduced by the Decree *Ne temere*: Marriages are to be celebrated in the parish in which either of the contracting parties has a domicile or a quasi-domicile or a month's residence. It is treated as a requirement for liceity.

1. *AAS* 28 (1936), p. 339.
2. Cf. *Comm.* 11 (1979), p. 258.
3. *Comm.* 15 (1983), p. 208, c. 921 § 2, no. 3.

108 **§ 1. Consanguinitas computatur per lineas et gradus.**

§ 2. In linea recta tot sunt gradus quot generationes, seu quot personae, stipite dempto.

§ 3. In linea obliqua tot sunt gradus quot personae in utraque simul linea, stipite dempto.

§ 1. Consanguinity is reckoned by lines and degrees.

§ 2. In the direct line there are as many degrees as there are generations, that is, as there are persons, not counting the common ancestor.

§ 3. In the collateral line there are as many degrees as there are persons in both lines together, not counting the common ancestor.

SOURCES: § 1: c. 96 § 1
§ 2: c. 96 § 2

CROSS REFERENCES: cc. 478 § 2, 492 § 3, 1091, 1298, 1448, 1548 § 2, 2°

COMMENTARY

Amadeo de Fuenmayor

1. Canons 108 and 109 are concerned with kinship by consanguinity and affinity, following the criterion of the former Code but with several important innovations. Canon 110 establishes a precept regarding the tie derived from civil adoption, which coincides only in part with the prior discipline of the impediment of legal kinship. The matrimonial impediment of spiritual kinship which existed between baptismal godparents and godchildren (c. 1079 *CIC*/1917) has been abolished. Now only the regulations regarding the obligations of godparents, both baptismal (c. 872) and of confirmation (c. 892) are preserved.

2. Consanguinity is the relationship that exists between persons united by common blood: those that come from one another or those that have a close common ancestor.

Consanguinity is reckoned by lines and degrees (c. 108 § 1). A line is the whole of persons that proceed from one another successively. In a direct line, the blood relations descend one from another, either with an intermediary or immediately. In a collateral line (or oblique), the blood relations do not proceed from one another; the common ancestor, family head, or founder of the line is the person or persons from whom they proceed.

The degree indicates the distance between relatives.

Consanguinity can be legitimate or illegitimate, depending on whether the person who makes up the line or lines in which the blood relations are situated (excepting the common ancestor) are considered legitimate children or not.

Consanguinity can be full or partial (also called doubly tied or simply tied), depending on whether the common ancestor of the blood relations is specifically constituted by the same progenitors or only by one of them. Doubly tied brothers are also called *germans*; those of a simple tie are called *agnates* when the father is common and the mother is distinct, and *uterine* in the opposite case. In both cases, consanguinity produces the same canonical effects: brothers are kin in a collateral line and in the second degree, independent of their being of a double or single tie.

Consanguinity can also be single or multiple, according to whether the persons have only one common ancestor or two or more common ancestors, such that various kinds of kinship are shared between two specific persons, something that the former law determined would duplicate the matrimonial impediment of consanguinity (c. 1076 § 2 *CIC*/1917). The current canon 1091 § 3 provides that "the impediment of consanguinity is not multiplied."

3. To determine the degree of consanguinity, c. 108 provides the following rules:

a) "In the direct line there are as many degrees as there are generations, that is, as there are persons, not counting the common ancestor" (§ 2). It is the same criterion of the *CIC*/1917 (c. 96 § 2). Thus, a child is removed from a parent by one degree, two from a grandparent, and three from a great-grandparent.

b) "In the collateral line there are as many degrees as there are persons in both lines together, not counting the common ancestor" (§ 3). The following are consanguineous: brothers, in the second degree; uncle and nephew, in the third degree; great uncle and grand nephew, in the fourth degree; cousins, in the fourth degree.

4. Paragraph 3 has introduced an important innovation by abandoning the canonical criterion of germanic inspiration which governed the Church since olden times and which in the former Code was formulated by stating "in the collateral line, if both branches are equal, there are as many degrees as there are generations in the longest branch" (c. 96 § 3 *CIC*/1917). Kinship was measured up to the common ancestor by only one line if both were equal; if they were unequal, by the longest, but keeping in mind the degree of the other. For example, between uncle and nephew there was kinship of the second degree touching the first. Now, there are as many degrees as there are persons in both lines, not counting the common ancestor: uncle and nephew are consanguineous in the third degree.

The so-called Roman system was the one followed by the Eastern Churches[1] and is now preserved in c. 918 *CCEO*. It was also followed in large part by civil legal systems.

This change of criterion, regarding the method of reckoning consanguinity and affinity in an oblique or collateral line, signifies a great innovation because the criterion that is being abandoned had a multi-secular validity in the Latin Church. To justify it, the revision commission of the *CIC* alleged the advisability of conforming the canon law to the civil law in effect in the majority of countries.[2] This was the most important example of imitating the civil law by the ecclesiastical legislator. To this reason another was added of special import: to unite the Latin law with the Eastern Canon law in this point. And a third reason was also declared in replying to a consultant Father who asked to preserve the germanic criterion: it was made clear by everyone that it had been admitted that the norm of the *Schema*—the Roman criterion of reckoning—was the clearest.[3]

All in all, the new criterion of reckoning is clearer. In the former Code there was an anomaly that two first cousins were related in the same degree as uncle and nephew, an anomaly that was presented in many other cases. Since in reality the strength of kinship was not the same, the canonists, in order to distinguish in practice the kinship that, even though being in the same degree had a different strength, adopted a special nomenclature in which they made reference to the two collateral lines (and not only to one of them, as the former c. 96 § 3 required).

The strength of kinship is considered through the proximity of the person in question to the common ancestor: the kinship of the first mixed with the second was stronger than the second touching the first, and both relationships were stronger than that of the second touching the second. This greater proximity of kinship had a practical influence regarding the dispensation of the impediment. An Instruction of the SCDS of August 1, 1931 warned parish priests that to obtain the dispensation of the impediment of the first to the second (*in primo gradu lineae collateralis mixto cum secundo*), serious reasons were required that were usually alleged in other impediments.[4]

5. The principle effect of consanguinity concerns marriage because it constitutes a diriment impediment. In a direct line, a marriage is void between ascendants and descendants, both legitimate and natural (c. 1091 § 1). In a collateral line, it is void up to the fourth degree, inclusive (c. 1091 § 2).

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1. Cf. Pius XII, mp *Cleri sanctitati*, c. 24, June 11, 1957, in *AAS* 49 (1957), p. 442.
2. Cf. *Comm.* 6 (1974), p. 97.
3. Cf. *Comm.* 14 (1982), p. 141, ad c. 106.
4. Cf. *AAS* 23 (1931), p. 413.

Kinship by consanguinity is also kept in mind within certain limits: *a)* for the exclusion of some offices (cc. 478 § 2 and 492 § 3); *b)* to prohibit the alienation or rental of ecclesiastical goods in favor of certain persons (c. 1298); *c)* as a determinant reason for a judge, promoter of justice, defender of the bond, and auditor not to undertake certain cases (c. 1448); and *d)* as cause that excuses testifying in certain cases (c. 1548 § 2, 2°).

109 **§ 1. Affinitas oritur ex matrimonio valido, etsi non consummato, atque viget inter virum et mulieris consanguineos, itemque mulierem inter et viri consanguineos.**

§ 2. Ita computantur ut qui sunt consanguinei viri, iidem in eadem linea et gradu sint affines mulieris, et vice versa.

§ 1. Affinity arises from a valid marriage, even if not consummated, and it exists between the man and the blood relations of the woman, and likewise between the woman and the blood relations of the man.

§ 2. It is reckoned in such a way that the blood relations of the man are related by affinity to the woman in the same line and the same degree, and vice versa.

SOURCES: § 1: c. 97 § § 1 et 2; SCHO Resp., 31 ian. 1957 (*AAS* 49 [1957] 77)
§ 2: c. 97 § 3

CROSS REFERENCES: cc. 108, 492 § 3, 1092, 1298, 1448, 1548 § 2, 2°

COMMENTARY

Amadeo de Fuenmayor

1. Affinity is the relationship of kinship that exists between each spouse and the blood relations of the other.

The present canon determines the origin of affinity, the subjects of this relationship, and how degrees of kinship are reckoned.

a) "Affinity arises from a valid marriage, even if not consummated" (c. 109 § 1).

Canon 97 § 1 of the *CIC* stated: "Affinitas oritur ex matrimonio valido sive rato tantum sive rato et consummato." The expression *"matrimonio rato"* (marriage between baptized) has been suppressed, which had led to doubts if affinity also arose as a consequence of "lawful marriage" (marriage contracted validly between non-faithful or between a faithful and a non-faithful). During the deliberations of the revision commission of the *CIC* to suppress the reference to *matrimonio rato*, the then-in-effect norm of the Eastern Code was invoked: "Affinitas ex digeneia oritur ex matrimonio valido, etsi non consummato."[1] That norm has been incorporated now

1. MP *Cleri sanctitati*, June 11, 1957, c. 25 § 1, in *AAS* 49 (1957), p. 442; cf. *Comm.* 21 (1989), p. 50.

into c. 919 § 1 *CCEO*. Thus a rapprochement with Eastern law was reached by accepting a norm that had already been formulated by Pius XII in the *Motu proprio Crebrae allatae* of February 12, 1949, c. 68 § 1, 1°.[2] With the new text the prior controversy is resolved, in part already overcome by a response of the SCHO of January 31, 1957,[3] by declaring that affinity obtained by lawful marriage (that is, celebrated by the unbaptized) constituted an impediment for marriages celebrated after baptism, though of only one of the spouses.

The basis for affinity is now every valid marriage, sacramental or not. Therefore, it originates as an effect of any valid marriage, consummated or not.

b) Affinity "exists between the man and the blood relations of the woman, and likewise between the woman and the blood relations of the man" (c. 109 § 1). Each of the spouses becomes a blood kinsman of the other. But the relationship does not extend beyond because the blood relatives of one spouse do not have affinity with those of the other: the kin of both spouses are not kin among themselves, pursuant to the rule *affinitas non parit affinitatem*.

c) For affinity's being a reflection of kinship by consanguinity, it does not have degrees or its own lines. The rule for its reckoning is very simple: "It is reckoned in such a way that the blood relations of the man are related by affinity to the woman in the same line and the same degree, and vice versa" (c. 109 § 2).

The following must be distinguished: *a*) the relationship of the spouses between each other is not of kinship: the bond of matrimony ties them; *b*) the relationship of kinship by consanguinity of each spouse, who has his own common ancestor; and *c*) the relationship of kinship by affinity.

The husband is the common ancestor of the relationship of affinity between his own blood relatives and his wife; likewise, the wife is the common ancestor of the relationship of affinity between the husband and her blood relatives. For there to be a relationship of affinity, it is necessary that one of the sides of this relationship of kinship be the same spouse that is or was tied by the matrimonial bond from which it originated. But affinity is a perpetual tie, a consequence of reflected consanguinity. It only ceases to exist in the case of the marriage that constituted its origin being declared null. It neither lapses on the death of a spouse nor on dispensation *super rato*: certainly in these cases is when the impediment of affinity reaches its practical effect.

2. Affinity must be distinguished from the impediment of affinity. Affinity is the relationship of kinship, which constitutes a perpetual tie. The

2. *AAS* 41 (1949), p. 104.
3. Cf. *AAS* 49 (1957), p. 77.

impediment of kinship is the principal effect of this relationship. It is the prohibition that the law provides to prevent persons related in certain degrees from marrying. The present c. 1092 provides that "affinity in any degree of the direct line invalidates marriage." That is to say, the marriage being dissolved, the husband cannot marry blood relatives of his wife in a direct line, likewise the wife cannot marry blood relatives in her husband's direct line.

But the relationship of affinity causes other effects. It is also kept in mind within certain limits: *a*) for exclusion from some offices (c. 492 § 3); *b*) to prohibit alienation or rental of ecclesiastical good in favor of certain persons (c. 1298); *c*) as a determinant reason for a judge, promoter of justice, defender of the bond, assessor and auditor not to undertake certain cases (c. 1448); and *d*) as cause that excuses testifying in certain cases (c. 1548 § 2, 2°).

3. In canon law prior to the *CIC*/1917, kinship by affinity arose from perfected carnal relations, lawful or not. Illicit copula was also considered as the basis for the impediment of affinity, which was not the case for a valid marriage, if it had not been consummated. The *CIC*/1917 provided that affinity originated from every marriage, as long as it was valid. Illicit copula was also a cause of a marriage impediment, which now is called public propriety and because of its similarity to affinity it is also called quasi-affinity. In the present Code it is regulated in c. 1093: "The impediment of public propriety arises when a couple live together after an invalid marriage, or from a notorious or public concubinage. It invalidates marriage in the first degree of the direct line between the man and those related by consanguinity to the woman, and vice versa"; that is to say, with the father, mother, son, or daughter of the other party.

The relationship of quasi–affinity is only juridically taken into consideration as a cause of impediment, which is called public propriety because it is considered indecorous for those to contract matrimony who are in the conditions prescribed by the impediment. It is perpetual because it does not cease on the lapse of the cause that originated it. It arises from an invalid marriage, though it be putative (cf. c. 1061 § 3); likewise from a civil marriage, if there is cohabitation, for its being "notorious or public concubinage."

110 Filii, qui ad normam legis civilis adoptati sint, habentur ut filii eius vel eorum qui eos adoptaverint.

Children who have been adopted in accordance with the civil law are considered the children of that person or those persons who have adopted them.

SOURCES: cc. 1059, 1080

CROSS REFERENCES: cc. 108, 536 § 2, 877 § 3, 1094

COMMENTARY

Amadeo de Fuenmayor

1. After having regulated kinship by consanguinity (c. 108) and by affinity (c. 109), the Code concerns itself in the present canon with legal parentage, which arises from an adoption in accordance with civil law.

The *CIC*/1917 concerned itself with legal kinship by dealing exclusively with matrimonial impediments and incorporating the relevant civil law into canon law, such that the impediment was impedient or diriment in the ecclesiastical forum pursuant to state law. Canon 1059 *CIC*/1917 stated: "In countries where kinship founded on adoption makes marriage unlawful under civil law, it is also unlawful under canon law." And c. 1080 contemplated the *canonizatio*, in dealing with diriment impediments: "Those who by civil law are incapable of contracting marriage to each other due to legal kinship that arises from adoption, by prescription of canon law, they may not lawfully marry each other."

The *CIC* concerned itself with legal kinship in the present canon—which presents a new norm of great importance—and in c. 1094, which replaced cc. 1059 and 1080 *CIC*/1917. It refers to the impediment with a new criterion that will be commented on later: "Those who are legally related by adoption cannot validly marry each other if their relationship is in the direct line or in the second degree of the collateral line."

2. The present canon stems from a proposal formulated during the term of the revision commission, which would be preserved in the Code with a few minor changes. It stated initially: "children adopted in accordance with the civil law of a country are considered legitimate children of the person or persons who adopted them."[1] The text would pass into the

1. Cf. *Comm.* 6 (1974), p. 97; and *Schema* of book II *De Populo Dei*, 1974, *ad* can. 14, p. 26.

Schema of 1980 with one minor change: the classification of children as legitimate ("habentur uti filii") was suppressed.[2] The definitive text will suppress the reference to civil law of a country; it will say simply "in accordance with civil law."

The Church, in its great magisterial documents of the twentieth century, when referring to the family and familiar institutions in their social projection, has frequently mentioned the institution of adoption to show the purposes to which the Church is called on to serve; and has exhorted civil legislators to regulate it with suitable norms.

Thus, *Apostolicam actuositatem* 11, among the works of familiar apostolate states as primary purpose "to adopt as sons the abandoned children." *Familiaris Consortio* 41 also speaks of the availability of Christian families for "the adoption of those children who are deprived of their parents or abandoned by them"; and proclaims that "physical sterility can give spouses occasion for other important services benefiting the human person, like for example, adoption." The "Statement of the rights of the family," of John Paul II (22–X–1983) asks the State, in its legislation, to foster the adoption of children by families that can take them in and that, at the same time, to respect the natural rights of parents.

These exhortations coincide with a generalized environment that contributed to give a new impetus to the institution of adoption in civil legislation, from the end of the war of 1914–1918 and in the economic crisis of 1928, to combat the affective and moral need in which thousands of orphaned or abandoned children found themselves.

The ecclesiastical legislator echoes the great importance that civil adoption has acquired, incorporating it into c. 110, which represents a notable innovation from different points of view. Now, like the former Code, adoption is contemplated in reference to the civil law, but with a new relevance in the canonical system. The connection with the civil law is limited now to the constitutive moment of adoption. Legal kinship flows from canonical system as long as an adoption is constituted in accordance with the civil law. It is an assumption from which juridical effects are derived both in civil and canonical legal systems. Those effects are independent because the incorporation into canon law of civil legal consequences, as was done in the *CIC*/1917 regarding marital impediments, no longer exists.

3. Specifically regarding the canonical importance of civil adoption, one must now distinguish the familiar relationship that is established between the adopted child and the adopting person or persons and the marital impediment. One must distinguish the scope of legal kinship as a familiar relationship or bond and as an impediment, keeping in mind, moreover, that such scope can have a different significance in canon law and in civil law.

2. Cf. *Schema, ad* can. 108, p. 21.

a) The familiar relationship is the innovation that is now regulated in c. 110, situated among the norms relative to the canonical status of physical persons: "Children who have been adopted in accordance with the civil law are considered the children of that person or those persons who have adopted them." Thus it is established in canon law that civil adoptions produce the effects that are derived from the sovereign authority between the adopted child and the person or persons adopting. Consequently, in this case the canons are applicable that regulate the following:

— Capacity of minors (c. 98 § 2); and their legal domicile (c. 105 § 1);

— The conduct and responsibility of parent regarding the administration of sacraments to their children (baptism: cc. 851 § 2, 855, 867, 869 § 3, 872, 874 § 1, 2°; confirmation: cc. 890 and 891; the Most Holy Eucharist: c. 914);

— The obligation and right of parents regarding the education of offspring (cc. 1136, 793, and 795–798); and specifically the duty to form their children in the faith and practice of Christian life (cc. 774 § 2 and 1252);

— The participation of parents in the celebration of the marriages of minors (c. 1071 § 1, 6°);

— The sanction provided in c. 1366, applicable to "parents, and those taking the place of parents, who hand over their children to be baptized or brought up in a non-catholic religion, are to be punished with a censure or other just penalty."

An adoption done in accordance with civil law must be noted in the register of baptisms (c. 535 § 2). Pursuant to c. 877 § 3, "in the case of an adopted child, the names of the adopting parents are to be registered and, at least if this is done in the local civil registration, the names of the natural parents in accordance with §§ 1 and 2, subject however to the rulings of the Bishops' Conference."

In the registry system the rights of the adopted child, the adoptive parent or parents and those of the natural parents must be harmonized, thus attempting to prevent inconsistencies and contradictions between entries in the civil register and the parochial register. It is the interest of the adopted child to know his or her true identity, as well as not revealing before strangers the name of his or her natural parents, to whom it could be important for the register to certify their status to exercise rights that they could have regarding the child. Moreover social interest requests that the register allow the identification of the blood ties of the adopted child that constitute a matrimonial impediment. On the whole it is a complex question, upon which publicity and suitable reserve should be obtained at the same time which the lawful interests at play request; and which the legislator has wisely left to the particular regulations of the Bishops' Conferences.

b) Regarding the impediment of legal kinship, the present Code has revised the regulation of 1917 on two important points, as a consequence of having abandoned incorporating the civil impediment into canon law and of having generally suppressed impeding impediments.

Now—pursuant to the provisions of c. 1094—the impediment always invalidates a marriage and it arises among those "who are legally related by adoption in the direct line or in the second degree of the collateral line." For the reckoning of this kinship, by analogy, the criteria established for kinship by consanguinity of c. 108 are followed. Consequently, the impediment affects the adopted child in the direct line with the adopting parent or parents, and the adopting person with the descendents of the adopted child. In the collateral line, it invalidates a marriage between the children of the adoptive parent and the adopted child.

In the *CIC*/1917, the impediment of legal kinship lapsed in the canonical forum as long as the civil impediment (incorporated into canon law) lapsed. In some legal systems it lapsed in cases where a civil adoption lapsed. Now—given canonical regulation, independent of civil regulation—it cannot be stated that the lapse of legal kinship (because of the challenging or revoking of an adoption done in accordance with civil law) is a cause for the lapse of the impediment. The opinion that considers the impediment perpetual *ex se* seems better founded, and which holds that it can only lapse by canonical dispensation, which falls to the local ordinary to grant (c. 1078 § 1).

111 **§ 1. Ecclesiae latinae per receptum baptismum adscribitur filius parentum, qui ad eam pertineant vel, si alteruter ad eam non pertineat, ambo concordi voluntate optaverint ut proles in Ecclesia latina baptizaretur; quodsi concors voluntas desit, Ecclesiae rituali ad quam pater petinet adscribitur.**

§ 2. Quilibet baptizandus qui quartum decimum aetatis annum expleverit, libere potest eligere ut in Ecclesia latina vel in alia Ecclesia rituali sui iuris baptizetur; quo in casu, ipse ad eam Ecclesiam pertinet quam elegerit.

§ 1. Through the reception of baptism a child becomes a member of the latin Church if the parents belong to that Church or, should one of them not belong to it, if they have both by common consent chosen that the child be baptised in the latin Church: if that common consent is lacking, the child becomes a member of the ritual Church to which the father belongs.

§ 2. Any candidate for baptism who has completed the fourteenth year of age may freely choose to be baptised either in the latin Church or in another autonomous ritual Church; in which case the person belongs to the Church which he or she has chosen.

SOURCES: § 1: cc. 98 § 1, 756 §§ 1 et 2; CodCom Resp. 11, 16 oct. 1919 (*AAS* 11 [1919] 478); S CEC Decr. *Cum data fuerit*, 1 mar. 1929, art. 43 (*AAS* 21 [1929] 159); SCEC Decr. *Graeci-rutheni ritus*, 24 maii 1930, art. 48 (*AAS* 22 [1930] 353); SCEC Decr. Per Decretum, 23 nov. 1940 (*AAS* 33 [1941] 27–28)
§ 2: Pius PP. XII, mp *Postquam Apostolicis Litteris*, 9 feb. 1952, c. 303 § 1,1° (*AAS* 44 [1952] 144)

CROSS REFERENCES: cc. 1, 112, 372 § 2, 518

COMMENTARY

Amadeo de Fuenmayor

1. Canons 111 and 112 take the place of c. 98 *CIC*/1917, which was concerned with the traditional concept of "rite," regarding circumstances bearing on the juridical capacity of a person, while distinguishing between the several Catholic rites, the Latin rite and the Eastern rites.

Canons 111 and 112 contain several important innovations regarding the adopted terminology; and regarding the criteria that determines the incorporation of a person into a "ritual Church *sui iuris*." The concept of "rite" has been replaced by that of "ritual Church *sui iuris*." To belong to a rite is now expressed with the locution—more meaningful—of belonging to a "ritual Church *sui iuris*" (which is also translated as "ritual autonomous Church").

2. During the deliberations of the revision commission for the *CIC*, in the session of October 17, 1979 of the *coetus De personis physicis et iuridicis*,[1] the relator presented the question of the different meanings the word "*ritus*" had in the Eastern Church and in the Latin Church. For the Eastern Churches "rite" could be common to several individual Churches "*sui iuris*," as it is in the Byzantine Churches. The Eastern Commission, in the revision of the *LEF*, first proposed and later rejected the expression "*Ecclesia ritualis sui iuris*," preferring the phrase "*Ecclesia sui iuris*." And the relator added: "nevertheless, we must accept *Ecclesia ritualis sui iuris*," which is already sanctioned in the *LEF*.

The *CCEO* contains a definition of Church "*sui iuris*" in c. 27 which is equivalent to what cc. 111 and 112 *CIC* designate with the expression "ritual Church *sui iuris* or autonomous ritual Church": "The grouping of faithful Christians held together by a hierarchy according to law is called, in this Code, Church *sui iuris*, which the supreme authority of the Church expressly or implicitly recognizes as autonomous." And c. 28 § 1 of the *CCEO* presents an idea of "rite": "A rite is the liturgical, theological, spiritual, and disciplinary patrimony characterized by the historical culture and vicissitudes of a people, which their own manner of living the faith is expressed of each of the Churches *sui iuris*." Paragraph 2 of c. 28 adds that the rites dealt with in that Code of the Eastern Churches are "*nisi aliud constet*," which come from the Alexandrine, Antiochean, Armenian, Chaldean, and Constantinopolitan traditions.

3. Currently, because of rite, on one hand, the Latin Church exists (cf. cc. 1, 111, 112, and 438), in which various liturgical rites are preserved (e.g., Hispanic, Mozarabic, and Milanese or Ambrosian), but without their implying hierarchical and disciplinary differences. On the other hand, there are twenty-one Eastern Catholic Churches endowed of their own liturgical rites and, moreover, which have their own Hierarchy and discipline. They are different ritual Churches *sui iuris*, thus named for being ruled by their respective particular disciplines.[2] It should be observed that the *CCEO* mentions the Latin Church several times, considering it an *Ecclesia sui iuris*, governed by the *Codex iuris canonici*: thus, c. 30, which refers implicitly to the Latin Church; and cc. 41 and 830 § 1, which expressly mention it.

1. Cf. *Comm.* 12 (1980), p. 71.
2. Cf. *OE* 5 and 6; *CCEO*, cc. 27–28 and 39–41.

The *CIC* only employs the locution "ritual Church *sui iuris*" in cc. 111 and 112. In numerous other canons the term "rite" continues being used as a circumstance that bears on the juridical capacity of persons; or it is taken into consideration to make a reference to some particular regulation.

The current c. 372 § 2 speaks of particular churches according to different rites; and c. 518, about personal parishes according to rite. Regarding the spiritual service for faithful of a different "rite" in the same diocese, cf. *Christus Dominus* 23.3 and cc. 383 § 2, 476 and 518. Regarding spiritual service for emigrants of a different rite, cf. the Instruction *Nemo est*, of the SCB, of August 22, 1969, nos. 16 § 2, 31 § 3, and 38.[3]

The *CCEO* pertains to the people, discipline, and rites of the Eastern Churches, though they might be mixed, that is, the matter or people might also have to do with Latin rites; but only those territories in which the majority of Christians belong to the Eastern rites are subject to the *CCEO*. In Latin territories it concerns itself with the nuclei of faithful of Eastern rites that are not yet organized, even by establishing a proper hierarchy if the number of faithful and the circumstances were to require it.[4] (Regarding the hierarchies of Eastern rite constituted outside the corresponding patriarchal territory, cf. *CCEO* cc. 146–150). The *Motu proprio Ecclesiae Orientalis* of John Paul II, of January 15, 1993, erects the "Permanent Interdicasterial Commission for the Church in Eastern Europe," with competencies for Churches of both the Latin and Eastern rite.[5]

4. Canons 111 and 112 of the *CIC* regulate the ascription or incorporation of physical persons into the Latin Church or into another ritual Church *sui iuris*. This incorporation determines the normative system—the Latin system or that of one of the Eastern Churches *sui iuris*—applicable to the juridical acts and Christian life of the Catholic faithful. Canon 111 is concerned with incorporation originating from baptism; and c. 112, with incorporation into another ritual Church *sui iuris* after the receiving of baptism. The *CCEO* also is concerned with the subject matter of these two canons, as had been the prior Eastern law (cf. *CS*), which had established more detailed prescriptions regarding incorporation into ritual Churches *sui iuris* (cc. 29–38). This requires making both legislations agree in several specific cases.

In the prior Latin (c. 98 of the *CIC*/1917) and Eastern (*CS* c. 6) law, each person belonged, as a general rule, to that rite by whose ceremonies he or she was baptized, independent of the rite of the parents. Pursuant to the new Latin and Eastern law, the determining factor of ascription is, especially, the parents' belonging to the Latin Church or an Eastern Church

3. In *AAS* 61 (1969), pp. 614–615.
4. Cf. *PB* 59 and *CCEO*, cc. 311–321. Cf. CEC, Decl. of April 30, 1986 regarding the Ordinariate for Catholics of the eastern rite residing in France, in *AAS* 78 (1986), pp. 784–786.
5. Cf. *AAS* 85 (1993), pp. 309–310.

sui iuris, though the baptism might have been administered with liturgical ceremonies corresponding to a Church different from that to which the person's parents belong.

In the prior law, a minor child had to have remained in the "rite" of the father. This is what the *CIC*/1917 provided in its c. 756 § 2: "If one of the parents belongs to the Latin rite and the other to the Eastern rite, the child must be baptized into the rite of the father, unless otherwise provided by a special law."

5. Canon 111 of the current Latin Code, upon which we are commenting, distinguishes two cases with respect to a child of less than 14 years:

a) If the father and mother belong to the Latin Church, the child is incorporated into the Church through the reception of baptism.

b) If one of the parents does not belong to the Latin Church, the minor child with less than 14 years of age, upon being baptized, will become incorporated into the Latin Church if the parents so agree; otherwise, the child is incorporated *ipso iure* into the Church of the father's rite.

Regarding these two cases, c. 29 § 1 of the *CCEO* establishes an equivalent regulation: "A child who has not completed his fourteenth year, is incorporated by baptism into the Church *sui iuris* to which his Catholic father belongs; if only the mother is Catholic, or if the parents so request, the child is incorporated into the Church *sui iuris* to which the mother belongs, unless the particular law established by the Apostolic See provides otherwise."

In the present law, the *CIC* (c. 111 § 1) and the *CCEO* (c. 29 § 1) are practically the same, in that both provide for the possibility of the ascription of a baptized child of less than fourteen years into the Church *sui iuris* to which the mother belongs, if both parents so decide.

This new criterion, established first in the *Codex Iuris Cononici*, was also incorporated into the codification of the Eastern law, but not without a certain resistance in accepting the agreement of the parents, fearing that it could weaken an Eastern Church in the Diaspora, and by adding a moderating phrase: "unless the particular law established by the Apostolic See provides otherwise." This phrase is not in c. 111 of the *CIC* but it also applies to the Latin Church.

John Paul II expressly referred to the innovations of c. 29 § 1 of the *CCEO*, saying that it was one of those norms "that the Vicar of Christ considers necessary for the good of the universal Church and to safeguard its righteousness and the fundamental and irreducible rights of man who is redeemed by Christ" (it is a question of equality of the rights of parents in relation to their children); and adds that the phrase of the *ius a Romano Pontifice approbatum* "has been added to the canon regarding the spe-

cific intent of parents in the selection of the ritual patrimony of their children, to indicate the way and to apply opportune remedies, when it is considered necessary, for the protection of the flourishing of the Eastern Churches in regions where they are in the minority.[6]

6. A third case is contemplated in c. 111 § 2 of the *CIC*:

"Any candidate for baptism who has completed the fourteenth year of age may freely choose to be baptized either in the Latin Church or in another autonomous ritual Church; in which case the person belongs to the Church which he or she has chosen."

This case is also contemplated in c. 30 of the *CCEO*:

"A candidate for baptism who has completed his fourteenth year can freely choose any Church *sui iuris*, into which he will be incorporated by baptism, except as provided in the particular law established by the Holy See."

Both canons establish the identical regulation: the expression "any Church *sui iuris*" of the *CCEO* is equivalent to the "Latin Church or other autonomous ritual Church" employed by the CIC.

Only one difference exists because the canon of the *CCEO* adds: "except as provided in the particular law established by the Apostolic See." This phrase must be taken as being also applicable to the Latin Church, in the proper case. Special law can establish special norms—while always respecting the freedom of choice of the candidate for baptism—regarding certain circumstances, among them are avoiding the conflict that could occur in countries whose civil laws only permit adults to change religions, that is (as a general rule)—those who have completed 18 years.

7. In relation to catechumens, c 588 of the *CCEO* must be kept in mind, especially formulated with practical reference to missionary lands, for it is a norm included in title XIV, *De evangelizatione gentium*: "Catechumens have complete freedom to ascribe to any Church *sui iuris*, in accordance with canon 30; with care taken, nevertheless, to counsel them about what can be an obstacle to their incorporation into a Church less akin to their culture."

6. *Address* of John Paul II at the presentation of the *CCEO* to the Synod of Bishops, October 25, 1990, in *AAS* 83 (1991), p. 492.

112 **§ 1. Post receptum baptismum, alii Ecclesiae ritualis sui iuris adscribuntur:**

1° qui licentiam ab Apostolica Sede obtinuerit;

2° coniux qui, in matrimonio ineundo vel eo durante, ad Ecclesiam ritualem sui iuris alterius coniugis se transire declaraverit; matrimonio autem soluto, libere potest ad latinam Ecclesiam redire;

3° filii eorum, de quibus in nn. 1 et 2, ante decimum quartum aetatis annum completum itemque, in matrimonio mixto, filii partis catholicae quae ad aliam Ecclesiam ritualem legitime transierit; adepta vero hac aetate, iidem possunt ad latinam Ecclesiam redire.

§ 2. Mos, quamvis diuturnus, sacramenta secundum ritum alicuius Ecclesiae ritualis sui iuris recipiendi, non secumfert adscriptionem eidem Ecclesiae.

§ 1. After the reception of baptism, the following become members of another autonomous ritual Church:

1° those who have obtained permission from the Apostolic See;

2° a spouse who, on entering marriage or during its course, has declared that he or she is transferring to the autonomous ritual Church of the other spouse; on the dissolution of the marriage, however, that person may freely return to the latin Church;

3° the children of those mentioned in nn.1 and 2 who have not completed their fourteenth year, and likewise in a mixed marriage the children of a catholic party who has lawfully transferred to another ritual Church; on completion of their fourteenth year, however, they may return to the latin Church.

§ 2. The practice, however long standing, of receiving the sacraments according to the rite of an autonomous ritual Church, does not bring with it membership of that Church.

SOURCES: § 1: c. 98 § § 3 et 4; CodCom Resp. VI, 10 nov. 1925 (*AAS* 17 [1925] 583); SCEC Decr. *Nemini licere*, 6 dec. 1928 (*AAS* 20 [1928] 416–417); Pontificia Commissio pro Russia, Instr. *Edito in Actis*, 26 aug. 1929, I (*AAS* 21 [1929] 609); SCEC Decr. *Graeci-rutheni ritus*, 24 maii 1930, art. 44 (*AAS* 22 [1930] 353); CodCom Resp. I, 29 apr. 1940 (*AAS* 32 [1940] 212); SCEC Decr. *Quo firmior*, 23 nov. 1940 (*AAS* 33 [1941] 28); *CS* 11 § 1; *OE* 4; RCIA Appendix, 2
§ 2: c. 98 § 5

CROSS REFERENCES: cc. 111, 535 § 2, 846 § 2, 923, 991, 1015 § 2, 1021, 1109, 1248 § 1

COMMENTARY

Amadeo de Fuenmayor

1. The *CIC*/1917 expressly prohibited a change in rite without permission of the Apostolic See (c. 98 § 3). This pontifical reservation pertained to the fundamental criterion that each of Christ's faithful remained permanently a member of the Church (Latin or Eastern) into which he was incorporated by baptism; and it was based on the principle of equal dignity for all "rites," which was upheld by the Supreme Pontiffs starting with Leo XIII. Vatican Council II acknowledged this criterion when it proclaimed that all Catholics "should everywhere retain their proper rite, cherish it, and observe it to the best of their ability." (*OE* 4). The need to obtain permission from the Apostolic See for a change of rite—acknowledged the Council—was sanctioned by Pius XII (*CS* c. 8), "following the practice of previous times," since the Roman Pontiff was the authority in the Church that can guarantee the respect all rites deserve, by the "par dignitas" of all the Churches, both Eastern and Western, entrusted "*aequali modo*" to the pastoral governance of the Roman Pontiff (*OE* 3).

To protect the Eastern Churches, c. 31 of the *CCEO* warns that "no one shall attempt to induce one of Christ's faithful to transfer from one Church *sui iuris* to another." This is a norm that pertains to the entire Latin Church and is complemented by the sanction of c. 1465.[1]

2. Canon 112 of the *CIC* provides (§ 1, 1°) that one may join another ritual Church *sui iuris* if one obtains the permission of the Apostolic See.

We find this norm also in c. 32 § 1 of the *CCEO*: "No one may validly transfer to another Church *sui iuris* without the consent of the Apostolic See."

The Eastern Code adds (c. 32 § 2) a presumption to facilitate the change: "Nevertheless, in the case of one of Christ's faithful from one eparchy of a Church *sui iuris*, who asks to transfer to another Church *sui iuris*, which has its own eparchy in the same territory, and this consent of the Holy See is presumed, as long as both eparchial bishops give their consent to the transfer in writing."

An analogous presumption was established by the Roman Pontiff in favor of one of Christ's faithful of the Latin Church who applied for transfer to another ritual Church *sui iuris* that had its eparchy inside the same

1. "Qui officium, ministerium vel aliud munus in Ecclesia exercens, cuicumque Ecclesiae sui iuris, etiam Ecclesiae latinae, ascriptus est, quemvis christifidelem contra can. 31 ad transitum ad aliam Ecclesiam sui iuris quomodocumque inducere praesumpsit, congrua poena puniatur."

territory, if the bishops of both dioceses consented (that is, of the Latin diocese and of the eparchy).[2]

With the purpose of also procuring permanence for each of Christ's faithful to remain in his or her own rite, an indult of the Holy See was required in the *CIC*: *a*) so that the proper bishop of Latin rite could lawfully ordain a subject of Eastern rite (c. 1015 § 2; and *b*) to send dimissorial letters to the bishops of a rite different than that of the candidate for ordination (c. 1021).

3. Besides the change of Church with permission of the Holy See, the *CIC* (c. 112 § 1, 2°) facilitates that married persons immediately transfer to the ritual Church of the other spouse without need of the consent of any authority. They must declare such desire when they contract marriage or during the marriage. It is a faculty accorded to both husband and wife (not only to the latter, as the prior law had provided: *CIC*/1917 c. 98 § 4). If the marriage is dissolved, each can freely return to the Latin Church: dissolution cases in the strict sense (because of the death of the other spouse or because of dispensation *super rato*: cc. 1141–1142); and also, by analogy, in the case of sentence for annulment of marriage that has been executed (cc. 1684–1685).

In c. 33, the *CCEO* is concerned with the change of rite by spouses, but with a different criterion. It only grants to the wife the faculty of transferring to the Church *sui iuris* of her husband on celebrating nuptials or during the marriage: once the marriage is dissolved, the wife can freely return to her original Church. It was desired to maintain the prior criterion (*CS* 9) without incorporating the provisions of c. 112 CIC. The environment was not yet considered propitious to accept on this subject—as in the Latin Code—the principle of equality between spouses. Nevertheless, the husband can transfer to his wife's Church pursuant to the *CCEO* by utilizing the common procedure, namely, by appealing to the Apostolic See (c. 32 § 1), whose consent is presumed if there coexist in the territory hierarchs of the two Churches *sui iuris* (of the husband and of the wife) who consent in writing: c. 32 § 2.

2. The rescript of the Secretariat of State of November 26, 1992 reads: "Ad normam can. 112, § 1, 1 Codicis Iuris Canonici, quisque vetatur post susceptum Baptismum alii ascribi Ecclesiae rituali sui iuris, nisi licentia ei facta ab Apostolica Sede. Hac de re, probato iudicio Pontificii Consilii de Legum Textibus Interpretandis, Summus Pontifex statuit eiusmodi licentiam praesumi posse, quoties transitum ad aliam Ecclesiam ritualem sui iuris sibi petierit Christifidelis Ecclesiae Latinae, quae Eparchiam suam intra eosdem fines habet, dummodo Episcopi dioecesani utriusque dioecesis in id secum ipsi scripto consentiant. Ex audentia Sanctissimi, die XXVI mensis Novembris, anno MCMXCII" (*AAS* 85 (1993), p. 81); cf. J. CANOSA, "La presunzione della licenza di cui al can. 112 § 1, 1° del Codice di Diritto Canonico. Alcune note su un rescritto della segreteria di Stato," in *Ius Ecclesiae* 5 (1993), p. 613–631.

4. The norms examined up to now—of the Latin and Eastern Codes—relative to the transfer from one Church *sui iuris* to another, only contemplate cases where the change is done voluntarily by the subject. There exist still other norms in which the change occurs *ipso iure*, independent of the will of the subject. They are found in c. 112 § 1, 3° *CIC* and c. 34 *CCEO*, which should be considered together to specify better the applicable criterion, which is identical in both Codes.

— *Canon 112 § 1, 3 CIC*. Ascribed to another ritual Church *sui iuris* are "the children of those described in nos. 1 and 2, before they turn fourteen years old, and likewise, in a mixed marriage, the children of the Catholic party who has lawfully transferred to another ritual Church; but once having reached that age, they can return to the Latin Church."

— *Canon 34 CCEO*. "If the parents or, in a mixed marriage, the Catholic spouse has transferred to another Church *sui iuris*, children less than fourteen years old are incorporated *ipso iure* into that Church; if, in a marriage between Catholics, only one of the parents transfers to another Church *sui iuris*, the children transfer only if both parents consent; once having reached fourteen years of age, they can return to the original Church."

These two canons—Latin and Eastern—contain the identical regulation. The transfer by the parents to another Church *sui iuris* entails a transfer, *ipso iure*, of the children to the same Church, if the following requirements are met:

a) the children are less than fourteen years old;

b) both parents have transferred to another Church *sui iuris*;

c) in the case of a mixed marriage, the Catholic spouse has changed ritual Churches (always Catholic);

d) if it is a marriage between Catholics and only one of the parents has changed Churches, both parents are required to consent to the transfer of the children to that Church;

e) in any case, once having reached fourteen years of age, the children can return to the original Church.

Canon 535 § 2 *CIC* refers to a change of rite stating that this change will be noted in the baptismal registry of the parish and will always be stated on the baptismal certificate.

The provisions of a canon of the Eastern Code are to be kept in mind, which is also applicable in the proper case to the Latin Church. *Canon 37 CCEO*: "Every ascription to a certain Church *sui iuris* or transfer to another Church *sui iuris*, should be noted in the baptismal registry of the parish, likewise from the Latin Church as the case may be, where the baptism was celebrated; if that is not possible, a relevant document must be preserved in the parochial archive of the proper parish priest of the Church *sui iuris* to which the ascription was made."

Where the baptism has been administered in a Latin parish to a child of parents ascribed to an Eastern Church *sui iuris*, the notation will be in the Latin parish, but the competent Eastern hierarch must be notified, that is, for example, the hierarch of the Church *sui iuris* to which the parents belong, for that is the Church to which the child is ascribed (cf. c. 111 § 1 *CIC* and c. 29 *CCEO*).

5. The fundamental principle that requires the preservation of the ascription to a certain Church, inspires other canons which close the path to every change by individual initiative outside the expressly authorized cases, without prejudice to the faithful's receiving the sacraments in a rite different from his own. Explicitly or implicitly, the following canons deal with this possibility in regard to:

— baptism (c. 861 § 2) with the permission of the parish priest (c. 530, 1°);

— confession (c. 991);

— communion (c. 923);

— the anointing of the sick (c. 1003 § 2);

— confirmation (cc. 882, 886 § 1 and 887);

— marriage (cc. 1108–1110);

— satisfying the obligation of participating in the Mass by assisting at Mass wherever it is celebrated in a Catholic rite (c. 1248 § 1).

This affording of the freedom to receive the sacraments in a rite different from one's own has its complement in the provision formulated by c. 112 § 2 *CIC*: "The practice, however long standing, of receiving the sacraments according to the rite of an autonomous ritual Church *sui iuris*, does not bring with it membership of that Church."

For its part, the Eastern Code contains a norm directed to protect every party of Eastern rites: "The faithful Christians of the Eastern Churches, though they might be entrusted to the pastoral care of the Hierarch or of the parish priest of another Church *sui iuris*, remain, nevertheless, ascribed to their own Church *sui iuris*" (c. 38 *CCEO*).

CAPUT II
De personis iuridicis

CHAPTER II
Juridic Persons

113 **§ 1. Catholica Ecclesia et Apostolica Sedes, moralis personae rationem habent ex ipsa ordinatione divina.**

§ 2. Sunt etiam in Ecclesia, praeter personas physicas, personae iuridicae, subiecta scilicet in iure canonico obligationum et iurium quae ipsarum indoli congruunt.

§ 1. The Catholic Church and the Apostolic See have the status of a moral person by divine disposition.

§ 2. In the Church, besides physical persons, there are also juridical persons, that is, in canon law subjects of obligations and rights which accord with their nature.

SOURCES: § 1: c. 100 § 1
§ 2: c. 99

CROSS REFERENCES: —

COMMENTARY
Gaetano Lo Castro

1. *Literal structure of the norm*

The literal structure of the norm, in its two paragraphs, asserts that in the present canonical order the concept of moral person, reserved to the Catholic Church and Apostolic See, must be distinguished from juridical person: besides the cited moral persons, states this canon, "there are also juridical persons" (§ 2). At the same time, the concept of juridical per-

son is connected by the norm to the idea of subject *in iure canonico*, which it shares with physical persons.

The Latin text of § 1, taken exactly from § 1 (first part) of c. 100 of the *CIC*/1917, does not state—as is read in the Spanish and Italian translations—that the Catholic Church and Apostolic See are moral persons, but that they have "the nature" (*rationem habent*) of moral persons,[1] to signify that the classification of moral persons transcends these two entities, and can also be proper to others.

Once it is stated that Catholic Church must be understood to mean, likewise pursuant to c. 204 §§ 1 and 2, the whole of the faithful who constitute the people of God, instituted and ordained in society and subject to the authority of the Roman Pontiff and the bishops in communion with him; and that by Apostolic See has to be understood as the very office of the Roman Pontiff, in a more restrictive sense than what is proposed by c. 361, which is extended to all the offices of the Roman Curia;[2] then it is necessary to add that in law, from the practical point of view, the distinction between moral person and juridical person absolutely lacks legal effects. One would have to look for the relevance it assumes and what juridical consequences arise from the affording of personality (whether moral or juridical) to the Church and Holy See.

2. *Preparatory work*

Nevertheless, it appears that the legislator of the Code wanted to attribute meaningful weight to the distinction between moral person and juridical person by inclining himself toward the general use of this latter expression and permitting the former only as an exception.[3]

To understand the meaning of this distinction introduced by the legislator, with precedents neither in the canonical order nor in secular juridical systems, it can be useful to notice that, in the course of the preparatory work of the present Code, up to the *Schema novissimum* of 1982, that is, up to the eve of its promulgation, the pontifical commission in charge of the work of revision of the legislative text was considering not proposing again in the Code, just at the point of promulgation, the first part of c. 100 § 1 of the *CIC*/1917, then in force, namely "Catholica Eccle-

1. More specifically, the French translation speaks of "*qualité* de personne morale," the English of "*status* of a moral person," the German of "*Charakter* einer moralischen Person."

2. For an observation along these lines, cf. V. De Paolis, in *Il diritto nel mistero della Chiesa*, I, 2nd ed. (Rome 1986), p. 348.

3. Cf. for a comparative view of the dispositions of the former and the present Code, H. Schnizer, "Die Erfassung der juristischen Person im CIC 1983," in Fr. Pototschnig-A. Rinnerthaler (eds.), *Im Dienst von Kirche und Staat. In memoriam C. Holböik* (Vienna 1985), pp. 445–458.

sia et Apostolica Sedes moralis personae rationem habent ex ipsa ordinatione divina."

The *praenotanda* to the *Schema canonum libri II De Populo Dei*[4] (the book in which the norms regarding persons were first included), to justify omitting this normative disposition, maintained that the personality of the Catholic Church is not of a juridical order but moral (which, in any case, could not have been doubted in international law). Therefore, it should have been assumed in the Code, but not stated. The justification for the conviction that the personality of the Church (as occurs, otherwise, with that of the State) is not "juridical" lies in this: that the Church cannot (nor can the State) grant itself a quality that the act of concession must presuppose; not to mention the difficulties to separate the subject itself from such personality and its nature (whether collegial or non-collegial). Thus, it was preferable to omit the statement "huius personalitatis moralis in iure recognito, in quo de personalitate iuridica tantum normae tradendae sunt."[5]

3. *The legislative option*

The legislator oriented himself differently from the proposal of the Code Commission: the norm regarding the moral personality of the Catholic Church and of the Holy See was finally maintained.

It is necessary to observe, nevertheless, that, precisely because of the reasons expressed by the legislator, the reproduction of that norm in the text that was finally approved could not address technical requirements, but perhaps did address the same defensive reasons in the face of hostile attitudes of civil societies that had been justified in the preceding Code. While reserving for that end the expression "moral person," the legislator has taken care always to utilize, in the remaining canons, the expression "juridical person." It has made an abrupt turn in the *modus loquendi* of the *CIC*/1917, where *persona iuridica* was used in only three canons (687, 1489 § 1, 1494 § 2), while the remaining canons, including those that state general norms on this subject (99–103, 106), used *persona moralis*.[6] A different meaning, therefore, has been attributed to those two expressions, becoming separate from the Pio-Benedictine legislator, for whom they had to be understood as total equivalents. The preference granted, in fact, by the former legislator to the term *persona moralis* was due to the conviction—void of theoretical meaning—that that term was used in the scientific sources, both secular and curial (D'Annibale, Cavag-

4. Cf. *Comm.* 9 (1977), pp. 240–241.
5. Cf. ibid.
6. Cf. G. Lo Castro, *Personalità morale e soggettività giuridica nel diritto canonico* (Milan 1974), p. 29, note 15.

nis, and Liberatore), which inspired those who developed the *CIC*/1917; it stood in contrast, further, not to *persona iuridica*, but to *physical person*.[7]

In conclusion, *moral person* should now indicate natural phenomena or those in any way transcending the juridical system, which the latter must recognize (such as the Catholic Church and the Apostolic See). *Juridical person*, should designate, however, only complete and formal realities, dependent on the positive law regarding governance and its own being. The institution of juridical personality represents in that conception the formal instrument in the hands of the legislator to give life to new subjects by law.

Moreover, the option of the legislator of 1983 for the expression "persona iuridica," in a conceptual context loaded with meanings like those mentioned, better serves to illuminate the adjoining definatory option which was missing in the *CIC*/1917, and that now is expressed in § 2 of the present canon: "*Sunt etiam in Ecclesia ... personae iuridicae, subiecta scilicet in iure canonico obligationum et iurium quae ipsarum indoli congruunt.*" In its first part, the norm sounds as though it wants to restate—perhaps before the secular systems—the existence of juridical persons "also in the Church". This aspect has been betrayed rather than expressed by the canon's translations into modern languages, which relate, through the term *etiam*, juridical persons with physical persons (as though saying: besides physical persons, there *also* exist juridical persons). But the meaning of the norm in the original Latin is different. It is a norm apparently explicative of the concept of juridical person, tautological in its meaning (since juridical persons have always been understood as subjects of rights and duties in the system), and whose function could be that of the provision of enclosure of juridical subjectivity. Subjects by law are *only* personified entities; but if it is understood in that sense, it collides with the whole of the system, which can do no less than permit, as it also happened in the formal Code, phenomena of subjectivity on the fringes of conceding personality (see commentary on c. 114).

4. *The nature of juridical persons (some points)*

The prevalence in canonical science, subsequent to the first codifications of the theories of reality or of "metaphysical truth" of juridical persons (A. Vermeersch, F.X. Wernz-P. Vidal, G. Michiels, K. Hohenloe) and the insistent rejection of that of the *Fiktionstheorie* (who had the greatest

7. Cf. ibid.

defender of canon law in U. Stutz),[8] clearly shows the purpose of conceiving of the juridical person as similar to the physical person, with regard to both juridical capacity and capacity to act. The great part of the hypotheses formulated by the various authors regarding the nature of moral and juridical persons oscillated, not by pure chance, from one reality of juridical persons presented as a reflection of the reality of physical persons who constituted its structure, to a reality affirmed independently of the elements that make it up, as an ideal and metaphysical reality, but in the end, reality.

Nevertheless, the predominant vision of the real nature of juridical persons, leaving intact the need for recognition of moral persons by ecclesiastical authority, also in view of the positive juridical fact, lent itself to reclaim, from a theoretical point of view, the originality and autonomy of ecclesiastical juridical persons before civil authority. Therefore, authoritarian and centralizing conceptions of the ecclesial system were defended at the same time, which subordinated the existence of juridical persons and the entire phenomenon of juridical subjectivity to the will of authority, and a pluralistic and liberal vision of civil organization to favor the reason of the *libertas Ecclesiae* in this specific matter.

That ambivalent vision, which already emerged in the course of the preparatory work of the *CIC*/1917, appeared to have exercised a certain influence on the preparation of the present Code; an influence that finally was manifested in multiple directions: first, in an accentuated technicality (*norms like cc. 363 §§ 1–2, 238 § 2, 393, 532, which speak of "persona* Romani pontificis," "*persona* Apostolicae Sedis," "*persona* seminarii," "*persona* dioecesis," and "*persona* paroeciae," demonstrate a punctilious attempt to present a formal juridical representation of substantial phenomena whose "reality" or whose "truth," notwithstanding, would have to be equally defended with the classification of *person*, and, in any case, will not have to be veiled by it); secondly, in the development of the institution of juridical personality from the viewpoint of the concession of subjectivity on the part of the legal system (persons denominated "juridical," and not "moral," "*quia revera ipso ordine iuridico positivo Ecclesiae uti subiecta obligationum et iurium canonicorum constituuntur*");[9] and finally, in the mentioned statement of *moral* personality of the Catholic Church and of the Apostolic See, in contrast to *juridical* personality, to emphasize that the later depends on the legal system (canonical), while the former is affirmed before the system (canonical, but especially secular).

8. For a more extensive explanation of those theories, for more precise citations from their defenders and for the so-called eclectic theses (among which one must place those of P. Gillet, A. Hanig , and J. Lammeyer), cf. G. LO CASTRO, *Personalità morale e soggettività...*, cit.; idem, *Il soggetto e i suoi diritti nell'ordinamento canonico* (Milan 1985), ch. II.
9. *Comm.* 9 (1977), p. 240.

114 **§ 1. Personae iuridicae constituuntur aut ex ipso iuris praescripto aut ex speciali competentis auctoritatis concessione per decretum data, universitates sive personarum sive rerum in finem missioni Ecclesiae congruentem, qui singulorum finem transcendit, ordinatae.**

§ 2. Fines, de quibus in § 1, intelleguntur qui ad opera pietatis, apostolatus vel caritatis sive spiritualis sive temporalis attinent.

§ 3. Auctoritas Ecclesiae competens personalitatem iuridicam ne conferat nisi iis personarum aut rerum universitatibus, quae finem persequuntur reapse utilem atque, omnibus perpensis, mediis gaudent quae sufficere posse praevidentur ad finem praestitutum assequendum.

§ 1. Aggregates of persons or of things which are directed to a purpose befitting the Church's mission, which transcends the purpose of the individuals, are constituted juridical persons either by a provision of the law itself or by a special concession given in the form of a decree by the competent authority.

§ 2. The purposes indicated in § 1 are understood to be those which concern works of piety, of the apostolate or of charity, whether spiritual or temporal.

§ 3. The competent ecclesiastical authority is not to confer juridical personality except on those aggregates of persons or of things which aim at a genuinely useful purpose and which, all things considered, have the means which are foreseen to be sufficient to achieve the purpose in view.

SOURCES: § 1: c. 100 § 1; SCCouncil Resol., 13 nov. 1920 (*AAS* 13 [1921] 135–144); CodCom Resp., 26 sep. 1921; SCR Decr. *Quod iam*, 30 nov. 1922 (*AAS* 14 [1922] 644); SCCouncil Resol., 5 mar. 1932 (*AAS* 25 [1933] 436–438); Pius PP. XII, Litt. Ap. *Quam Romani Pontifices*, 14 sep. 1949 (*AAS* 43 [1951] 722–724); Secr. St. *Notif.*, 15 iun. 1953 (*AAS* 45 [1953] 570); SCR Decr. *Sacra Congregatio*, 9 dec. 1957; Secr. St. *Notif.*, 16 nov. 1959 (*AAS* 51 [1959] 875)
§ 2: c. 100 § 1; SCR Decr. *Sacra Congregatio*, 9 dec. 1957
§ 3: c. 1489 § 2

CROSS REFERENCES: c. 116

COMMENTARY

Gaetano Lo Castro

I. Constitution of Juridical Persons

Both this canon and c. 116 (with specific reference to public and private juridical persons) concern the constitution of juridical persons.

The present canon specifies, in particular, the forms of constitution of a juridical person, establishes provisions regarding their ends, and determines the competencies of ecclesiastical authority regarding the evaluation of those ends and of the sufficiency of means to carry them out.

II. Forms of Constitution of Juridical Persons

1. *Recognition by normative means (ex ipso iuris praescripto)*

A juridical person can be constituted either through normative prescription or by decree (administrative) by the competent ecclesiastical authority.

The normative prescription can contemplate categories of entities. In that case, the granting of juridical personality will be normally general and preventative: *general* inasmuch as it corresponds to all entities existing at the time the norm is established and can be encompassed by the criteria prescribed by that norm; *preventative* (unless specifically excluded by the normative prescription), in the sense that all the entities constituted after the norm has been established, if its requirements are met, have *ipso iure* juridical personality. They are phenomena diffused in modern juridical systems.

But recognition through a normative prescription can also concern a particular entity that might be totally new or encompassed by a category to which the law has not yet attributed juridical personality and has no intention of doing so in the usual general manner. Recognition, in that case, will be granted by a provision–norm: that is, by a norm that has the nature and force of law, but the substantial content of a particular provision.

In all these cases, it can be argued whether the basis of juridical personality, the genetic source of subjectivity, is in the "system" or else in the ecclesiastical authority, whose power is exercised in that case through the

normative route. The problem concerns basing the law on the Church, but since it has scarce practical importance, we can overlook it here.

The Code provides a number of entities to which personality is afforded by normative prescription (*ipso iure*): they are the seminaries (c. 238 § 1), particular churches (c. 373), ecclesiastical provinces (c. 432 § 2), Bishops' Conferences (c. 449 § 2), parishes (c. 515 § 3), religious institutes, their provinces and their houses (c. 634 § 1), and societies of apostolic life (c. 741 § 1).

a) *Recognition* ipso facto *and* ipso iure

Recognition *ipso iure* can also be given by virtue of dispositions different from those of the Code, though they are always normative. It is right to ask whether it can be given by virtue of the dispositions of an administrative nature that would establish (in the same way as normative dispositions) automatic recognition of the entity upon verifying the existence of the conditions or, upon taking place, the events foreseen by the said dispositions.

In that respect it is necessary to distinguish between recognition *ipso facto* and recognition *ipso iure*.

Recognition *ipso facto* refers to the automatic character of the acquisition of juridical personality upon verifying the existence of the conditions set by a prior normative act (e.g., upon the constitution in fact of the entity). In such case there would be no temporal distinction between the constitution of the assumption in fact (or material erection) of the entity and its formal classification as a personified subject in law; but in any case the entity must be considered recognized *ex ipso iuris praescripto*.[1]

Recognition *ipso iure* refers, however, to the method of granting the formal classification of person and its basis: the attribution of personality is not referred to the authority wielding executive power, but through procedures that always contemplate specific and individual cases, in execution of legal norms, which are an expression of the normative power of ecclesiastical authority, tied by nature only in respect to the essential principles of canon law (especially of divine law).

Thus, while it is possible to think that recognition can be given to a specific entity by normative disposition (called *law-provision*), it would be contradictory however to consider permissible a recognition *ipso iure* of juridical personality by virtue of acts of an executive nature, though they would foresee automatic attribution of personality upon verifying the existence of determined events. In effect, recognition through an adminis-

1. Cf. P. CIPROTTI, "De decreto quo persona iuridica constituitur," in *Apollinaris* 10 (1937), pp. 269–272; idem, "A proposito del riconoscimento delle persone morali in diritto canonico," in *Archivio di diritto ecclesiastico* 3 (1941), pp. 62–63; in a partially different sense, L. PRETI, "Il riconoscimento delle persone morali in diritto canonico," in *Archivio di diritto ecclesiastico* 2 (1940), pp. 319ff.

trative act always implies a specific and individual assessment of the requirements that the entity must meet (especially with reference to the end and the means it has to carry it out); an assessment that, precisely for being that, cannot be preventative and general.

Regarding the statutory of entities already recognized, if they are a manifestation of the legislative power of an institutional authority in the Church, and are considered, therefore, in the provision of c. 94 § 3, they can provide juridical personality for other entities that form a part of the principal entity. Keeping in mind the specific legislative nature of the statutes in the above case, the recognition of personality is, in that case *ex ipso iuris praescripto*, and if it is conditioned on the verification of the existence of certain events (generally, on the erection of the entity), it can also be *ipso facto*.[2]

b) *Implicit recognition or recognition by way of analogical interpretation?*

It is necessary to ask oneself if juridical personality can be implicitly recognized by an act not aimed at its formal attribution but connected to it (e.g., by the act of material erection of the entity), and likewise if it can be recognized by way of analogous application of the norms that provide recognition (*ipso iure*) for other classes of entities.

The problem can be put forth for entities provided for in the canonical order, which form a stable part of it and act in it as autonomous centers for the attribution of powers, rights, and duties that, nevertheless, do not have an explicit recognition of juridical personality. Consider the episcopal college, which, among other things, is subject to the "supremae et plenae potestatis in universam Ecclesiam" (c. 336); but also consider the personal prelatures, erected by the Holy See through a specific act of a legislative nature,[3] with a prelate who is its proper ordinary, with important functions in the Church, with the possibility of maintaining relations with the local ordinaries (cc. 294–297); about the cathedral chapters, which perform tasks not reserved only to the liturgical purview (c. 503); about the secular institutes, which, in a special way, within the phenomenon of consecrated life, contribute to the accomplishment of important goals of the Church (c. 710); about the universities of studies and about the ecclesiastical faculties, erected and approved by the Holy See (c. 816 § 1).

2. For a case of that order cf. no. 154 of the *Codex iuris particularis Operis Dei*, in A. de Fuenmayor-V. Gómez Iglesias-J.L. Illanes, *The Canonical Path of Opus Dei* (Princeton-Chicago 1994), p. 639.

3. The administrative act of erection of the personal prelature of Opus Dei, the only one that has been erected up until now, was confirmed by means of an apostolic constitution (cf. Ap. Const. *Ut sit*, November 28, 1982, in *AAS* 75 1983, pp. 423–425). On the problems relative to this specific recognition, cf. G. Lo Castro, *Le prelature personali. Profili giuridici*, Milan 1988, pp. 71ff. (Spanish translation: *Las prelaturas personales. Perfiles jurídicos*, Pamplona 1991; French translation: *Les prélatures personnelles*, Bruxelles 1993).

For some of these entities (as is the case of the episcopal college) juridical personality cannot even be spoken of, but rather moral personality, pursuant to the distinction incorporated in the current Code (see commentary on c. 113); for others, it might be that in practice a granting of personality is not given with the specific act of the ecclesiastical authority that erects them but based on the regulations provided in the Code.

On the other hand, if personality is conceived of in a formal sense (as we see ourselves induced to do in the canonical order), then it would require a specific act (either of a normative nature or of an administrative nature) of ecclesiastical authority; and if that act were not to occur (what happens or could happen in these cases) it would have to be admitted that it would not be given personality, and as a conclusion, that those entities would lack subjectivity.

So as not to make a similar absurd conclusion, the case of a recognition of implicit juridical personality in the material constitution of an entity on the part of ecclesiastical authority would have to be admitted, or else of a recognition by way of analogous application of the norms that provide for it in other classes of entities, which also form a part of the organizational structure of the Church.

In that sense, while in effect the *CIC*/1917, likewise the doctrine that was distinguished for maintaining in support of the normative fact a formal conception of institution, had to admit that juridical personality *ex ipso iuris praescripto*, besides resulting from an explicit grant of the legislator, could be concluded from other facts: the fact that an entity was granted a juridical capacity by law, a right (public or private), or that an obligation was imposed on it; or else the fact that the law reserved the erection, constitution, and institution of an entity to the ecclesiastical authority.[4]

In fact, what causes confusion is no longer the conclusion, but the premise of the argument and the conceptual context within which it is developed: the conception of personality as the only instrument in the hands of the legislator and of ecclesiastical authority that can "give juridical dimension to a reality that, before being recognized or classified as a person, subject in law, it would not be worth anything in the purview of the legal system". Thus, the recognition of personality would perform the specific function of engendering juridical life in entities that otherwise would

4. Cf. G. Michiels, "De personalitate morali ex ipso juris praescripto in Codice Juris Canonici," in *Questioni attuali di diritto canonico* (Romae 1955), pp. 34–45; for the new Code cf. the balanced observations of H. Schnizer, "Die Erfassung der juristischen Person im CIC 1983," in Fr. Pototschnig-A. Rinnerthaler (eds.), *Im Dienst von Kirche und Staat. In memoriam C. Holböik* (Wien 1985), pp. 452–454, favorable to a recognition by way of analogy to the juridical personality or, in any case, to the *Vermögensfähigkeit* of these entities.

be lacking it.[5] Hence, the tendencial identification, on the part of juridical science, between subjectivity and personality; identification in respect to which, nevertheless, the normative fact itself had not been able to be preserved as logical (in effect, certain cases of subjectivity occur, considered and treated as such by the law, independently of formal recognition of personality).[6]

If, on the one hand, one reflects on the artificiality of such a conceptual and dogmatic construction and, on the other hand, one observes the practice of the Church's legal system, one would notice that, in canon law, juridical subjectivity is a broader classification than personality. One becomes a subject by means of recognition of personality, *quoquomodo data*; but it is also a subject when it is the center for imputation of powers, rights, and duties, within the limits recognized and sanctioned by the law. Likewise, it is not necessary to understand the subject in law as an entity endowed with absolute, abstract, and preliminary capacity with respect to the legal system, seconding the thesis that personality is understood in the common way. It is sufficient that the subject be conceived of as a point of convergence and unification of juridical relationships, and treated unitarily by the law.

Otherwise, that is how it was in the law prior to codification, when, while contemplating subjectivity by itself, a selection process of several elements in fact was considered necessary (material erection of the entity, its autonomy with respect to other entities, its ecclesiality, and other similar elements), and not a formal classification (that at that time was not given).

On the other hand, the practice in canonical juridical experience did not show excessive attention toward formal classification of "person" *in iure canonico*, both because of the solicitude of its recognition and its concession. An entity erected by ecclesiastical authority is treated as a subject in law, whatever its formal classification. The subjectivity of the entity, although perhaps obtained without formal attribution of personality, is considered a necessary and sufficient supposition to request recognition as a juridical person in the various legal systems in which by only that juridical classification can they derive juridical consequences.

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5. Cf., in a critical sense, G. Lo Castro, *Il soggetto e i suoi diritti nell'ordinamento canonico* (Milan 1985), p. 163.

6. Cf. M. Condorelli, *Destinazione di patrimoni e personalità giuridica nel diritto canonico. Contributo allo studio degli enti non personificati* (Milan 1964); G. Lo Castro, *Personalità morale e soggettività giuridica nel diritto canonico* (Milano 1974), above all, ch. III; S. Bueno Salinas, *La noción de persona jurídica en el derecho canónico* (Barcelona 1985), pp. 215ff.

2. *Recognition by administrative decree*

The second form of recognition of personality consists in an act of *concession by means of an individual decree of ecclesiastical authority.*[7]

The authority that can issue the decree, alluded to in § 1 of this canon, must be endowed with executive power. All the authorities that have that power (with the classification of "Ordinaries": cf. cc. 134 § 1, 295 § 1) can erect juridical persons. Therefore the power is not only for the supreme authority, the Roman Pontiff[8] (as it generally happens in States), but for diocesan bishops,[9] and similar authorities (territorial prelates and abbots, apostolic prelates and vicars, and apostolic administrators), military ordinaries, and personal prelates.[10]

It is necessary to add, moreover, that, in accordance with the general principles in effect on administrative subjects, the power of the ecclesiastical authority to recognize juridical personality is configured, in this canon as well, as a *general power*, that is, as a power that can be exercised in cases of fact that are not predetermined, in which there may be requirements imposed by canonical norm. The only *internal* limit which that power encounters is in the possible reservation of competence by the law of certain bodies (in particular, that reserved to the Roman Pontiff);[11] therefore, it would not be correct to conceive of it as power conferred for the recognition of entities specifically classified by the positive law.

From what can be deduced, *ex adversis*, from c. 136, it appears that the effects of the executive power of organs different from the Roman Pontiff would remain restricted to the purview of the personal or territorial competence that each organ has. Otherwise, if it were not so, the difference between entities of pontifical law and of diocesan or particular law could wane.

But it is necessary to specify that for every administrative act, in any legal system, certain specific effects must be distinguished which tie that decision to the authority that has issued the act and to the scope of its competence, from other effects that transcend that authority and its

7. Regarding that administrative act, see commentary on cc. 48–58. For the distinction between the decree of material erection of the entity and the decree granting the juridical personality, see commentary on c. 116.

8. Cf. c. 294, for personal prelatures; 312 § 1, 1°, for public associations of a national or international character; 373, for particular churches; 431–433, for ecclesiastical provinces and regions; 449, for bishops' conferences; 504, for cathedral chapters; 589 and 732, for the ICL and SAL; 709, for conferences of major Superiors; 816 § 1, for ecclesiastical universities and faculties.

9. Cf. cc. 234 § 1, 237 § 1 and 238 § 1, for diocesan and interdiocesan seminaries; 312 § 1, 3°, for public associations of diocesan scope; 513 §§ 2–3, for parishes; 579 and 792, for the ICL and SAL of diocesan scope.

10. Cf. c. 295 § 1, for national and international seminaries.

11. Cf. *supra*, note 8.

competence, and that find their source in the general law. The subjectivity of an entity (and the juridical capacity that it expresses) is found among these last effects, such that its juridical responsibility—the projection of subjectivity in the operative plane—is expressed in the entire canonical order, even though the entity might have been created by an authority with particular competence. Other aspects of personality (like some effects of the capacity to act) can remain, however, confined in the particular legal system in which the entity has arisen.

3. *Content of the act of recognition of personality*

The decree of the competent ecclesiastical authority must have the recognition of the juridical personality of the entity as its goal. An act of praise, recommendation of the entity, or even approval of its ends would not be suitable.[12]

Moreover, it is necessary to distinguish the possible erection or material constitution of an entity by the ecclesiastical authority of the act of concession of juridical personality (without contradicting what was stated *supra*: II, 1, b; see also commentary on c. 116): the ecclesiastical authority can constitute an entity in its materiality, which, if provided for by the law, will be endowed with juridical personality *ipso iure*; otherwise, it will be able to have juridical personality if the constituting authority so attributes it and to the extent it does so. In any case, it will be endowed with juridical subjectivity (those who, like Michiels,[13] reduced juridical subjectivity to juridical personality—such that they could not be subjects in law if they were not juridical persons—saw themselves obliged to employ genuine conceptual artifices to avoid solutions imposed by a logical-formal consequentiality of said premise, but absurd and unacceptable in substance).

III. CERTIFICATION OF PERSONALITY

Regarding entities whose juridical personality and whose subjectivity is recognized *ex lege*, the ecclesiastical authority, in the exercise of its executive power, can be called on only to certify that extreme.

A refusal to issue certification does not bear on personality or subjectivity, but it could negatively affect its specific exercise, for which recourse against it will be able to be maintained through administrative and juridical channels pursuant to the normal means of challenge provided by the law.

12. Cf., for the *CIC*/1917, G. MICHIELS, *De personalitate morali...*, cit., pp. 16–20.
13. Cf. *ibid.*, pp. 18–28, and the doctrine there cited in note 18.

IV. Evaluation of the Means and Ends of Juridical Persons

The recognition of juridical personality through a decree (which is the suitable form for both public and private juridical persons: see commentary on c. 116) is configured as discretional by § 3 of the present canon.

In the case of an entity erected by private initiative, no right to recognition of personality is given to the entity or its members, nor can a correlative obligation on the part of the ecclesiastical authority be given. For an entity of public law, it is evident that discretion is exercised from the moment of its constitution.

It must be remembered here that, in both cases, there are some negative limits set for the granting of personality and the power of the ecclesiastical authority: personality cannot be afforded if the usefulness of the end and the sufficiency of the means to achieve them has not been confirmed by the granting authority.

Regarding the end, the requirement that it transcend the individual interests of the members of the entity—for which the entity that wishes to be recognized should also be considered in this aspect endowed of its own proper autonomous feature—does not imply that such end cannot be resolved for the good and in the interests of the members (moreover, that will be the normal case), as if the members should pursue, through the entity, altruistic goals. It does imply, however, that it must be configured as autonomous of individual ends.

Not just any lawful end justifies attribution of juridical personality in canon law, but only the ends of "piety, the apostolate, and spiritual and temporal charity" (§ 2). The *CIC*/1917 spoke, more generally, of "religious or charitable ends" (c. 100 § 1), specifying the latter for non-collegial ecclesiastical institutes, spiritual or temporal (c. 1489 § 1). The more precise diction of the current canon of the *CIC*—invoked by c. 1303 § 1, 1° for non-autonomous pious foundations, corresponding to the former non-collegial ecclesiastical institutes—does not restrict this provision in any way. Rather it serves to dispel possible doubts that could have arisen regarding the possibility of incorporation of apostolic ends into the ends of religion.

Certainly included among the purposes of c. 114 are those indicated by c. 298 § 1 for associations of faithful (to foster among Christians a more nearly perfect life, to promote public worship and the diffusion of Christian doctrine, to realize other apostolic activities, like evangelization, the exercise of works of piety and charity, and the motivation of temporal matters with the Christian spirit) and by c. 1254 § 2 for the Catholic Church (to maintain divine worship, support the clergy and ministers of

worship, to be concerned with the works of apostolate and charity, especially for the most needy).[14]

The assessment to which the ecclesiastical authority is called by § 3 regarding the "usefulness" of the end, does not refer to the end considered in itself (no doubt that, considered in the abstract, an end of piety, charity, or of apostolate is congruent with the ends of the Church), but to its pursuit in specific circumstances in which the entity must act, such that the ecclesiastical authority would consider that it is not useful to institute or recognize a specific juridical person, for example, for the fact that the end proposed by the entity is already being pursued sufficiently by other entities.

Regarding means, the evaluation of their sufficiency appears to be no less delicate. Likewise an abstract judgment in this case is not fitting, based on predetermined parameters, but rather specific ones, in relation to the end pursued (the endowment of a bibliographic patrimony, suitable for recognition of a university, would not, however, be suitable for an entity with ends of worship) and environmental circumstances in which the entity must act (means that in an opulent society should be considered insufficient could be judged congruent in a poor social context.)

Considering the broad discretion enjoyed by the ecclesiastical authority in the exercise of its function, it is difficult for the refusal to grant recognition due to a negative evaluation of end or means to be overcome by the judicial route. It appears more difficult to think about an appeal to the same authority to reconsider the case.

Finally, regarding the revocation of recognition because of the end becoming inappropriate or because there might be fewer means to carry it out, see commentary on c. 120.

14. Cf. T. MAURO, "La disciplina delle persone giuridiche. Le norme sui beni ecclesiastici e sul loro regime con riferimento all'ordinamento statale," in *Monitor ecclesiasticus* 109 (1984), p. 380.

115 **§ 1. Personae iuridicae in Ecclesia sunt aut universitates personarum aut universitates rerum.**

§ 2. Universitas personarum, quae quidem nonnisi ex tribus saltem personis constitui potest, est collegialis, si eius actionem determinant membra, in decisionibus ferendis concurrentia, sive aequali iure sive non, ad normam iuris et statutorum; secus est non collegialis.

§ 3. Universitas rerum seu fundatio autonoma constat bonis seu rebus, sive spiritualibus sive materialibus, eamque, ad normam iuris et statutorum, moderantur sive una vel plures personae physicae sive collegium.

§ 1. Juridical persons in the Church are either aggregates of persons or aggregates of things.

§ 2. An aggregate of persons, which must be made up of at least three persons, is collegial if the members decide its conduct by participating together in making its decisions, whether by equal right or not, in accordance with the law and the statutes; otherwise, it is non-collegial.

§ 3. An aggregate of things, or an autonomous foundation, consists of goods or things, whether spiritual or material, and is directed, in accordance with the law and the statutes, by one or more physical persons or by a college.

SOURCES: § 1: c. 99
§ 2: c. 100 § 2

CROSS REFERENCES: cc. 119, 1303

COMMENTARY

Gaetano Lo Castro

1. *"Universitates personarum" and "universitates rerum"*

In relation to the cases necessary for the existence of a juridical person, the present canon distinguishes the *universitates personarum* from the *universitates rerum.* The first (associations, corporations) are characterized by being composed of a group or aggregate of physical persons, with no fewer than three members (based on the Roman rule: "tres faciunt collegium");[1] the second, by being composed of a complex or aggregate of

1. D. 50, 16, 85.

goods dedicated to the furtherance of a certain end (foundations, institutions).

The terminology used by the legislator in this canon (and used in many others) is new with respect to the *CIC*/1917, although it possesses an old tradition, especially in classical canon law. But Roman law already recognized the phenomenon of the unification of a plurality of individual entities into a unique conceptual reality ("corpora quae ex cohaerentibus quaeque ex distantibus constant"),[2] which could be treated as a single thing in law. The unitary consideration, from the juridical point of view, for a multiplicity of individuals was not the fruit of the granting of juridical personality, an institution that the Romans did not recognize, but of a conceptual abstraction.

Thus, even today, it is also possible in canon law to consider as unitary a *universitas bonorum aut personarum*, if among the things or persons that compose it there are connections that allow or require it to be considered as a whole (recall the classical example of the flock that, like a *universitas rerum*, can also be the object of rights).

The granting of personality transforms that aggregate into a center of imputation of rights and duties, in other terms, into a subject in law; such that it can be said that the function of personality, likewise in canon law, consists in the creation of new subjects in law, different from physical persons (see introduction to the present title of the Code).

2. *Collegial and non-collegial juridical persons*

The *CIC*/1917 (cf. c. 99) had adopted terminology different from the present one: it called entities of an associative nature, *collegial* persons, and those entities of an institutional nature, *non-collegial*. But that distinction preserved the doubt concerning whether entities like dioceses and parishes should be considered collegial or non-collegial persons; a doubt that the legislator had tried to resolve in the current Code with the adoption of new terminology.[3]

In the present Code the distinction between collegial and non-collegial persons has been preserved under another aspect: it no longer makes reference to the substratum of which the structure of the subject in law is composed, but to the action of associative entities. A collegial person as established in § 2 of this canon is the *universitas personarum* whose action is determined, pursuant to the norms of the law, statutes,

2. Cf. D. 6, 1, 23, 5.
3. Cf. la *relatio* of W. Onclin on the work of the *coetus studiorum de personis physicis et iuridicis*, in *Comm.* 6 (1974), p. 98; cf., and the *praenotanda* to the *Schema canonum libri II De Populo Dei*, in *Comm.* 9 (1977), p. 241.

and by its members, whether they participate in the decision with parity of rights, or whether some are in a position of preeminence (or, what is the same, of subordination) with respect to others. In contrast, non-collegial refers to the *universitas personarum* in which there is no selection process in the determination of the action for the more or less extensive classification of its members. Therefore, the dioceses and parishes must be classified as non-collegial juridical persons since the faithful who belong to them do not take part in their decisions.

This distinction is, otherwise, descriptive to the extent that it recognizes phenomena that occur in the Church, but lacking in relevant juridical effects. In the same way § 3 of this canon, according to which the *universitates rerum* (foundations or entities of an institutional nature) can be governed, pursuant to the law and statutes, by one or more persons, or by a college, is limited to recognize existing realities in specific juridical experience.

3. *Autonomous foundations*

With reference to § 3 of this canon, it must be noted that the *universitates rerum* are also called "autonomous foundations," when they are constituted as juridical persons.

Universitates rerum can also be treated in a unitary way in law (recall the aggregate of goods that constitute an inheritance), but if it is not endowed of juridical personality, it does not constitute a *fundatio autonoma*, but a "non-autonomous foundation," mentioned in c. 1303 § 2. This is one more piece of evidence that personality is not necessary for the conceptual unification of an entity formed *ex pluribus*, but only for its consideration as a subject in law.

4. *Spiritual goods or things*

Finally, always with reference to § 3 of the present canon, it must be noted that in no norm of the present Code can an idea of spiritual goods or things be found which pursuant to the norm can constitute the substratum of the *universitas rerum*. Canon 727 § 1 of the *CIC*/1917 allowed the development of an idea of spiritual things, distinguishing them as *intrinsically spiritual things* (like "the sacraments, ecclesiastical jurisdiction, consecration, indulgences, etc."), and *spiritual things connected to temporal things*, such that a temporal thing could not exist without the spiritual (like an ecclesiastical benefice, etc.). But that canon was not incorporated into the present Code.

On the other hand, the more it might be treated as a substantially correct distinction to consider it a foundation with a juridical personality composed only of intrinsically spiritual things becomes difficult. It is even more difficult, however, to think in terms of an aggregate of spiritual things connected to temporal things, susceptible to being recognized as a person in law.

116 **§ 1. Personae iuridicae publicae sunt universitates personarum aut rerum, quae ab ecclesiastica auctoritate competenti coustituuntur ut intra fines sibi praestitutos nomine Ecclesiae, ad normam praescriptorum iuris, munus proprium intuitu boni publici ipsis commissum expleant; ceterae personae iuridicae sunt privatae.**

§ 2. Personae iuridicae publicae hac personalitate donantur sive ipso iure sive speciali competentis auctoritatis decreto eandem expresse concedenti; personae iuridicae privatae hac personalitate donantur tantum per speciale competentis auctoritatis decretum eandem personalitatem expresse concedens.

§ 1. Public juridical persons are aggregates of persons or of things which are established by the competent ecclesiastical authority so that, within the limits allotted to them, they might in the name of the Church and in accordance with the provisions of law, fulfil the specific task entrusted to them in view of the public good. Other juridical persons are private.

§ 2. Public juridical persons are given this personality either by the law itself or by a special decree of the competent authority expressly granting it. Private juridical persons are given this personality only by a special decree of the competent authority expressly granting it.

SOURCES: —

CROSS REFERENCES: c. 114

COMMENTARY

Gaetano Lo Castro

1. *Public and private juridical persons*

Paragraph 1 of this canon introduces a distinction between public juridical persons and private juridical persons which did not exist before in the law of the Church. In § 2 rules are stated regarding the forms of recognition of those entities.

The distinction between public juridical persons and private juridical persons had already been proposed in the course of the preparatory work

of the *CIC*/1917, with a vote of the consultor C. Lombardi[1] to respect, according to what he himself said, "il diritto d'associazione anche privato." That rationale has been adopted by the new legislator, who, when distinguishing public juridical persons from private juridical persons, has intended to recognize all *Christ's faithful* "ut libere condant atque moderentur consociationes ad eos fines religionis vel pietatis prosequendos, quorum persecutio non uni Ecclesiae auctoritati reservatur."[2]

Hence there has resulted a full parallelism between the phenomenon of personality (public and private) that this canon is concerned with, and that of public association (cc. 301 and 313ff) and private association (cc. 321ff), such that the respective norms are mutually illuminated and clarified.[3]

Regarding the practical consequences of the distinction between the two classifications of entities, among the most important should be noted those which refer to goods (c. 1257). The goods of public juridical persons are ecclesiastical and their governance is established by the Code (book V) and by the statutes. The governance of the goods of private juridical persons, on the other hand, is ruled by statutes and not by the Code, except when provided otherwise.[4]

From a technical point of view, the distinction between public and private juridical persons (likewise between public and private associations) makes reference to a triple criterion, which sometimes concerns the *end*, and always the *constitution* (or material erection) of the entities, and the *method* by which they pursue their own goals.[5]

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1. Cf. cc. 6 and 7 of that vote (dated 1906) in G. LO CASTRO, *Personalità morale e soggettività giuridica nel diritto canonico* (Milano 1974), pp. 227–228, as well as the *Nota illustrativa* of this same consultor, ibid., pp. 231–232.
2. Cf. *relatio* Onclin, in *Comm.* 6 (1974), p. 99.
3. Cf., for the preparatory works of the current Code, the meeting of the *Coetus studii de quaestionibus specialibus libri II (sessio II: 9–12 dec. 1967)*, in *Comm.* 21 (1989), pp. 129ff.
4. Cf. P. LOMBARDÍA, "Persona jurídica pública y persona jurídica privada en el ordenamiento canónico," in *Escritos de derecho canónico y de derecho eclesiástico del Estado*, IV (Pamplona 1991), pp. 446ff; H. SCHNIZER, "Kirchliches Vermögensrecht nach dem CIC 1983. Rechtsträger und Rechtsgeschäfte in Österreich," in *Administrator bonorum. Oeconomus tamquam paterfamilias. S. Ritter zum 70. Geburtstag, hrsg. H. Paarhammer* (Thaur/Tirol 1987), pp. 229–230; S. BUENO SALINAS, *La noción de persona jurídica en el derecho canónico* (Barcelona 1985), pp. 227ff.
5. Cf. R. BOTTA, "Persone giuridiche pubbliche e persone giuridiche private nel nuovo Codice di diritto canonico," in *Il diritto ecclesiastico* 96 (1985), p. 343; V. PRIETO MARTÍNEZ, "Iniciativa privada y personalidad jurídica: las personas jurídicas privadas," in *Ius canonicum* 25 (1985), pp. 527ff; A.M. PUNZI NICOLÒ, "Persone giuridiche. II) Diritto canonico," in *Enciclopedia giuridica*, vol. XXIII (Rome 1990), p. 2.

2. *The distinction between public and private persons*

a) *With respect to the end*

The end could be the principal criterion to carry out that distinction, but it will not always be decisive.

In any case, it must be kept in mind that there can be occurrences of ends that the ecclesiastical authority reserves to itself and to the entities it creates with public connotations. In such cases, not provided for by this canon, but specifically mentioned for public associations by c. 301 § 1, the pursued end reveals the existence of a public juridical entity: they are the cases of entities (associations, in our case) that are proposed to transmit the doctrine of the Church, to promote public worship, and other unspecified ends, reserved because of their nature to the ecclesiastical authority. Here we always encounter the presence of a public association.

But it cannot be stated that a specific pursued end is a conclusive element to clarify the nature of the entity. In effect, there can be goals not reserved to the ecclesiastical authority, which would also be proper to private entities, but that the authority pursues as a substitute: in such case it will be a public association (c. 301 §§ 2–3) and, consequently, a public juridical person. Nevertheless, the distinction between public and private juridical person could not be deduced from the end pursued. In that case, resort must be had to other distinguishing criteria proposed by the Code.

b) *With respect to the constitution of the entity*

The criterion of the constitution of the entity can be crucial to distinguish public juridical persons from private juridical persons. The ecclesiastical authority "constitutes" (for public associations c. 301 speaks of "erection") public but not private juridical persons.

It must be kept in mind that when the legislator speaks of "constitution" (or of "erection") of the entity, he wishes to refer to the substantial meaning of the term, as a material constitutive act of the entity, according to the use prevalent in the oldest canonical juridical science. To that end, it is necessary not to confuse, at least from the conceptual point of view, the constitutive instant of the entity and the instant of granting personality. This distinction is evident, for example, in the case of a private association, which can also be recognized as a juridical person (in which case the provisions of c. 310 are applied). Besides being implicit in the relationship between the two paragraphs of c. 116, it is also evident in the case of public associations: in effect, c. 313, in establishing that with its erection by the ecclesiastical authority its constitution as a juridical person is effected, it presupposes the conceptual distinction of the two instances (material constitution of the entity and recognition of juridical personality), to provide for its temporal and operative coincidence (for several specifications regarding the relationship between material erection and

formal recognitions of the entity under the *CIC*/1917, see commentary on c. 114: nos. II, 1, b, and II, 3).

On the other hand, all entities of any nature, constituted by the ecclesiastical authority, must be considered subjects *in iure canonico*, even though afterwards they might not be accorded personality by specific decree, nor obtain it *ipso iure*, nor would the norm of the aforementioned c. 313 exist for associations. The subjectivity of the entity as such connects, in reality, to the accomplishment of the tasks that the ecclesiastical authority entrusts to it.

The material constitution of private juridical persons, however, is always an act of private autonomy (for which it will never be possible for these juridical persons to form a part of the hierarchical structure of the ecclesiastical organization).[6]

Nevertheless, a public juridical person can also come about through an act of private autonomy, if the ecclesiastical authority, after the entity has been constituted in fact and formally recognized, taking as its own, its ends, inserting it in a relationship of organizational identification[7] in the structure of the ecclesiastical organization, and carrying out, consequently, an innovation of its formal juridical classification.[8] In such a case, the new and different classification of the entity merges the act of its material constitution and its preceding formal classification.

c) *With respect to the modalities of the pursuit of the end*

The last distinguishing criterion refers to the way in which juridical persons pursue their goals.

Public juridical persons act "*nomine Ecclesiae,*" looking to the public good (*intuitu boni publici*); private juridical persons, however, act in their own name under the responsibility of their members.[9] But this, more than a distinct criterion between the two species of persons, is a consequence of their juridical classification. Furthermore, it is the only positive consequence of the distinction between public and private juridical persons in regard to the juridical system.

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6. P. Lombardía, *Lezioni di diritto canonico* (Milan 1985), p. 192 (orig. cast.: *Lecciones de Derecho Canónico*, Madrid 1984); idem, "Personas jurídicas públicas y privadas," in *Escritos de derecho canónico...*, cit., pp. 611–627; A.M. Punzi Nicolò, *Gli enti nell'ordinamento canonico* (Padova 1982), pp. 83ff.

7. In Italian, we have designated this relationship by an expression that is difficult to translate "immedesimazione organica."

8. For a case of this type, see commentary on c. 121; cf. also, for a recent case, G. Lo Castro, *Le prelature personali. Profili giuridici* (Milan 1988; ed. cast.: *Las prelaturas personales. Perfiles jurídicos*, Pamplona 1991; French translation: *Les prèlatures personnelles*, Brussells 1993), pp. 190ff.

9. Cf. E. Molano, commentary on cc. 116–117, in *Pamplona Com*; F.J. Urrutia, "De quibusdam quaestionibus ad librum primum Codicis pertinentibus," in *Periodica* 73 (1984), p. 320; L. Vela Sánchez, "Personas jurídicas," in C. Corral Salvador-J.M. Urteaga Embil (eds.), *Diccionario de derecho canónico* (Madrid 1989), p. 477.

Nevertheless, it is a consequence of forms which are not always clear and perceptible, since it is not evident what "acting in the name of the Church" might signify. If that manner of acting were to imply a use of the proper authority of the Church as institution and of its constitutional organs, everything would be clear, and public juridical persons would be easily identifiable.

But the Church can also be understood in a non-institutional sense, such as in a community sense, like the people of God. In that case, the responsibility of spreading the message it bears falls to the faithful (and the common priesthood will undertake this of which they have been invested by virtue of baptism).

Likewise, it may not be said that service towards the public good is absent in the faithful when they pursue a private interest. Here private interests have a public relevance; so much so that a functional responsibility of the hierarchy to the faithful survives. From the juridical structural point of view, that responsibility has been shown in two specific norms which catch the problem at its root and resolve it: in the provisions of c. 300, dictated for associations, which subordinates the classification "Catholic" of the association (and, therefore, its capacity to express or represent interests of the Church-people of God) to the consent (a term more general and broader than "approval") of the ecclesiastical authority; and in the provisions of c. 117, which contemplate the necessary approval of the statutes by competent authority so that the entity can obtain juridical personality.

3. *The forms of recognition of public and private juridical persons*

Pursuant to § 2 of this canon, the recognition of public and private juridical persons can take place according to the forms provided in general by c. 114 § 1 (see commentary): a) *ex ipso iuris praescripto*, only for public juridical persons (moreover, it must be understood that in all the cases in which there is recognition *ipso iure*, it is a matter of public juridical personality although such a conclusion may not have been proposed by the law: cf. e.g., cc. 373, for parochial churches; 432 § 2, for ecclesiastical provinces; 449 § 2, for Bishops' Conferences; 515 § 3, for parishes); and b) by decree, for public juridical persons, and for private juridical persons (in which case, to avoid being treated in an ambivalent form, it would be advisable that the decree specify what kind of juridical personality is being dealt with; although the law does not require it, and therefore recourse is necessary to the aforementioned stated distinguishing criteria, by way of interpretation).

4. *Formal aspects and substantial aspects of the recognition of juridical persons*

Finally, the problem remains to be addressed in determining whether the classification of a public or private juridical person is of a formal nature (tied to the *form* of recognition) or of a substantial nature (dependent on material constitution or the specific ends that are pursued); and if the substantial features of an entity prevail over its formal classification in case of discordance (and therefore, whether an entity that presents the characteristic features of public juridical persons must be considered and treated as such, despite its formally being recognized as a private juridical person, or vice versa).

Temporal legal systems and secular juridical science, which have been responsible in the recent history of juridical thought for the formal conception of juridical personality, when classifying an entity, tend more and more to observe its substantial profile, transcending its formal aspects.[10]

Regarding the canonical system, it must be said that its sensibility is still not mature despite having an ancient tradition favoring a substantial vision of the subject. At least for the present then, it would be, if not inconceivable, then at least difficult, to force formal classification that results from the acts of recognition of the entity to make room for and give prevalence to its substantial aspects.

10. An example is given in the sentence of the *Corte Costituzionale Italiana* de April 7, 1988, no. 396, in *Giurisprudenza costituzionale* 33 (1988), I, pp. 1744ff.

117 **Nulla personarum vel rerum universitas personalitatem iuridicam obtinere intendens, eandem consequi valet nisi ipsius statuta a competenti auctoritate sint probata.**

No aggregate of persons or of things seeking juridical personality can acquire it unless its statutes are approved by the competent authority.

SOURCES: Pius PP. XII, Litt. Ap. *Quam Romani Pontifices*, 14 sep. 1949 (*AAS* 43 [1951] 722–724); Secr. St. *Notif.*, 15 iun. 1953 (*AAS* 45 [1953] 570); Secr. St. *Notif.*, 26 oct. 1953 (*AAS* 45 [1953] 821); Secr. St. *Notif.*, 16 nov. 1959 (*AAS* 51 [1959] 875); Ioannes PP. XXIII, Litt. Ap. *Religiosissimo*, 8 dec. 1962 (*AAS* 55 [1963] 444–446)

CROSS REFERENCES: c. 94

COMMENTARY

Gaetano Lo Castro

1. *Approval of the statutes of juridical persons*

The approval of the statutes of juridical persons on the part of the competent authority (and the authority that can grant juridical personality must be considered "competent") is a necessary requirement for the application for and granting of juridical personality.[1]

In practice, approval of the statutes is given almost always with the same act that confers personality. Nonetheless, the two acts continue being distinct, both from the conceptual point of view and from the juridical point of view, meaning that the legitimacy and sufficiency of the statutes are evaluated and considered separately. Thus, the act of the authority could be lawful in the part that approves the statutes of the entity but not in the part that grants personality, while a possible unlawful approval of the statutes, since it deals with an essential requirement for recognition, must also concern the act of concession of juridical personality (regarding the statutes, see commentary on c. 94).

1. Cf., in a different sense, V. De Paolis, who speaks of approval of the statutes subsequent to the erection of the entity, in *Il diritto nel mistero della Chiesa*, vol. I, 2nd ed. (Rome 1986), p. 353.

2. *Formation of the statutes*

For the specific problems that concern the statutes of juridical persons, it is necessary to note that, as a general rule or always (in the case of private juridical persons), the statutes are formed (*condita*) on the part of the entities, and later they are approved by the ecclesiastical authority.

The formation of the statutes is, therefore, an expression of private autonomy in the Church, while their approval is a manifestation of the executive power of the ecclesiastical authority.

But in the case of public juridical persons the statute can be—and as a general rule is—created by the same ecclesiastical authority, which will promulgate it "by virtue of its legislative power" (c. 94 § 3), by means of a law or by means of an equivalent act (by means of a general decree and, in our opinion, also by means of individual acts, such that they could be approved in a specific form by the Roman Pontiff). In this case statutes would not be "approved," but, in the strict sense, "promulgated" by the ecclesiastical authority, and we will find ourselves outside the purview of the provisions of the present canon, which, in conclusion, is reserved only to private juridical persons.

In effect, the procedure for approval implies and means a control, on the part of the administrative authority (in a position of preeminence and prevalence), of the activity carried out by another subject (in a position of subordination), for the ends and within the bounds fixed by law; a control that cannot be verified in case the statute were promulgated by the same legislative authority. In such case the moment referring to the formation of the statutory norms of the entity and the moment referring to its formal recognition in the Church only will be able to be distinguished, within the same instituting will of the juridical person (public). It is necessary to add still that, for many public juridical persons recognized *ipso iure* (dioceses, parishes, etc.) the statutory norms are identified with their juridical regulation contained in the Code.

Finally, we must remember that in the case of the transformation of entities endowed with private juridical personality into entities with public juridical personality (see commentary on c. 116: 2, c; and on c. 121), the statutes which originally were prepared with an action of private autonomy and at such time were perhaps "approved" by the ecclesiastical authority will be able to be made proper by such authority, assumed in its legislative will, modified (if it were necessary and opportune) and imposed by means of a law on the members of the new public juridical person. But also in that case we would find ourselves outside the purview of the application of the present canon. What matters, in effect, is not so much the preparation or material formation of the articulated statutory scheme (which can be done by anyone), as much as its assumption in the law-making procedure on the part of the ecclesiastical authority.

118 **Personam iuridicam publicam repraesentant, eius nomine agentes, ii quibus iure universali vel particulari aut propriis statutis haec competentia agnoscitur; personam iuridicam privatam, ii quibus eadem competentia per statuta tribuitur.**

Those persons represent, and act in the name of, a public juridical person whose competence to do so is acknowledged by universal or particular Law, or by their own statutes; those persons represent a private juridical person who are given this competence by their statutes.

SOURCES: —

CROSS REFERENCES: —

COMMENTARY

Gaetano Lo Castro

1. *The representation of juridical persons*

This canon regulates the representation *ad extra* of juridical persons, according to the manifestation of the will of those entities. That manifestation of will can refer to several fields of the law: it can be a matter of contractual will or procedural will (cf. c. 1480 § 1), etc.

It is important to remember in this respect, that in the Code the norm of c. 100 of the *CIC*/1917 has not been included, which went back to the golden period of classical canon law (cf. X I, 41, 1 and 3), according to which "personae morales sive collegiales sive non collegiales minoribus aequiparantur."[1] This norm imposed the submission of the activity of juridical persons to preventive controls (authorizations) and successive controls (approvals), whose omission could lead to the annulment of the acts; controls that still today, even though they are no longer required as a general rule, can be made use of by particular and statutory norms.

1. Cf. F.E. Adami, *Ecclesia minoribus aequiparatur* (Padova 1970); G. Leziroli, "Persona morale e persona fisica nel diritto canonico. Notazioni minime sul can. 100 § 3," in *Studi in onore di P.A. D'Avack*, vol. II (Milan 1976), pp. 871–897; in particular, pp. 878ff.

2. *Individuation of the representative*

The canon designates the subject, or rather, sets the rule, and the route that must be followed to individuate the subject that, acting in the name of and on behalf of the juridical person, manifests its will.

For the public juridical person, it is necessary to resort to the general law (represented by the Code itself: cf. cc. 393 and 532, for the dioceses and parishes), or particular (the constitutional law of a certain juridical person), or to the statutes sanctioned by the ecclesiastical authority. It is not stated that the representative must be designated by the constitutional norms of the public juridical person, or by those that sanction the statutes if they happen to be different; and generally they will be.

For the private juridical person, the representative will be designated by the statutes.

The individuation of the person that represents the entity and manifests its will to the exterior appears as a necessary requirement for the approval of the statutes on the part of the competent ecclesiastical authority and, consequently, for the recognition itself of the juridical person. Otherwise, it is understood that, without the representative, it would be as though the public or private juridical person did not have a voice: it would find itself incapable of manifesting its will and of participating in the formation of a juridical relationship.

3. *Relationship between the representative and the represented entity*

The representative must act with respect to the will of the juridical person. Regarding this topic several points must be made, since the canon does not state specific norms.

It can occur that the representative may not be only the organ of external manifestation of the entity, but also an organ of formation of that will. Several cases can be conceived to that purpose: that the organ of the formation of the will of the juridical person might coincide completely with that of its external manifestation; or it might not coincide at all; or it could coincide in part because the formation of the will might be produced though a complex procedure (e.g., a collegial act), in which a plurality of subjects participate, but after the will is externally manifested by a representative that has participated in the formation of the wishes of the entity.

In all these cases, even when the subject that represents the entity *ad extra* and manifests its will coincides with the organ of its formation, it is necessary always to distinguish the two instances, that of formation and

that of exteriorization of the will,[2] and to assess its correct formation, possible defects, and the consequent responsibilities.

The limits of the activity of the representative come from various origins.

In the first place, he cannot manifest a detrimental will of juridical norms, although authorized or ordered to do so by the organs of the government of the juridical person, which forms its will. The observance of the norms of law constitutes a general limit on the action of the juridical person, such that any deliberation would be null, even having been adopted according to the ritual forms, which would tend to infringe on the law or exceed it (in that sense the following old saying must be understood: "persona iuridica delinquere non potest"). A lawful will would be imputable to the entity itself, which once recognized cannot do other than act according to the general and particular norms of law,[3] but an unlawful will would be imputable to the persons that, in their capacity as organ (of formation of will) or as representative (for its external manifestation), have exceeded the limits imposed by those norms. But outside such cases of personal responsibility of those who are invested with organic functions in the juridical person (functions that can refer to the formation of the will of the entity or, in the proper case, to the control of correct formation). The juridical person will only answer for acts executed by its order or in its name by the representative.

Another limit is set by the constitutional norms of the juridical person (if it is public) and by its statutes (whether public or private).

A last limit, finally, is constituted by the specific mandate of the deciding organs of the juridical person received by the representative. In this respect the most delicate problems are set forth, or can be set forth, regarding the responsibility of the representative and of the represented juridical person, toward the exterior and in their reciprocal relations. The Code does not state norms on this subject, but it can be said in general, that, on the basis of the principles that regulate the representation, not all that was done by the representative can be imputed to the juridical person, but only that which comports with the conferred mandate. It is well understood that the representative will answer before the juridical person for the acts carried out in the execution of its mandate on the basis of the general principles applicable to the case.

2. Cf. H. HEIMERL-H. PREE, *Kirchenrecht. Allgemeine Normen und Eherecht* (Wien-New York 1983), p. 96.

3. Cf. W. AYMANS-K. MÖRSDORF, *Kanonisches Recht*, b. I (Paderborn-Munich-Wien-Zürich 1991), p. 323, which recognize, in turn, a full *Deliktfähigkeit*, based on the subjectivity of juridical persons, equivalent to that of physical persons.

119 **Ad actus collegiales quod attinet, nisi iure vel statutis aliud caveatur:**

1° si agatur de electionibus, id vim habet iuris, quod, praesente quidem maiore parte eorum qui convocari debent, placuerit parti absolute maiori eorum qui sunt praesentes; post duo inefficacia scrutinia, suffragatio fiat super duobus candidatis qui maiorem suffragiorum partem obtinuerint, vel, si sunt plures, super duobus aetate senioribus; post tertium scrutinium, si paritas maneat, ille electus habeatur qui senior sit aetate;

2° si agatur de aliis negotiis, id vim habet iuris, quod, praesente quidem maiore parte eorum qui convocari debent, placuerit parti absolute maiori eorum qui sunt praesentes; quod si post duo scrutinia suffragia aequalia fuerint, praeses suo voto paritatem dirimere potest;

3° quod autem omnes uti singulos tangit, ab omnibus approbari debet.

In regard to collegial acts, unless the law or the statutes provide otherwise:

1° in regard to elections, provided a majority of those who must be summoned are present, what is decided by an absolute majority of those present has the force of law. If there have been two inconclusive scrutinies, a vote is to be taken between the two candidates with the greatest number of votes or, if there are more than two, between the two senior by age. After a third inconclusive scrutiny, that person is deemed elected who is senior by age;

2° in regard to other matters, provided a majority of those who must be summoned are present, what is decided by an absolute majority of those present has the force of law. If the votes are equal after two scrutinies, the person presiding can break the tie with a casting vote;

3° that which affects all as individuals must be approved by all.

SOURCES: cc. 100 § 1, 180 § 1, 321, 329 § 3, 433 § 2, 526; SCR Litt. circ., 9 mar. 1920 (*AAS* 12 [1920] 366); SCR Ind., 18 oct. 1928; SCR Ind., 4 iul. 1929; SCR Ind., 6 dec. 1940; Pius PP. XII, Ap. Const. *Vacantis Apostolicae Sedis,* 8 dec. 1945, 68 (*AAS* 38 [1946] 87); Ioannes PP. XXIII, m. p. *Appropinquante Concilio*, 6 aug. 1962, art. 39 (*AAS* 54 [1962] 624); Ioannes PP. XXIII, m. p. *Summi Pontificis electio*, 5 sep. 1962, XV

(*AAS* 54 [1962] 638–639); Secr. St. Normae, 13 sep. 1963, art. 39; Secr. St. Rescr. 8 dec. 1966, art. 24 (*AAS* 59 [1967] 99–100); CPAC Rescr., 24 iun. 1969, art. 26 (*AAS* 61 [1969] 535); Paulus PP. VI, Ap. Const. *Romano Pontifici eligendo*, 1 oct. 1975, 65 (*AAS* 67 [1975] 634)

CROSS REFERENCES: —

COMMENTARY

Gaetano Lo Castro

1. *The formation of the will of juridical persons*

The Code is silent regarding the formation of the will of juridical persons, with the single exception represented by this canon, which regulates the specific case of the formation of the so-called collegial will.

The regulations concern, therefore, only those collective (*universitates personarum*) collegial entities or the foundations (*universitates rerum*) ruled by a college (see commentary on c. 115), independent of their public or private nature.

On the subject of collegial acts, the canon distinguishes two cases.

a) *Electoral collegial acts*

The first case occurs when the object of the collegial act is an election (necessarily being understood as organs that form a part of the juridical person). In such case, the procedure for formation of the act must follow the following rules:

1°) The majority of those who have a right to participate must participate. In that regard problems could arise, both for the individuation of those who have a right—which will have to be left to the constitutional law of the juridical person and its statutes—and for their lawful convocation (note that not summoning one who has a right to participate represents, according to general principles, an incurable defect of procedure, unless the interested party presents himself to take part in it, cf. c. 166 § 2).

2°) In the first two ballots, the one who obtains an absolute majority (50% + 1) of the votes of those present at the electoral procedure will be elected (which can coincide with the voters or not, in case there were abstentions).

3°) If the election has not occurred in the first two ballots, a third tie-breaking vote will be had between the two candidates getting the most votes (meaning: the most votes in the second round of voting). If more

than two persons have obtained in the second round of voting the same number of votes, the breaking of the tie will be between the two oldest persons, and the one who receives the majority will be elected. The canon does not specify whether this case requires an absolute majority (of those present) or whether a relative majority is enough, which caused doubts and uncertainties in the doctrine.[1] These doubts and uncertainties have been eliminated by an authentic interpretation of the Code of June 29, 1990,[2] according to which a relative majority is sufficient for the third scrutiny.[3]

4°) If neither of the two candidates that compete in the tie-breaker achieves a majority in the third scrutiny, not even a relative majority—which will be able to occur only if there is again a parity of votes—the election will conclude in any case in the fourth scrutiny, in which, either a majority will be had (and therefore the one who receives the most votes will be elected) or the tie will persist, in which case the oldest candidate will be elected.

b) *Collegial acts distinct from electoral acts*

The second case encompasses all the remaining collegial deliberations, relative to the distinguishing acts of the elections, always subject to the requirement of a majority for any collegial act.

The procedure in those cases, reproduces, with regard to the first scrutiny, the provisions for elections (presence of the majority of those entitled to vote, a decision adopted by the absolute majority of those present). The norm establishes that if, after two ballots (*"post duo scrutinia"*), the votes are equal, the vote of the president decides. This provision must be interpreted in the sense that, in the second ballot, it can be enough so that the collegial decision is given even by the relative majority of those present (not of the voters; think simply of the case of there being abstentions), and that only in the case of a tie is the decision left to the vote of the president (who, of course, can concur in the voting to the formation of that tie).

2. *The modifications of this matter regarding the CIC/1917*

Regarding the formation of the collegial will there have been notable modifications with respect to the *CIC*/1917 (cc. 101 §§ 1 and 2), especially regarding the determination of a majority.

1. Cf. V. De Paolis, in *Il diritto nel mistero della Chiesa*, vol. I, 2ª ed. (Rome 1986), p. 356; T.I. Jiménez Urresti, commentary on c. 119, in *Salamanca Com.*
2. *AAS* 82 (1990), pp. 120ff.
3. Cf. J. Canosa, "La maggioranza richiesta nell'elezione canonica," in *Ius Ecclesiae* 3 (1991), pp. 367–374.

Without getting into details (for which the already cited doctrine can be consulted), it seems that the legislator of the present Code has had a dual preoccupation in reforming these regulations: in the first place, the collegial acts must be to the extent possible an expression of a significant majority of the juridical person, such that its collegial dimension remains safeguarded (which, after all, is the most secure method of guaranteeing collective responsibility in the management of the entity); secondly, the aspiration of that collegial dimension must not hinder the activity of the entity for more than a reasonable time. It can be said that the legislator knew how to find a precise balance between those counterposed requirements.

3. *The rule "quod omnes, uti singulos, tangit"*

The third paragraph of the canon reproduces a norm already contained in the *CIC*/1917 (c. 101 § 1, 2°), and taken, with a slight, but meaningful, addition of the *regula* XXIX of the *Liber VI* of Boniface VIII (which is based on even older juridical traditions).

Regarding the *regula* of *Liber VI* ("quod omnes tangit debet ab omnibus approbari"), the norm sanctioned both in the *CIC*/1917 and the present Code adds the important restrictive clause "uti singulos." In *Liber VI* the rule had, therefore, a broader and more general scope than that provided for by the modern law.

In reality the rule was understood, with an interpretation of surpassing importance for the constitutional customs of modern states, in the sense that everyone belonging to a community must take part in the deliberations concerning it (in this area we encounter the universal suffrage and the majority principle). Likewise it assumed a procedural meaning: all interested parties must be summoned to justice.

But today (since the *CIC*/1917) that rule presents, precisely because of the introduction of the clause "*uti singuli*," a more restrictive meaning (that was not absent, otherwise, in the former law, where it was added to the other meanings that we have just mentioned). It constitutes a limit on the deliberations of the majority, since it is intended to state the rights of each one of the members of the community. It could also be said that the existence of those rights is by itself a limit on the deliberations of the majority.

Two aspects must still be clarified:

First of all, the limit does not affect the validity of the decision of the collegial majority (that validity is tied to respecting for the formal requirements necessary for their position), but rather its efficacy. The decision, if it is valid from the formal point of view, will produce its effects for all the aspects that do not refer to the rights of individuals. The approval by all

and each of those concerned by the decision can be understood, therefore, according to what has been proposed, as a *conditio iuris* for the efficacy of the decision.[4]

In the second place, the rights of the individual persons protected by the norm must be related to their participation in the college, or derivative from such norm. The rights pertaining to them independent of their belonging to the college are protected as such by the law, pursuant to general principles, and could not be diminished in any case by collegial decisions (if the norm were stated for this last case, it would be completely superfluous).

Finally, it must be added, that not even a unanimous collegial decision (adopted with the approval of the interested party) could have a bearing on a right afforded to a subject as indispensable, or regarding a power that has been granted by the law and that cannot be renounced. Moreover, in such case, inefficacy should not be spoken of anymore, but of the genuine and proper invalidity of that deliberation, for its irremediable conflict with imperative norms of the fundamental legal system.

4. Cf. O. GIACCHI, "La regola 'quod omnes tangit' nel diritto canonico (can. 101 § 1, no. 2 C.J.C.)," in *Studi in onore di V. Del Giudice*, vol. I (Milan 1953), p. 352; also cf. E. REGATILLO, "Quod omnes tangit," in *Sal terrae* 45 (1957), pp. 636ff.

120 **§ 1. Persona iuridica natura sua perpetua est; extinguitur tamen si a competenti auctoritate legitime supprimatur aut per centum annorum spatium agere desierit; persona iuridica privata insuper extinguitur, si ipsa consociatio ad normam statutorum dissolvatur, aut si, de iudicio auctoritatis competentis, ipsa fundatio ad normam statutorum esse desierit.**

§ 2. Si vel unum ex personae iuridicae collegialis membris supersit, et personarum universitas secundum statuta esse non desierit, exercitium omnium iurium universitatis illi membro competit.

§ 1. A juridical person is by its nature perpetual. It ceases to exist, however, if it is lawfully suppressed by the competent authority, or if it has been inactive for a hundred years. A private juridical person also ceases to exist if the association itself is dissolved in accordance with the statutes, or if, in the judgement of the competent authority, the foundation itself has, in accordance with the statutes, ceased to exist.

§ 2. If even a single member of a collegial juridical person survives, and the aggregate of persons has not, according to the statutes, ceased to exist, the exercise of all the rights of the aggregate devolves upon that member.

SOURCES: § 1: c. 102 § 1; *ES* I, 34 § 1
§ 2: c. 102 § 2

CROSS REFERENCES: c. 123

COMMENTARY

Gaetano Lo Castro

1. *Duration of the juridical person*

The present canon provides that the juridical person, by its nature, is perpetual. But the juridical person does not have a "nature" of its own. As an artificial subject created by the law, it has the nature that law attributes to it. By "its nature" must be understood in the sense that, being a center of rights and duties that transcend physical persons, the juridical person as such is not tied to the life of physical persons.

2. *Extinction of the juridical person*

The juridical person ceases to exist in the circumstances provided by the law. In this canon, the present Code provided for only the cases of extinction related to the will of the authority—manifested by the appropriate individual act (for the case of a single entity) or general (for the categories of entities or even for all the entities)—or by events subject to that will.

Two of those cases concern all juridical persons: *a*) lawful suppression on the part of the competent authority; and *b*) the lapse of its activity for one-hundred years.

Another two cases, although not determined in regard to their content, specifically concern private juridical persons. These are extinguished: *c*) in the cases provided for in the statutes, if they are entities of a corporate or associative nature; and *d*) likewise in the cases provided for by the statutes, if they are entities of a foundational or institutional nature, but after verification on the part of the competent authority (on the need for that verification is based the difference with the prior case).

Except in case *a*) (suppression: see below, no. 3), in the remaining cases, the juridical person ceases *ipso iure*; rather, the personality is extinguished by virtue of normative or statutory regulations that tie that extinction to the verification of a certain fact or act. This fact can be the passage of time tied to the inactivity of the entity, and likewise by any other fact or act provided for by the statutes. Therefore, even if the statutes were to provide for the extinction of the juridical person by the will of the members, the cause of the cessation of the entity would not have to situate it in that will, but always in the will of the legislator, who would have attributed to those facts or acts the power of causing the desired effect. This conclusion is required by the formal conception of the juridical person incorporated by the Code in the same way that the power of giving life to new subjects in law is afforded to the legislator, through the instrument of the juridical person; and only to him does it grant the power to take it away, by means of specific extinctive procedures or by means of dispositions that certain events attribute extinctive force for the personality.

The judgment of the competent authority, of which the last part of § 1 speaks, intended to confirm whether there has occurred in the foundation one of the cases of extinction provided for by the statutes, is of a merely verifying nature. In this case the juridical person is extinguished by the will of the legislator, upon the occurrence of the event contemplated or on fulfillment of the prescribed actions.

It remains to be asked if there can be other cases of extinction of the juridical person, besides those enunciated in the canon. In particular, we must ask ourselves if a *consociatio privata*, recognized as a juridical person, can cease to exist on voluntary dissolution by the members, not provided for in the statutes; if the entities of a foundational nature cease in

the case where their intended end fails or ceases to exist, or when their goal has been achieved, or when it become useless or superfluous (multiple cases can be formed), or it is simply impossible (e.g., because of the loss of patrimony). The comments expounded above are valid for this case: given the formal nature of personality embraced by the legislator, all these facts or acts, if they are not provided for by appropriate legislative or statutory dispositions, do not possess by themselves the power of causing the extinguishing of juridical personality. Since such personality is conferred by the authority, it can be taken away only by the same authority, either by means of an immediate and particular decision, or by means of a mediated provision. The declaration of dissolution by the members, the extinction of the entity, etc., (according to the cases formulated prior) constitute only a pretext for the suppressive act of personality on the part of competent authority.

3. *In particular: the suppression of the juridical personality by an act of authority*

It is necessary to remember that the competent authority for the suppression of the entity is, as a general rule, the same that granted the juridical person; but not always. There can be, for example, the case of an institute of consecrated life erected by the diocesan bishop (c. 579), which, by explicit normative provision, can be suppressed only by the Holy See (c. 584). It could be said, therefore, that the power of suppression is more restricted than that of creation of the juridical person.

The act of the authority must be lawful, that is, in conformance with law (as long as it deals with acts of an administrative nature). It might not be lawful for formal reasons (e.g., if a juridical person instituted by means of a law intended to extinguish itself), or for substantial reasons (for being inactive, or for coming from a non-competent authority, or for having been adopted by surpassing the powers proper of the authority that acted). In opposing such an unlawful act, recourse can be had to the means of protection, administrative and judicial, provided for by the law.

But the extinction of the juridical person, the revocation of its personality, could be disposed of also by means of a law, or an equivalent act. In such case, the only limit is the "rationality" (in the canonical sense) of the disposition.

4. *Reduction of the universitas personarum to one single person*

Paragraph 2 contemplates the case of a *universitas personarum* (which, to be able to be constituted, must have at least three people: cf. c. 115 § 2), which is reduced to a single person. As formulated in first part,

the norm only seems to contemplate collegial juridical persons of an associative nature, and not non-collegial juridical persons of an associative nature (see commentary on c. 115: the classification of "collegial" does not indicate the structure of the juridical person, but the method by which its will is formed).

The case provided for in the present Code seems, then, more restricted than the case regulated by the *CIC*/1917 (c. 102 § 2). Essentially, the latter took into consideration—as does, on the other hand, the present canon—the case of the reduction to a single member of a collegial person (moral); but within the meaning of the *CIC*/1917 that concept encompassed all the persons that today are denominated *universitates personarum*, that act in a collegial or non-collegial form.

Thus the norm provides that, either the collegial juridical person (within the meaning of the present Code) is extinguished, if so provided in the statutes, or the exercise of its rights (and therefore the determination to act) can be accomplished by the act of the surviving member. In other words: the juridical person cannot act in a collegial manner, because there is no longer a college (therefore, it ceases to exist as a "collegial" juridical person), but survives as a "juridical person." Thus, it is a matter of a disposition that is concerned with preserving the life of the juridical person, though it may have become less than its original connotation.

Moreover, the canon wanted to specify something that should have been considered implicit in the norm of the *CIC*/1917, namely: that upon the only remaining member fall the rights—note well: "*all* rights"—of the *universitas* (the abrogated c. 102 § 2 *CIC*/1917 spoke, perhaps with less propriety, about the rights of the members of the *universitas*, but there could not have arisen serious doubts about the fact that it was a question of rights that pertains to the *universitas*).

Still it remains fitting to ask what rule must be applied in the case—which we have considered above as foreign to the text of the present norm—of a juridical person of an associative foundation but non-collegial (*universitas personarum non collegialis*). In particular it is necessary to ask whether, since likewise that kind of *universitates* must be formed by at least three people, it will remain in force if reduced to a single member. The response, keeping in mind the formal idea of personality incorporated by the Code, cannot be other than affirmative; but with one difference with respect to the case considered by the norm: the only remaining member will be able to act in the name of the *universitas* or not, according to whether he possesses or does not possess the requirement to be able to determine the action of the juridical person. In case the members to whom it was reserved have disappeared, by virtue of the requirements they personally met, the determination of societal action, the juridical person will no longer be able to act, and will remain in a state of inactivity (a premise for a legitimate terminating act on the part of the authority, or if it lasts for one hundred years, for the extinguishing cause provided for in the prior

paragraph); and will or not be able, according to statutory provisions, to be reintegrated into the personal foundation to recommence its functioning and action.

Finally, regarding the rights of the *universitas* that are concentrated in the remaining member, it must be understood that duties also fall to him: for that reason the member in question not only will be able to judicially sue, for example, but also be sued, as established—in a different context—in old Roman law (from which the canonical provision is derived), which states "si universitas ad unum redit, magis admittitur posse eum convenire et conveniri, cum ius omnium in unum recciderit et stet nomen universitatis" (D. 3, 4, 7, 2).

121 Si universitates sive personarum sive rerum, quae sunt personae iuridicae publicae, ita coniungantur ut ex iisdem una constituatur universitas personalitate iuridica et ipsa pollens, nova haec persona iuridica bona iuraque patrimonialia prioribus propria obtinet atque onera suscipit, quibus eaedem gravabantur; ad destinationem autem praesertim bonorum et ad onerum adimpletionem quod attinet, fundatorum oblatorumque voluntas atque iura quaesita salva esse debent.

When aggregates of persons or of things which are public juridical persons are so amalgamated that one aggregate, itself with a juridical personality, is formed, this new juridical person obtains the patrimonial goods and rights which belonged to the previous aggregates; it also accepts the liabilities of the previous aggregates. In what concerns particularly the arrangements for the goods and the discharge of obligations, the wishes of the founders and benefactors, and any acquired rights, must be safeguarded.

SOURCES: —

CROSS REFERENCES: —

COMMENTARY

Gaetano Lo Castro

In this canon and the following several cases are considered regarding the suppression and constitution of public juridical persons by means of the merger of several juridical persons or the division of one juridical person.

1. *Transformation of juridical persons*

The cases contemplated in this canon and in c. 122 are the only ones provided for in the Code regarding the transformation of juridical persons. It concerns, on the other hand, transformations in an improper sense; in fact, the fusion (c. 121) or division (c. 122) of juridical persons, forms assumptions about the extinction of juridical persons, rather than transformation.

The Code does not establish any other provision regarding transformations in a proper sense. But nevertheless, they constitute a diffuse phenomenon: there can be transformations in the nature and in the classification of a juridical person (one entity is transformed from foundational to associative, or vice versa: or from a private juridical person to a public one, and the inverse case can also be established); there can be modifications in the statutes, either relative to the end, to the organs of governance and of representation, to its locations, etc.

All these modifications, and others that could be thought of, since they concern the manner of acting and being of juridical persons, shall be submitted for approval to the competent ecclesiastical authority (which will be, as a general rule, the one that has erected them or accorded them juridical personality). When it happens, approval of a modification will be implied in the cases in which it can occur (which are those of public juridical persons) on the initiative and will of the proper ecclesiastical authority.

2. *Merger of public juridical persons*

In the case—which represents the only case provided for by the canon—a merger of public juridical persons (both on the personal level and the patrimonial level), we are in the presence of a single act (that of merger) with a dual object: the extinction of the juridical persons that must be merged and the constitution in their place of a new juridical person, which will also have a public nature. The same result could be reached also by means of a dual act (the first one being extinction; the second, constitution). Therefore the provision of this canon seeks to achieve an economy of procedure.

Regarding the property, rights, and obligations that devolve to the public juridical person that results from the merger, the canon provides that the new juridical person assumes all the goods and rights of the juridical persons to which it succeeds, or the obligations that encumbers them. In particular, it provides that the rights acquired by third parties and the wishes of the founders and benefactors must be safeguarded regarding the disposition of the goods and the fulfillment of the obligations.

It should be noted that the norm (nonexistent in the *CIC*/1917), though contemplating only public juridical persons, speaks of the wishes of the founders. We know that public juridical persons can be constituted by ecclesiastical authority. But here the case is implicitly considered (in the commentary on c. 116 under other aspects) of the phenomena of transformation of entities which, being originally private (and therefore lending ample room to the wishes of the founders), can be converted into public phenomena; and being originally associative, can be converted into institutional phenomena.

The limits imposed by the canon on the decision to undertake a merger are legal limits, which the ecclesiastical authority is obliged to respect, if the operation is to be presented as a merger of entities. Otherwise, the authority shall proceed to the adoption of a dual measure: the extinction of the preceding juridical persons, with the consequent cancellation of all their rights and obligations, and with the consequent liquidation of their patrimony, pursuant to c. 123; and afterwards, the constitution of a new public juridical person that will receive nothing from the extinguished juridical persons. The formal lawfulness of these measures cannot be doubted. But, nevertheless, especially if they are adopted by virtue of executive authority, the control of their lawfulness is possible through the usual administrative and judicial procedures, especially to verify that acquired rights are not damaged, by substantially evading or eluding the law.

3. *Merger of private juridical persons*

It is fitting to ask whether the merger of two (or more) private juridical persons or of a private juridical person with a public juridical person is possible.

There are no reasons to deny that possibility.[1] If the individual persons can constitute an entity *ex novo*, to which afterwards will be attributed private juridical personality (formal recognition is always the competency of the ecclesiastical authority), likewise they can obtain the same result through the union or merger of the entities already existing, even though the operation cannot be accomplished without the participation of the competent ecclesiastical authority. Such authority will be called on to approve the merger, providing the extinction of the preexisting juridical persons and the recognition of the new juridical person (there is greater reason for this necessary participation if the merger were to affect public and private juridical persons, with the constitution of a new public juridical person).

The norms dictated by this canon and the principles that govern the exercise of private autonomy will be applied to the merger of private juridical persons: the rights of third parties must be respected and obligations must be fulfilled; commitments already made cannot be avoided by means of the merger.

1. W. Aymans and K. Mörsdorf admit it (*Kanonisches Recht*, b. I (Paderborn-Munich-Wien-Zürich 1991), p. 324), but while maintaining that in the case of a fusion of mixed entities (public and private), it can only come about as a result of the elevation of the private juridical person to a public one. It is useful to note, however, that, being a fusion, the new juridical person, result of an act of the authority, therefore in no way prevents, in line with principles, this from creating a private juridical person.

In relation to merger of private juridical persons, the last part of the canon which concerns the preservation of the destination of goods, the fulfillment of obligations, the will of the founders and benefactors, must be considered less binding. It appears here that the legislator might have wanted to safeguard, in the face of an intervention of the ecclesiastical authority, the aspects or interests of a private nature that can be found present also in a public juridical person. But when the merger concerns private juridical persons, the individuals themselves will watch out for their interests. At the same time, the danger of a corruption of justice on the part of the ecclesiastical authority is, in those cases, null and completely marginal (see commentary on c. 122, no. 2).

How is it that the legislator has not concerned himself with regulating the phenomenon of merger nor, in the following canon (see commentary), with the division of private juridical persons?

The preparatory work on the Code casts no light on the matter. When the *Coetus studii "de personis physicis et iuridicis"* (*sess. X*, November 13–17, 1972) had to discuss the problem of the merger or conjunction of communities that had juridical personality, to the observation that in the proposed canon only public personality was spoken of, it was stated that "*si non publica, regitur statutis.*"[2] Thus, the problem was ended with an insufficient annotation, since the statutes can not foresee the case of merger (or of division), and in fact, generally they will not contemplate it. In such a case, it will be necessary to find the applicable norms outside the statutes.

The truth is that, once the private juridical personality is admitted along the lines of principles, both for the advisability of granting greater room to private autonomy in the canonical order (motive of promotion), and for the necessity of protecting the institutional authority of the Church in the face of elections and activities of which it is not directly responsible (motive of protection), the legislator and juridical science itself have continued thinking of the phenomenon of juridical persons in a predominantly public view, which prevailed during the time the *CIC*/1917 was in effect.

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2. Cf. *Comm.* 22 (1990), p. 129. In the doctrine, W. Aymans and K. Mörsdorf tend toward that solution *Kanonisches Recht*, cit., p. 324.

122 **Si universitas, quae gaudet personalitate iuridica publica, ita dividatur ut aut illius pars alii personae iuridicae uniatur aut ex parte dismembrata distincta persona iuridica publica erigatur, auctoritas ecclesiastica, cui divisio competat, curare debet per se vel per exsecutorem, servatis quidem in primis tum fundatorum ac oblatorum voluntate tum iuribus quaesitis tum probatis statutis:**

1° ut communia, quae dividi possunt, bona atque iura patrimonialia necnon aes alienum aliaque onera dividantur inter personas iuridicas, de quibus agitur, debita cum proportione ex aequo et bono, ratione habita omnium adiunctorum et necessitatum utriusque;

2° ut usus et ususfructus communium bonorum, quae divisioni obnoxia non sunt, utrique personae iuridicae cedant, oneraque iisdem propria utrique imponantur, servata item debita proportione ex aequo et bono definienda.

When an aggregate which is a public juridical person is divided in such a way that part of it is joined to another juridical person, or a distinct public juridical person is established from one part of it, the first obligation is to observe the wishes of the founders and benefactors, the demands of acquired rights and the requirements of the approved statutes. Then the competent ecclesiastical authority, either personally or through an executor, is to ensure:

1° that the divisible common patrimonial goods and rights, the monies owed and the other liabilities, are divided between the juridical persons in question in due proportion, in a fashion which is equitable and right, taking account of all the circumstances and needs of both;

2° that the use and enjoyment of the common goods which cannot be divided, be given to each juridical person, and also that the liabilities which are proper to each are the responsibility of each, in due proportion, in a fashion which is equitable and right.

SOURCES: c. 1500; SCCouncil Resol., 16 iul. 1932 (*AAS* 25 [1933] 470–472)

CROSS REFERENCES: —

COMMENTARY

Gaetano Lo Castro

1. *Division of public juridical persons*

In the *CIC*/1917 the canon relative to the division of juridical persons (c. 1500) was contained in book III, *De rebus*, under the title "De bonis ecclesiasticis adquirendis." Presently the norm, transferred to the chapter on juridical persons for a better connection of the subject, contemplates not just any division, but only that of public juridical persons (both constituted in *universitates personarum* or in *universitates rerum*).

The canon provides for two cases of division and contains a dual provision relative to goods.

The first case of division occurs when the separated part of a public juridical person is joined to another public juridical person that is already constituted. In this case the numbers of existing juridical persons will not increase, but only change in composition.

The second case occurs when the separated part represents the substrate for the constitution of a new public juridical person. Here we will have a new subject in law in the system.

In both cases the competent ecclesiastical authority to carry out the division (which generally will be the same one that can constitute juridical persons resulting from the action) shall, before all, respect acquired rights, the will of the founders and benefactors and whatever might be provided in the approved statutes (meaning that in case they provide something regarding division and transformation of the entity and incorporation of another entity; but the ecclesiastical authority is free to predispose an appropriate regimen, different from the preexisting one, for the new entity that must flow from the division).

The ecclesiastical authority shall, moreover, provide—by itself or by giving a mandate to a curator—so that the division of the goods, rights, and duties of the divided entity is realized with respect to a dual normative provision:

a) If it is a matter of commonly divisible patrimonial goods and rights (that is to say, those which otherwise cannot be assigned to either entity, as will happen with a parochial church, in the case of the division of one parish), of debts, and other obligations, they must be divided between the juridical persons concerned by the procedure of division, in due proportion to each entity and in an equitable manner (*ex aequo et bono*), keeping in mind the circumstances and needs of both.

The norm, from looking at the way it is formulated, has sought to leave broad margins for evaluation to the ecclesiastical authority, without tying it to mechanical criteria of partition, connected to predetermined parameters, which with the zeal to eliminate the danger of arbitrariness and favoritism on the part of the authority would have ended up being unjust in practice. That does not mean the discretion that must guide the ecclesiastical authority, the sense of balance and equity that is asked of it, should be understood as complete discretion, so that the adopted decision may not be submitted to a superior control (as long as that is acceptable according to the norms of procedure), precisely in relation to the same aspect of equity sanctioned by the norm, which, in practice, is considered in multiple ways.

b) If it deals with common goods not subject to division (because they are indivisible, or because it is considered opportune and advisable not to divide them, likewise so as not to fractionalize or diminish their value), the use and usufruct by one party and the obligations of the other correspond to both juridical persons or fall to them, always with respect to the due proportion, which has to be determined with an equitable criterion in the same manner of the prior case.

2. *Division of private juridical persons*

It is fitting to ask, finally, as in the case of a merger (see commentary on c. 121), if the division of private juridical persons is possible and, in case of an affirmative answer, what regimen is applied.

Once the faculty of constituting private juridical persons is afforded, there is no reason to deny the possibility of dividing them. In the end, the division is resolved either in the attribution of a new dimension to juridical persons already constituted (separation of one part of a juridical person to be incorporated into another), or in the creation of a new juridical person (especially, respecting the common case of constitution ex novo, from which the created juridical person will be formed by a foundation that already formed a part of the other juridical person). We encounter a phenomenon that is inscribed, with its peculiarities, in the whole of the regimen delineated by the legislator on the subject of juridical persons.

The norms regarding the division of public juridical persons dictated in this canon are concerned especially with fixing the limits for a correct exercise of power of ecclesiastical authority. Thus, there is no reason to apply them without discernment of the division of private juridical persons, which will occur with respect to the principles that govern the exercise of private autonomy. The considerations formulated regarding mergers are also valid in this case.

123 **Extincta persona iuridica publica, destinatio eiusdem bonorum iuriumque patrimonialium itemque onerum regitur iure et statutis, quae, si sileant, obveniunt personae iuridicae immediate superiori, salvis semper fundatorum vel oblatorum voluntate necnon iuribus quaesitis; extincta persona iuridica privata, eiusdem bonorum et onerum destinatio statutis regitur.**

On the extinction of a public juridical person, the destination of its goods and patrimonial rights as also of its obligations is ruled by law and the statutes. If the statutes do not deal with the matter, the goods and the patrimonial rights go to the next higher juridical person, always with due regard for the wishes of the founders and benefactors and for acquired rights. On the extinction of a private juridical person, the destination of its goods and obligations is governed by its own statutes.

SOURCES: c. 1501

CROSS REFERENCES: —

COMMENTARY

Gaetano Lo Castro

Destination of the goods of an extinct juridical person

The goods of an extinct juridical person, its patrimonial rights and the obligations that encumber it cannot remain without an owner due to the extinction. The disappearance of the subject does not make its patrimony disappear, likewise for the rights and duties that make it up or encumber it. All these must pass, as in the case of the death of a physical person, to another subject.

Upon dictating suitable provisions to regulate the allocation of the patrimony of an extinct juridical person, the norm excepts, in every case, acquired rights (which, strictly speaking, would have been included in the "charges" that fall to the juridical person) and the will of the founders and benefactors. This will goes beyond the existence of the juridical person; but here is only that which is relative to goods that are bestowed: this is clear for "benefactors," and it should be also regarding "founders," whose will, to the extent it does not concern goods possibly contributed by them to the juridical person, even though set out in the statutes, is diminished upon the extinguishing of such person. It is, in other words, a matter of a will that concerns goods that are given, and remains connected to them to determine and condition their fate.

Afterwards, the norm distinguishes public juridical persons from private juridical persons, and does not just indicate the criteria for the allocation of the patrimony and the attendant rights and duties, but the places (normative sources) where those criteria should be sought. For public juridical persons, those places are the law and the statutes; for private juridical persons, only the statutes are relevant.

In case neither law nor statutes say anything about the allocation of the patrimony of the extinct public juridical person, such patrimony passes to the immediately superior public juridical person. Who the immediately superior juridical person might be for each public juridical person, is a matter that will have to be decided case by case, according to the norms that regulate the ecclesiastical organization. Note that the goods will go not to the superior body to which the extinct juridical person is subordinate (e.g., the bishop, in the case of a parish), but to the juridical person presided over by the superior body (in the cited example, the diocese).

In the Code several norms occur that indicate the body that can make provisions regarding the allocation of the goods of juridical persons. Thus, c. 584, which reserves to the Holy See the dissolution of an institute of consecrated life constituted by the bishop, and the consequent allocation of its temporal goods.

In the case of the extinction of a private juridical person, the canon does not provide for the case of the statutes' reticence concerning the destination of its goods. We think that, by way of an analogous interpretation, the criterion set for the extinction of public juridical persons should be applied: the goods will pass to the immediately superior juridical person. But, since here we are outside the framework of the ecclesiastical organization, it may not be feasible to identify that superior juridical person, and therefore the silence of the canon is understandable.

Therefore, when the ecclesiastical authority is called upon to approve the statutes of a private juridical person, pursuant to c. 117, it should always confirm that they provide for the destination of patrimony in case of extinction. If the statutes were to establish nothing in this regard, the ecclesiastical authority should return them to the interested parties, before their approval, so that they be completed and perfected on that point.

TITULUS VII
De actibus iuridicis

TITLE VII
Juridical Acts

INTRODUCTION

Michel Thériault (†)

Although many elements of the canonical order come directly from Roman law, the concept of *juridical act* is not among them. The Romans did not give us a definition of juridical act as such. However, some of the notions that form part of our *corpus* of knowledge on the juridical act do come from Roman law. We have only to think of the influence of fear on the significance given to consent "quod metus causa gestum erit ratum non habebo". Of course, a notion like that postulates the necessary integral parts of one's juridical activities: will, the act itself, the legal framework and the juridical effect.

The *concept* of juridical act originates in the natural-law philosophy of 18th-century Germany, but what is primary in that concept is the individual will to create a juridical relationship through the act. Afterwards, historicists like Friedrich Carl von Savigny incorporated the notion of juridical act into their ideology, in that individual will is necessary for the creation of juridical effects. Further on, the 19th-century pandectists developed a definition of *negotium juridicum* as "an expression of individual will intending to bring about a juridical effect."[1] The concept was extended to the state and to public authority, and the "will," as regards these acts, was that of the legislator or of the administration. One speaks of *negotium juridicum* in Germany *(Rechtsgeschäft)*, *negocio jurídico* in Spain and of *negozio giuridico* in Italy, but of *acte juridique (juridical act)* in France. The *CIC*/1917 and the *CIC* chose to use *actus juridicus* because this expression can be applied as much to a private juridical act as to a public one.[2]

1. Cf. M. HUGHES, "A New Title in the Code: On Juridical Acts," in *Studia canonica*, 14 (1980), pp. 396–397.
2. Cf. O. ROBLEDA, "De conceptu actus iuridici," in *Periodica de re morali, canonica, liturgica*, 51 (1962), pp. 414–418.

Though it is not easy to define what a juridical act is in canon law because of its numerous component elements, each one of which demands nuance, it is not an impossible endeavor. Indeed, G. Michiels, the most important twentieth century commentator on the general norms of canon law, uses the following formula: a juridical act is the "actus humanus socialis legitime positus et declaratus, cui a lege ideo et eatenus effectus juridicus determinatus agnoscitur, quia et quatenus effectus ille ab agente intenditur"—a "social human act performed and expressed in a legitimate way, to which the law recognizes a specific juridical effect, inasmuch as the effect is willed by the agent."[3] It must be added that Michiels does not interpret his definition regarding juridical effects in a literal way. For him, the effect does not have to be the primary reason of the act performed by the agent. It is sufficient that the agent should want the act to have some practical consequence. It is the law that grants a specific juridical effect to the act.

One speaks of a *human act*, which supposes that it is an act performed through an act of the agent's will, i.e., an act chosen deliberately and freely by that agent. A human act is in contrast to the act of someone who is not *sui compos* or that of someone who has not attained what is conventionally called the age of reason, because the person does not have the capacity or the adequate psychological or emotional maturity to deliberate sufficiently, taking into account the importance of the act. A human act can also be contrasted with an act performed "as a result of force imposed from the outside" or "as a result of fear" (c. 125), according to the degree established by the law.

The acts must be *social*, i.e., part and parcel of the agent's relationship with what is outside himself. Therefore, the act is necessarily external to the agent but coming from him. A purely internal act (thinking, willing) cannot, by definition, be a juridical act. In this context, only the expression of that will or that thought can be a juridical act. For example, the desire to buy a bicycle cannot be considered a juridical act. If, however, I desire to buy a bicyle, then go to the store and buy one, then clearly I have committed a juridical act, since my act completes itself in the external forum.

The act performed must be *legitimate*, i.e., *according to the law*, in the sense that, in order for the act to have juridical effect, the necessary legal conditions and formalities established by the law for the act in question must be followed. One speaks of a *legitimate* act and not of a *licit* act in order to avoid confusion with the moral order. A licit act in the moral sphere is an act which violates no moral norm, divine or human. A juridical act is an act in the external forum, and use of the notion of liceity can be a

3. Cf. G. MICHIELS, *Principia generalia de personis in Ecclesia: commentarius libri II Codicis juris canonici, canones prœliminares 87–106*, ed. altera penitus retractata et notabiliter aucta (Paris-Tournai-Rome-Desclée 1955), p. 572.

source of confusion. For example, if I perform an act with full deliberation and freedom, therefore without any extenuating circumstances, I perform an act which is an offence (delict) against the legal order in place. For instance, I am a priest and I violate the secret of the confessional (cf. c. 1388 § 1). This act is of course illicit morally, but it is also a juridical act because it has juridical consequences—i.e. a penalty—though the juridical effect of the act is not willed *directly* by the agent but by Church order. It is the act that is performed by the agent while the juridical consequence is willed by society. The juridical effect is thus willed *indirectly* by the agent because he knows that the act as performed has consequences, even if they may not be clear in his mind or not be the ones that he would wish.

As mentioned above, the law grants a juridical effect to the act. The law provides that, in the abstract, a certain act will have a specific effect as willed by the legislator, but this effect will occur only if the agent performs the act.

To sum up, the two *essential* or *constitutive elements* of the act are the *will* (the act has to be performed with knowledge and intention) and an *end* (the object that the agent wants to reach). Furthermore, positive law, i.e., the canonical order within which the act is performed, also adds requirements of *external form* (the formalities necessary to perform the act).[4]

The notion of juridical act can be found in the civilian tradition of Roman origin in continental Europe. In the common law tradition, also of Roman origin, one can find the concept of "legal transaction" which is close enough to that of *negotium juridicum,* and therefore to the notion of private juridical act.

The juridical act can also be the object of distinctions, but these are secondary and imperfect. They are only a practical means of classification and analysis, nothing more. We see no need to study all of them. We will only mention them.

For example, one can speak of *public* juridical acts, namely those that are performed by the competent authorities, e.g., the acts performed through legislative, executive and judicial power. These do not cause any problems conceptually. Indeed, it is evident, for example, that a singular administrative act, for example, the appointment to an ecclesiastical office, is a juridical act. It is external to the agent and is performed after an act of will of the competent authority. It is performed following the formalities established by the law and produces a specific effect. There are also *private* juridical acts, those that are performed by individuals as private persons or by juridical persons. Here again, the distinction is easy to

4. Cf. J. OTADUY, "Normas y actos jurídicos," in *Manual de derecho canónico* (Pamplona 1988), p. 287; E. MOLANO, *La autonomía privada en el ordenamiento canónico: criterios para su delimitación material y formal* (Pamplona 1974), pp. 116–118.

explain. Indeed, if two individuals decide to conclude a contract to buy and sell an automobile, there is a will as well as an expression thereof in an external act performed according to the formalities established by the law (payment of the agreed price by one and receipt of the payment by the other; payment of the sales tax; change of registration; acquiring new licence plates; conclusion of a civil liability insurance contract, etc.). These individuals have concluded a *negotium juridicum*.

There are other distinctions, but they are only of speculative or academic interest, without being of any true usefulness in practice. Thus, one can speak of real acts (e.g., a transfer of property) or of obligatory ones (e.g., a promise to marry brings about an obligation); of onerous acts (e.g., buying and selling) or of gratuitous ones (e.g., a donation); of acts *inter vivos* (e.g., a donation, a lease) or of acts *mortis causa* (e.g., a bequest); of unilateral acts (e.g., a will; the removal from an ecclesiastical office), of bilateral acts (e.g., a contract between two parties) or of multilateral ones (when there are more than two parties); of formal or solemn acts (those that have to be performed according to a specific procedure, e.g., the advice or the consent to ask for in accordance with c. 127) or of non-formal acts (those that require only the essential elements of will and cause).

The only distinction that has some real importance apart from the one between public and private juridical acts is that between *valid, nonexistent* and *invalid* acts. According to Roman law, "Ea quæ lege fieri prohibentur, si fuerint facta, non solum inutilia, sed etiam pro infectis habeantur."[5] This axiom has been accepted by canon law and its substance can be found in the following *regula iuris*: "Quæ contra ius fiunt debent utique pro infectis haberi."[6] *Valid* juridical acts are performed with their essential elements as well as with those required by positive law; they produce juridical effects. *Nonexistent* acts are those that are lacking an element or one the elements required by positive law; they lack juridical effect. The acts are juridical in intention but not juridical per se, and, in fact, they cannot bring about juridical effects. *Invalid* or *null acts* are those that do not lack any of their essential elements but only lack one of the formalities required by positive law or one non-essential element; positive law denies juridical effects to these acts.

5. *C* 1, 14, 15.
6. Reg. 64, R.I. in VI.

124 **§ 1. Ad validitatem actus iuridici requiritur ut a persona habili sit positus, atque in eodem adsint quae actum ipsum essentialiter constituunt, necnon sollemnia et requisita iure ad validitatem actus imposita.**

§ 2. Actus iuridicus quoad sua elementa externa rite positus praesumitur validus.

§ 1. For the validity of a juridical act, it is required that it be performed by a person who is legally capable, and it must contain those elements which constitute the essence of the act, as well as the formalities and requirements which the law prescribes for the validity of the act.

§ 2. A juridical act which, as far as its external elements are concerned, is properly performed, is presumed to be valid.

SOURCES: §1: c. 1680 §1; SCCouncil Resol., 17 maii 1919 (*AAS* 11 [1919] 382–387)

CROSS REFERENCES: cc. 39, 65, 146, 140–150, 171, 181, 638, 643, 647–648, 656, 721, 1584

COMMENTARY

Michel Thériault (†)

Following the practice of legal codes, civil or canonical, c. 124 does not define what a juridical act is in canon law, but concentrates on listing the three factors necessary for the valid performance of a juridical act (§1): 1) on the part of the person or agent, legal capacity; 2) on the part of the act, its essential elements, as well as 3) the formalities required by positive law. These factors are not all of the same nature or importance. Indeed, two factors are always required for the validity of every juridical act, i.e., legal capacity and the constitutive elements of the act. As for the formalities required by positive law, they are not necessarily required for every juridical act. For example, a verbal contract between two adults who are *sui compotes* is per se valid, even if there are no formalities established by positive law for concluding such a contract; the problem, which is another question, is proving in the external forum that such a contract existed.

Legal capacity is defined as the requirement that the physical person can perform a human act, fulfils the basic requirements of the law as well as the specific ones to the act to be performed, and has the right or legal competence to act. In this definition, "human act" supposes the exercise

of intelligence and will, as well as that the act performed be, consequently, free, conscious, and responsible. An example of "basic requirements" which must be fulfilled would be those of minimum canonical age for marriage. An example of the "legal competence to act" would be when the bishop cannot dispense from a law even if he has the right to do so because the dispensation has already been granted by another competent authority. A necessary corollary is that the act must have an adequate object or projected result, which is simply common sense: a contract to buy and sell a house cannot exist if the alleged seller does not own a house.

As for the *essential* or *constitutive elements* of the act, it is difficult to define them satisfactorily in a positive way. One can certainly say that these are elements required by the nature of the act, doctrine, tradition or a combination of these factors in order for the act to be a juridical act. This seems to be tautological. So, for once, a negative definition may be clearer: that without which the act in question does not exist. Can one become a member of an institute of consecrated life without making profession? No, the religious profession of the evangelical counsels is of the essence of consecrated life whatever mode of commitment is chosen. Can there be a contract to buy and sell, and therefore an exchange of rights (the right to the good being sold, the right to the price agreed on) with only one party? No, because one cannot conclude a contract with himself.

If two persons do not speak the same (legal) language, no juridical link is created: if A believes that an agreement is being concluded with B to buy and sell some goods while B only promises to deliver the goods later, no juridical act is performed (A and B are not in agreement on the same object: for A, it is buying and selling; for B it is the promise of a donation). For juridical persons, the principles of legal capacity are the same, *mutatis mutandis.* Obviously, juridical persons act through the agency of physical persons. Therefore, on the one hand, constitutions, statutes or by-laws will have to state who may act in the name of the juridical person and for what purposes (sign contracts, issue checks, etc.) and, on the other, these physical persons will have to act within the parameters of their responsibilities and not *ultra vires.*

The *formalities* required by positive law can be of various kinds. The canon, of course, concentrates only on those that are required by positive law for the *validity* of the act, in order that the act bring about an effect in the life of the Church. These formalities can be intrinsic to the nature of the act (e.g., marriage consent can certainly have been exchanged between putative spouses but the marriage bond will have no juridical effect in public law because the consent will not have been expressed according to the form established by the law) or to the manner of performing it (e.g., the bishop can certainly want to remove C from his office as a parish priest but he cannot validly invite him to resign, threatening eventually to remove him, without indicating the reasons on which he bases his request). The formalities can also be extrinsic to the act or to the manner of

performing it (e.g., before erecting a parish, the bishop must consult the presbyteral council). The nullity of an act performed without fulfilling the required elements of c. 124 can be declared by a judge or by a competent administrative authority, both *ex officio*, but also following a hierarchical recourse (cc. 1732–1739) or a recissory action.[1]

Paragraph 2 establishes a presumption of law (*præsumptio iuris*, c. 1584) in favor of the validity of the act, if the external characteristics of the act are in place. The act is considered valid until there is proof to the contrary. The burden of proof lies with the one who challenges the validity of the act. It is for that person to show that the agent did not have the legal capacity to act, that one or the other constitutive elements of the act was absent or that one or the other formality required for the validity of the act was not fulfilled.

1. Cf. F. Roberti, *De processibus*, vol. I, *De actione—De praesuppositis processus et sententiae de merito*, 4th ed., in *Civitate Vaticana* 1956, nos. 268–269, pp. 619–623; M. Lega, *Commentarius in iudicia ecclesiastica*, vol. I (Rome 1938), pp. 410–413.

125 **§ 1. Actus positus ex vi ab extrinseco personae illata, cui ipsa nequaquam resistere potuit, pro infecto habetur.**

§ 2. Actus positus ex metu gravi, iniuste incusso, aut ex dolo, valet, nisi aliud iure caveatur; sed potest per sententiam iudicis rescindi, sive ad instantiam partis laesae eiusve in iure successorum sive ex officio.

§ 1. An act performed as a result of force imposed from outside on a person who was quite unable to resist it, is regarded as not having taken place.

§ 2. An act performed as a result of fear which is grave and unjustly inflicted, or as a result of deceit, is valid, unless the law provides otherwise. However, it can be rescinded by a court judgment, either at the instance of the injured party or that party's successors in law, or ex officio.

SOURCES: §1: 103 §1
§2: c. 103 §2

CROSS REFERENCES: cc. 17, 188, 643, 656, 735, 1098, 1103, 1191, 1200

COMMENTARY

Michel Thériault (†)

Canons 125–127 deal with the circumstances affecting the person who performs a juridical act: irresistible force (c. 125 §1), grave fear, deceit or fraud (c. 125 §2), ignorance or error (c. 126), and the consent or advice as a prerequisite to the act (c. 127).

Canon 125 §1 deals with irresistible force, but not of any particular type of force. Force has to be applied by an action external to the person performing the allegedly juridical act; in other words, it is a question of physical force or coercion. Thus, c. 125 §1 clarifies c. 103 §1 of the *CIC*/1917 by stating that the force has to be such that the agent cannot at all resist it (*nequaquam*), that the force is absolute and not relative. (Relative force means that one could resist it in some fashion.) From this perspective, the presumably juridical act performed by the agent is not *juridical* per se or in fact. It has no juridical effect because it is not a human act. The agent lacks the freedom to act according to his knowledge and intelligence; he also lacks will. This act is therefore nonexistent: the material elements of the act do not constitute a juridical act in themselves.

Paragraph §2 proceeds differently. For the legislator, the act performed under the influence of fear (violence or moral or psychological fear) or of deceit is in principle valid, except when the law establishes otherwise. (These exceptions will be dealt with later.) Fear and deceit are circumstances that affect the juridical act without necessarily taking away its character of being a human act, and therefore, without necessarily invalidating it.

Fear attacks the will. However, as is evident, it is not true that fear takes away all manifestation of the will or the freedom to perform the act. If one proves a total lack of freedom, the act is null and void by the law itself and this would be declared by the judge. Besides, the second part of §2 establishes precisely that a judicial action for nullity, a recissory action, can be begun against the presumably juridical act by the party that alleges injury, its legal successors (e.g., the heirs) or by the promoter of justice or the ecclesiastical superiors of individuals or of juridical persons. The action will have to prove that the act performed out of fear must be annulled because fear has sufficiently taken away the freedom of the agent, taking into account the nature and importance of the act, so that the annulment is justified. The question here is not of a declaration of nullity *ex tunc*, but of an annulment *ex nunc*. The act is per se valid but the judge considers that, taking all circumstances into account, it must be quashed.

But one cannot petition for the annulment or rescission of just any act performed out of fear. The fear must be *grave*, either absolutely (for anybody) or relative (only for the person who is subjected to it). Grave fear means that the agent reacts by performing the act (therefore, he *wills*) as a consequence to the credible threat of serious harm to him or to her. (If the threat is not credible, it is not a true threat.) The fear must be *unjust*. Indeed, some fear can be just, used by someone who has a right to do so (though, from some other aspects, to use fear may indicate a lack of prudence or not be opportune). For example, a religious superior can threaten a religious with a canonical penalty in order to oblige him to perform some juridical acts; or a person may threaten another with an action for breach of contract if that other person does not fulfil his or her obligations under the contract.

Deceit or *fraud* does not directly attack the will but the intelligence or, in other words, knowledge, though knowledge then determines the will, of course. The one who is responsible for the deceit deliberately hides certain facts or states as true things that are false and that he knows are false in order to persuade another to act in a certain way. Therefore, the act must have been performed as a result of deceit. In the same way as for fear, the act is per se valid at the outset but is voidable.

The canon states that acts performed as a result of fear or deceit are valid "unless the law provides otherwise." Therefore, the exception mentioned in c. 125 §2 is applied in certain cases. The following acts are invalid, not valid and voidable, if they are performed as a result of grave fear

or of deceit: voting (c. 172 §1, 1°); resigning from an ecclesiastical office (c. 188); admission to the novitiate in a religious institute (c. 646 §1, 4°); religious profession (c. 656, 4°); admission into a society of apostolic life (c. 735 §2); marriage consent (cc. 1098 et 1103); a vow (c. 1191 §3); and an oath (c. 1200 §2).

Let us also add that acting under the compulsion of grave fear can, within certain limits, exempt one from a canonical penalty (c. 1323, 4°).

126 **Actus positus ex ignorantia aut ex errore, qui versetur circa id quod eius substantiam constituit, aut qui recidit in condicionem sine qua non, irritus est; secus valet, nisi aliud iure caveatur, sed actus ex ignorantia aut ex errore initus locum dare potest actioni rescissoriae ad normam iuris.**

An act is invalid when performed as a result of ignorance or of error which concerns the substance of the act, or which amounts to a condition sine qua non; otherwise it is valid, unless the law provides differently. But an act done as a result of ignorance or error can give rise to a rescinding action in accordance with the law.

SOURCES: c. 104

CROSS REFERENCES: cc. 188, 1096–1097, 1099, 1323–1325

COMMENTARY

Michel Thériault (†)

Ignorance is, in a certain sense, a negative state. It is an habitual state in which the subject has no knowledge of this or that object; therefore, no judgment can be passed. For example, if I do not know that a red light means that I am forbidden to cross the street, I am not able to exercise my cognitive function and decide therefore to pass judgment and perform an act of will, either to respect the red light and wait for the green light, or to break the law and suffer the consequences (receiving a ticket, risking an accident or both). The most I have done in this case is to *suppose*, implicitly, that I could cross the street on a red light without truly deciding anything.

Error, however, is a positive state. The subject passes judgment on an object and this judgment brings about a decision of the will. But it is a false act because the evaluation of the object by the intelligence does not correspond to objective truth.

The error is one *of law* if it concerns the law, or one *of fact* if it concerns a fact to be evaluated. It is *substantial* if it concerns the essential elements of an act, or *accidental* if it concerns secondary elements. The error is *antecedent* if it is the cause of the act, in the sense that if the subject admits being in error, he does not perform the act and, therefore, the act is performed *because* of the error; or *concomitant*, in the sense that

the subject acts even knowing he was in error, therefore, the act is performed *with* error.[1]

It is not easy in daily life to distinguish ignorance from error. Indeed, ignorance often brings about an error or an erroneous judgment, either of which inevitably influences the will of the agent.

The canon says in fact that it is the substantial and antecedent error that invalidates the act. Since the act must be *informed* in order to be a human act, it follows logically that substantial error brings about nullity. The same holds for ignorance. The canon adds that if the error or ignorance revolves around a condition *sine qua non* of the act, a circumstance whose presence is required for the existence of the act itself, the act is null. One can also look at marriage law (c. 1097 §2). An example can be given in another subject matter: if the parish priest buys some stoles and chasubles because he was told that they had been designed by a very famous artist and he learns, after he receives them, that the artist in question did not design them, the sales contract is invalid in canon law. (It is also possible that the error may have been caused by deceit on the part of the dealer.) In this example, the parish priest had passed judgment in good faith and had bought in good faith *because* of the reputation of the artist (that is the condition *sine qua non*).

Other canons mention that some acts performed as a result of error are null: resignation from an ecclesiastical office (c. 188) and marriage (c. 1097). Ignorance may, in certain circumstances, bring about the invalidity of a marriage (c. 1096).

Although the other types of acts performed as a result of ignorance or error are valid, they may be quashed following a recissory action, considering the importance of the act and its negative consequences.

One should not forget also the effects of error and ignorance in penal law (cc. 1323–1325).

1. Cf. G. MICHIELS, *Principia generalia de personis in Ecclesia: commentarius libri II Codicis juris canonici, canones praeliminares 87–106*, ed. altera penitus retractata et notabiliter aucta (Paris-Tournai-Rome 1955), p. 651.

127 **§ 1. Cum iure statuatur ad actus ponendos Superiorem indigere consensu aut consilio alicuius collegii vel personarum coetus, convocari debet collegium vel coetus ad normam can. 166, nisi, cum agatur de consilio tantum exquirendo, aliter iure particulari aut proprio cautum sit; ut autem actus valeant requiritur ut obtineatur consensus partis absolute maioris eorum qui sunt praesentes aut omnium exquiratur consilium.**

§ 2. Cum iure statuatur ad actus ponendos Superiorem indigere consensu aut consilio aliquarum personarum, uti singularum:

1° si consensus exigatur, invalidus est actus Superioris consensum earum personarum non exquirentis aut contra earum vel alicuius votum agentis;

2° si consilium exigatur, invalidus est actus Superioris easdem personas non audientis; Superior, licet nulla obligatione teneatur accedendi ad earundem votum, etsi concors, tamen sine praevalenti ratione, suo iudicio aestimanda, ab earundem voto, praesertim concordi, ne discedat.

§ 3. Omnes quorum consensus aut consilium requiritur, obligatione tenentur sententiam suam sincere proferendi atque, si negotiorum gravitas id postulate, secretum sedulo servandi; quae quidem obligatio a Superiore urgeri potest.

§ 1. When the law prescribes that, in order to perform a juridical act, a superior requires the consent or the advice of some college or group of persons, the college or group must be convened in accordance with can. 166, unless, if there is question of seeking advice only, particular or proper law provides otherwise. For the validity of the act, it is required that the consent be obtained of an absolute majority of those present, or that the advice of all be sought.

§ 2. When the law prescribes that, in order to perform a juridical act, a superior requires the consent or advice of certain persons as individuals:

1° if consent is required, the superior's act is invalid if the superior does not seek the consent of those persons, or acts against the vote of all or any of them;

2° if advice is required, the superior's act is invalid if the superior does not hear those persons. The superior is not in any way bound to accept their vote, even if it is unanimous; nevertheless, without what is, in his or her judgment, an overriding reason, the superior is not to act against their vote, especially if it is a unanimous one.

§ 3. All whose consent or advice is required are obliged to give their opinions sincerely. If the seriousness of the matter requires it, they are obliged carefully to maintain secrecy, and the superior can insist on this obligation.

SOURCES: § 1: c. 105, 2°
§ 2: c. 105, 1°; SCCouncil Resol., 13 nov. 1920 (*AAS* 13 [1921] 43–46); *SCCong* Litt. circ., 25 ian. 1973, 8
§ 3: c. 105, 3°

CROSS REFERENCES: cc. 10, 15, 115, 166, 442, 461, 485, 494, 500, 567, 590, 638, 656, 665, 686, 689, 690, 697, 858, 1018, 1027, 1222, 1263, 1277, 1295, 1400, 1673, 1722, 1732–1739, 1742, 1745, 1750

COMMENTARY

Michel Thériault (†)

This canon substantially repeats what c. 105 of the *CIC*/1917 stated, but in a better arrangement, in a clearer way, and with a greater precision.

The canon speaks of a *superior*, a term which includes diocesan bishops and those who are their equivalent in law, male and female superiors in institutes of consecrated life and societies of apostolic life, interim substitutes, vicars and delegates of the above-mentioned office holders. In short, the *superior* is, in the context of c. 127, *any competent ecclesiastical authority.*

Though these superiors do enjoy a lot of discretionary power in the fulfilment of their duties, the legislator has established that, in specific circumstances, they need the advice or the consent of certain bodies or individuals before acting. These requirements exist out of common sense, to help the superior avoid hasty or erroneous decisions in delicate cases, or in order to apply the ecclesial principles of co-responsibility and participation by ensuring wider cooperation in the decision-making process from the persons consulted.

Consent, in this context, means that the superior cannot act validly if the bodies or persons consulted do not agree with the projected decision. (However, even if the consent in question is received, the superior can change his mind and drop the plan for which consent had been asked.) *Advice* is a simple expression of opinion which, formally, leaves the superior free to act or not to act, and also free to act validly against the advice given. (Clearly, the superior will have to weigh seriously the reasons that would cause him to act contrary to the advice received.)

1. The canon serves as a vehicle for quite a number of norms. Paragraph 1 begins by speaking of a *college* or a *group*. A *college* is a collegial juridical person in the sense of c. 115 §2 (e.g., the cathedral chapter, the religious chapter, the college of consultors). A *group* is either a noncollegial juridical person (e.g., the fabric of a parish, cf. c. 115 §2) or a group of persons not erected as a juridical person (e.g., the presbyteral council, the finance committee, the general or provincial council in a religious institute, the council of a major seminary).

The canon speaks of a *convocation* assembled according to c. 166. It seems that the reference regards only §1 of c. 166 (i.e., for the mode of convocation, all the members must be individually convoked and receive an agenda), and that the norm of §2 of c. 166, on the failure to convoke a member which may justify a recissory action, does not obtain in the case of a convocation required according to c. 127. If there is a convocation, it must be followed by a *meeting* of the members, all in the same place. *Individual* telephone contacts between the superior and each member of the college or group in turn does not fulfill the objective of the law, because the persons consulted cannot discuss together. Such a "meeting" would be invalid, as well, of course, would be the juridical acts that would result from it.[1] On the other hand, a *teleconference* formally convoked (with an agenda, etc.) fulfills the objectives of the law because the important value that the law promotes, the expression and exchange of opinions, is in fact supported by such a procedure. The *same place* that is mentioned above is not physical but moral, or rather, technological or electronic: each member is at a telephone and can converse with the superior as well as with all the others. (If there is a vote, it need not be cast verbally over the telephone, but by mail or even by fax, but this is another question.) Those who interpret the law today are products of their time and understand that it may be difficult and expensive to gather a group together for a meeting. In fact, it is often impossible for all to be present. In the case where only *advice* is required, c. 127 §1 is more flexible: if particular law or proper law (e.g., the constitutions of a religious institute) establishes other modes of convocation or other forms of meeting, such law has precedence over the general law of the *CIC*.

The canon also speaks, in the case of consent, of the *absolute majority of those present*, which means more than the majority of votes. The expression "of those present" means that the number of abstentions is counted in the total because those members were present; in a certain sense, abstentions are practically equivalent to negative votes. If the canon had said "of those present and voting," the number of abstentions would not count in the total. Here is an example: the religious chapter has 50 members. Only 35 are actually present at the meeting; when it is time to vote, there are 16 yeas, 13 nays and 6 abstentions. The absolute majority

1. Cf. A. CORIDEN, *An Introduction to Canon Law* (New York 1991), p. 153.

(more than half the votes) of the members present and voting (16 + 13 = 29) means that on 29 ballots cast, 15 are needed, i.e., more than half (29 x .5 = 14.5) for the motion put to the vote to be carried. The absolute majority (more than half the votes) of the members present (16 + 13 + 6 = 35) means that on 29 ballots cast, 18 are needed, i.e., more than half (35 x .5 = 17.5) for the motion put to the vote to be carried. It is this last option that the *CIC* has chosen.

It does not seem correct to say that the members are required to vote, (i.e., that they do not have the right to abstain from voting), and that the superior can even order them to vote by precept (c. 49). Such an action on the part of the superior would be a form of force and could even bring the member to simulate having an opinion (that it be positive or negative is not important). It would be a form of violation of conscience. Indeed, even if one is a member of a group convoked in order to give or, as the case may be, refuse consent, and has a duty to express one's opinion, one can express whichever opinion one wants during the meeting but, at the end, feel incapable of coming to a decision, even if one has had all the pertinent information in hand. One can therefore vote "yea" or "nay," but also abstain from coming to a decision, which means that one is "incapable of deciding."

In the case of *advice*, there are fewer formalities. The advice given is valid irrespective of its content, as long as the superior has asked for it from *all the members*.

The CPI's response dated May 5, 1985 stated that a superior needing consent according to c. 127 §1 cannot vote with the members of his council, not even to break a tie. Strictly speaking, this is logical. In fact, the superior asks for the consent of a group of advisers. He is not a member of the group and does not give advice to himself (and consent even less!). However, it is publicly known that many institutes of consecrated life and societies of apostolic life have established a different norm in their proper law, approved by the Holy See, and that in this case, the superior can vote with the council. It is also well known that the Congregation for Institutes of Consecrated Life and for Societies of Apostolic Life does not agree with the interpretation given by the CPI, and feels that there is at least a doubt of law on the applicability of the interpretation on institutes of consecrated life and societies of apostolic life.[2] Some authors share this opinion, and the controversy continues with no resolution in sight.

2. Paragraph 2 deals with the advice requested from *individuals* who do not per se form a body of advisors. For example, c. 524 says that the bishop is to consult the vicar forane or dean before appointing a parish priest; c. 1292 §1 requires that the diocesan bishop obtain the consent of in-

2. Cf. J. TORRES, "Interpretazione autentica dei canoni riguardanti la vita consacrata: commento," in *Informationes SCRIS* 14 (1988), pp. 276–281.

terested parties in some cases of alienation. The norms are fundamentally the same as those found in §1: without the required consent, the superior acts invalidly; without having asked for advice, he acts invalidly.

It is evident that the last part of c. 127 § 2, 2° ("Superior, licet... ne discedat"—"The superior ... unanimous vote") is not where it should be. It is applicable as well to §1 in cases of advice. This passage should have been in a separate paragraph (numbered §3 or §4).

3. Paragraph 3 does not seem in opposition to the opinion given above, according to which a member has the right to abstain from voting. That a member be required to express his opinion in the discussion, yes; that he be required to express himself formally at the end of the discussion with a juridical act like casting a ballot, no. Furthermore, if the canon asks that the members express their opinions sincerely, this means that the superior cannot force someone to vote, because this person, not feeling able to do so, would thus act insincerely. It would be a form of simulation *secundum quid*. However, as a corollary to the members' obligation to express their opinion sincerely, the superior has the obligation to present to the members all the facts and other elements necessary to inform them sufficiently.

Taking into account the nature of the subjects discussed, the superior has the right to insist that secrecy be kept concerning the discussions.

128 **Quicunque illegitime actu iuridico, immo quovis alio actu dolo vel culpa posito, alteri damnum infert, obligatione tenetur damnum illatum reparandi.**

Whoever unlawfully causes harm to another by a juridical act, or indeed by any other act which is malicious or culpable, is obliged to repair the damage done.

SOURCES: c. 1681

CROSS REFERENCES: cc. 221, 982, 1062, 1098, 1281, 1347, 1357, 1401, 1457, 1515, 1521, 1649

COMMENTARY

Michel Thériault (†)

Canon 128 only puts into the form of a norm of positive law a basic principle of natural justice: the reparation of damage caused. Canon 1681 of the *CIC*/1917 provided for the reparation of damage, but only if it were caused by an act that was null. The *CIC* rightly chose to widen the scope of the norm and to make it a norm of general application, which is logical and just.

If a juridical act illegitimately causes some damage to another, the physical person who has done the damage, either in his own name or as the agent of a juridical person, is required to repair the damage. If a juridical person is juridically responsible for some damage that can be repaired with financial compensation, it is for the juridical person to make payment and, then, if it so chooses, to claim reimbursement from the physical person who is in fact responsible for the damage, whether due to negligence, incompetence or otherwise.

One of the principles regarding reparation of damage is that this reparation is to be at least as public as was the damage. There must be a relation of proportionality between the damage and the reparation.

However, damage caused *legitimately* is not subject to a sanction. For example, the decree removing a parish priest can indeed damage his reputation if the process is, in fact, publicly known. But if the procedure of removal has been followed correctly, the damage is a secondary and involuntary effect, and the parish priest, in not deciding to resign, knew that he was risking removal and a tainted reputation.

The "any other act" goes beyond the parameters of c. 128 and should have been placed somewhere else, in a separate canon, probably somewhere around cc. 209–210. It refers to any action in the sense of c. 1401, 1°, i.e., introduced in an ecclesial context (which, therefore, does not come primarily under civil jurisdiction). The "other act" causes damage because of *malice* or *culpability*. In the context of c. 128, the Latin *dolus* must be translated by "malice" and not by "deceit," because otherwise, the scope of c. 128 would be too narrow. The canon originates in Roman law (*Lex Aquilia*, 286 B.C.). One of the basic elements of that law is the *mens rea*, the "bad intention," malice. (The concept of "*dolus*/deceit" present in c. 1098 would not be applicable to c. 128, i.e., to cheat, to mislead, deliberately to create false impressions *intuitu matrimonii*, to be underhanded or guileful, although all of this corresponds to the original concept of *dolus*.) *Dolus* can have various meanings depending on the context, and the comparison between cc. 128 and 1098 is a good illustration of that. Canon 128 conveys the broader concept of *dolus*, which consists of fraud and malice: the bad intention is the basic criterion, and c. 1098 conveys the original, narrower concept of trickery and fraud.[1] In the context of canonical vocabulary, "culpability" here means negligence.

The *damage* caused is not only monetary or even moral (reputation). The canon does not specify, and so it covers all types of damages: monetary, physical, material, moral, psychoemotional, spiritual, etc. The actions that can cause damage are also as varied: breach of contract, physical injury, criminal act, the illegal or inappropriate exercise of administrative authority, the unjust infliction of a penalty, a homily containing slanderous statements, etc.

There are three *methods* of seeking reparation: the action for damages (cc. 1729–1731); an out-of-court settlement (cc. 1713–1716); and hierarchical recourse (cc. 1732–1739), followed, as the case may be, by a contentious-administrative recourse to the Apostolic Signatura. The Signatura can also deal with damages caused by an act which is being challenged by the recourse, *PB* 123 §2.

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1. Cf. M. J. García Garrido, *Derecho privado romano*, I, *Instituciones*, 3rd ed., rev. (Madrid 1985), pp. 288–289; idem, *Dicionario de jurisprudencia romana*, 3rd ed. (Madrid 1988), *s.v.* "dolus"; A. Berger, *Encyclopedic Dictionary of Roman Law* (Philadelphia 1953), *s.v.* "dolus."

TITULUS VIII
De potestate regiminis

TITLE VIII
Power of Governance

INTRODUCTION

Antonio Viana

1. The *CIC* devotes an independent title to the power of governance within the book corresponding to general norms. These canons contain important differences with respect to the norms of the *CIC*/1917, which dealt with this subject within the general canons dedicated to clerics, under the title of *De postestate ordinaria et delegata*. In this commentary we will limit ourselves to presenting some observations regarding the meaning of the present title *De potestate regiminis*.

2. The canons of this title show a certain preference for the use of the term *potestas regiminis* over the more traditional term *potestas iurisdictionis*. One of the reasons for this preference consists in the appropriateness of differentiating the canonical concept of jurisdiction with respect to its use in civil law.[1] In some juridical systems, jurisdiction refers, in effect, to judicial power, while the canonical use of the concept also includes the exercise of legislative and executive powers. Even so, the preferential option alluded to does not exclude the use of the word *iurisdictio* on the part of the legislator, as c. 129 § 1 recognizes ("et etiam iurisdictionis vocatur") and other canons of the *CIC* that employ this traditional term (cf. cc. 1417 § 2, 1469 § 1, 1512, 3°).

3. Canons 129–144, which make up title VIII refer fundamentally to various aspects relative to the *exercise* of the power of governance or jurisdiction in the Church, and also include several provisions regarding the basic *organization* of the power of governance (especially in c. 134). They do not intend to resolve, however, the profound questions relative to the origin and founding of the power that exists in the Church by divine institution (cf. c. 129 § 1). It is advisable to keep in mind this observation because the recent canonical doctrine has concerned itself more with the basis of

1. Cf. *Praenotanda* of the *Schema Canonum libri I de normis generalibus* (Vatican City 1977).

the power in the Church than with the principles and provisions of Vatican Council II. It is the frequent use of various expression contained in the texts of the Council that do not always permit an immediate and undifferentiated transfer from the fundamental plane to the level proper of the canonical exercise of the power. Specifically, it is opportune to distinguish between *potestas sacra, munus regendi* and *potestas iurisdictionis* when dealing with the exercise of the power of governance in the Church.

a) The term *sacra potestas* is found in several texts of Vatican Council II and has been very frequently employed by theologians and canonists of our time. The Council especially uses it in *Lumen gentium* 10/b and 18/a. The first of the cited texts is included in the context of the distinction between common and ministerial priesthood: "The ministerial priesthood, for the sacred power it has (*potestate sacra qua gaudet*), forms and governs the priestly community, and produces the Eucharistic sacrifice in the person of Christ and offers it to God in the name of all such community." For its part, n. 18/a, which opens the chapter of *Lumen gentium* devoted to the hierarchical constitution of the Church, states that "the ministers, who possess sacred power (*qui sacra potestate pollent*), are at the service of their brothers, so that all who belong to the people of God and have, therefore, true Christian dignity, by freely following and in an orderly fashion the same end, reach salvation."

These and other similar texts (cf. *LG* 27; *PO* 2, 12) are normally considered expressive of a unitary and hierarchical concept of ecclesiastical power. In the most common interpretation, *sacra potestas* is identified with the pastoral function in the broad sense. It is the power that corresponds to the sacred ministers and more specifically to the hierarchy, because it deals with the power that Christ transmitted to the apostles and their successors so that they would teach, sanctify, and govern the Church in his name. In this sense *sacra potestas* structures the Church as a hierarchical society and is understood as the classical powers of order, jurisdiction, and magisterium.[2] *Sacra potestas* does not, therefore, only express a juridical power, because it also includes the capacity received by the sacrament of order to produce in the name of Christ the supernatural effects bound to the confection and administration of the sacraments and with the preaching of the divine Word.

b) We have stated before that *sacra potestas* includes the triple *munus* of teaching, sanctifying, and governing that was conferred by Christ on the apostles. This functional classification (*munus docendi, sanctificandi et regendi*) is present in the documents of Vatican Council II and partially inspires the system of the *CIC*.[3]

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2. Cf. J. HERVADA, *Elementos de Derecho Constitucional Canónico* (Pamplona 1987), p. 235ff.
3. Cf. *LG* 20ff, *CD* 11ff, and other places cited in X. OCHOA, *Index verborum cum documentis Concilii Vaticani Secundi* (Rome 1967), pp. 317–319. Regarding the *CIC*, cf. esp. Libs. III (*De Ecclesiae munere docendi*) and IV (*De Ecclesiae munere sanctificandi*).

The function of ruling or governing constitutes that dimension of *sacra potestas* which specifically refers to the governance of the Church as a society.[4] Its exercise includes, therefore, "the regulation of the social life of the people of God and the direction, coordination, and control of activities of a public nature."[5] Along with Hervada we can distinguish among various aspects of the *munus regendi* the direction, coordination, and control of public activities; the establishment of the general norms of participation in the life of the Church; the decisions and judgments regarding doctrinal controversies, the spirituality of the faithful and the activities of the institution in its social aspects; the regulation, fostering, and substitution of activities derived from the freedom of the faithful.[6]

c) The *munus regendi* is distinguished also from the power of governance or jurisdiction. The power of jurisdiction refers in the strict sense to the issuing of dispositions, decisions, or mandates that have the virtual quality as recognized by the legal system of juridically binding, externally and internally, the conduct of the faithful. It is a decision-making capacity, necessary for the legal effectiveness of a just social order in the Church and is manifested as legislative, executive, and judicial power, pursuant to the principle of distinction of powers in the exercise of ecclesiastical power (cf. c. 135 § 1).

On the other hand, the function of governance in the broad sense, the *munus regendi*, includes not only juridically binding decisions, but also other non-imperative provisions that intend to promote first the initiative and free membership of those to whom they are intended. This nuance that can seem at first glace somewhat artificial is important considering the particular nature of governance in the Church. The distinction is implicit in the well-know text of *Lumen gentium* 27, devoted to the pastoral function of bishops. There it is said, "Bishops rule, as vicars and legates of Christ, the particular churches that have been entrusted to them, with their advice, exhortations, examples, but also with their authority and sacred power." Advice, exhortation, and example, therefore, can be ways of governing the Church—which obviously does not exclude the opportune binding mandates—but they are not manifestations of power of governance or jurisdiction.

The distinction between power of jurisdiction and governance understood also as subsidiary, help and fostering of activities, is present in the doctrine of the authors[7] and also inspires ecclesiastical legislation.

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4. Cf. W. ONCLÍN, "De potestate regiminis in Ecclesia," in P. LEISCHING-F. POTOTSCHNIG-R. POTZ (Eds.), *Ex aequo et bono. Willibald M. Plöchl zum 70. Geburtstag* (Innsbruck 1977), p. 224.
5. J. HERVADA, *Elementos…*, cit., p. 250.
6. Ibid., pp. 251 and 252.
7. Cf., for example, in dates even closer to the clause of Vatican Council II, the opinions of K. MÖRSDORF, *Munus regendi et potestas iurisdictionis*, and J.A. SOUTO, "El *munus regendi* como función y como poder," published in Code Commission, *Acta Conventus Internationalis Canonistarum* (Rome May 20–25, 1968) (Rome 1970), pp. 199 and 245, respectively.

For example, the canons regarding the Roman Curia contained in the Apostolic Constitution *Pastor bonus* can be recalled. In this pontifical law particular attention has been paid to the new functions of pastoral service attributed to the Roman diacasteries, including the Congregations of the Curia, which are not limited to the exercise of administrative power.[8] Moreover, the need to consult the particular churches and episcopal organizations before important documents of a general character are prepared (cf. *PB* 26 § 1). ais a criterion of governance expressly included in the norms of *Pastor bonus,* This can turn out to be very useful for the reception and efficaciousness of the decisions.

In sum, we can define the power of governance or jurisdiction in the strict sense as an aspect of the function of governance that consists in juridical capacity, of divine institution and ecclesiastical regulation, of directing the social life of the Church according to the supernatural end of its members through the issuing of mandates and legislative, executive, and judicial decisions.

4. The norms contained in the title upon which we comment refer especially to the subjects and basic organization of power of governance (cc. 129 and 134), the juridical distinction and governance of legislative, executive, and judicial powers (c. 131), the public nature of governance (c. 130), the ways of participating in the power of governance (c. 131), and finally, various aspects relative to the exercise of executive power, the juridical governance of the delegation and extinction and substitution of power (cc. 135 § 2ff).

8. Cf. in general the expressions contained in *PB* 13. Also cf. A. VIANA, "La potestad de los dicasterios de la curia romana," in *Ius Canonicum* 30 (1990), p. 93.

129 **§ 1. Potestatis regiminis, quae quidem ex divina institutione est in Ecclesia et etiam potestas iurisdictionis vocatur, ad normam praescriptorum iuris, habiles sunt qui ordine sacro sunt insigniti.**

§ 2. In exercitio eiusdem potestatis, christifideles laici ad normam iuris cooperari possunt.

§ 1. Those who are in sacred orders are, in accordance with the provisions of law, capable of the power of governance, which in fact belongs to the Church by divine institution. This power is also called the power of jurisdiction.

§ 2. Lay members of Christ's faithful can cooperate in the exercise of this same power in accordance with the law.

SOURCES: § 1: c. 196
§ 2: SCCouncil Resol., 14 dec. 1918 (*AAS* 11 [1919] 128–133); Pontificia Commissio pro Russia, Ind., 20 ian. 1930; Signatura Resp. 19 nov. 1947; Pius PP. XII, Alloc., 5 oct. 1957 (*AAS* 49 [1957] 927); *LG* 33; *AA* 24; Signatura Decisio, 11 iun. 1968; SCRSI Rescr. 7 feb. 1969; SCRSI Decr. *Clericalia instituta*, 27 nov. 1969 (*AAS* 61 [1969] 739–740), Secr. St. Facul., 1 oct. 1974; *EN* 73a; SCRSI Rescr., 26 iun. 1978, 3; SCRSI Resp., 21 aug. 1978; *PA* 7, 17

CROSS REFERENCES: cc. 134, 274 § 1, 331, 391, 1421 § 2

COMMENTARY

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1. Canon 129 expresses the solution of the *CIC* to the problem of those who hold power of governance. This provision, *not found in the* norms of the *CIC*/1917, intends to give a practical response to a much deeper problem, especially debated by the authors after the celebration of Vatican Council II. The problem consists in determining with sufficient precision the relationships between the priesthood (common and ministerial) and power in the Church. The question of the subjects of ecclesiastical jurisdiction depends upon it. It seeks to express the meaning of the sacrament of holy orders in relation to the transmission and attribution of power of governance.

2. Traditionally a dual way to attribute public functions in the Church was distinguished: the sacrament of holy orders in its various degrees and the canonical mission. The sacramental path (power of orders) refers to the capacity of producing in the name of Christ the spiritual and sanctifying effects bound to holy orders. The canonical mission (the conferral of an ecclesiastical office, delegation of power) qualifies, for its part, according to the norms provided for the social governance of the Church (power of jurisdiction). This distinction is implicit in no. 2 of the *pen.*

The problem properly consists in determining in what measure holy orders are necessary or sufficient for the holding and the exercise of the power of governance and, in a parallel manner, what is the scope of the canonical mission, of participation in ecclesiastical authority, in the transmission of power. It is a complex issue because of the diversity and breadth of historical, theological, and canonical aspects that are related to it. From a practical point of view, one of the problems that must be resolved in this context is the possibility and scope of the exercise of jurisdiction on the part of laity, meaning here those faithful who have not received the sacrament of holy orders.[1]

It is not possible here to expound the doctrinal debate on the subject in complete detail. In a very summary manner three principal responses to the stated general problem can be made. These solutions are present in the theological and canonical doctrine after Vatican Council II and especially concern *episcopal* power.

In the first response, which is doctrinal, the sacrament of holy orders is the ontological foundation for power of governance or jurisdiction, which is transmitted exclusively through the canonical mission. Other authors point out that power is conferred, in part by the sacrament and in part by the canonical mission, the complementary action of both elements being necessary for a full constitution of power. Finally, another group of authors considers that power is conferred in its entirety by episcopal ordination tied to hierarchical communion, while the canonical mission only concerns the determination of the scope of the exercise of sacramentally received jurisdiction.[2]

These various solutions to the problem of the sacramental foundation of power in the Church were manifested during the preparatory work for c. 129 and are also present in the interpretation of the current law.[3]

1. Cf. in this sense the most accurate expression of the parallel canon in eastern law: "In exercitio potestatis regiminis *ceteri christifideles* ad normam iuris cooperari possunt": c. 979 § 2 *CCEO*.

2. Cf. the summery and bibliography cited by E. Molano, *Introducción al estudio del Derecho Canónico y del Derecho Eclesiástico del Estado* (Barcelona 1984), pp. 120, note 8 and p. 121. For a more complete paper, A. Celeghin, *Origine e natura della potestà sacra. Posizioni postconciliari* (Brescia 1987).

3. Cf. E. Malumbres, "Los laicos y la potestad de régimen en los trabajos de reforma codicial: una cuestión controvertida," in *Ius Canonicum*, 26 (1986), pp. 563–625.

The diversity among the authors is explained, on one hand, by the different concept of "power" that they employ. An opportune distinction is missed on occasion between the terms *sacra potestas, munus regendi* and *potestas iurisdictionis,* which are not perfectly interchangeable (see above commentary on book I, title VIII, *De potestate regiminis*). On the other hand, the interpretation of c. 129 is complicated even more because of the provisions contained in other canons of the *CIC* that make a harmonic solution difficult. Specifically, c. 274 § 1 provides, in the context of the rights and obligations of clerics, that "only clerics can obtain offices the exercise of which requires the power of orders or the power of ecclesiastical governance." In contrast, c. 1421 § 2 provides that "The Bishops' Conference can permit that laypersons also be appointed judges. Where necessity suggests, one of these can be chosen in forming a college of judges." That is to say, there is the possibility that a layperson would be the holder of an ecclesiastical office for the exercise of one of the typical manifestations of power of governance, such as administering justice (cf. c. 135 §§ 1 and 3).

All these facts, tied to the "intentional imprecision" of c. 129,[4] which has not tried to resolve a doctrinally debated question, have caused, we repeat, the absence of an interpretive consensus of the said norm. There are authors who emphasize the *habilitas* of the ordained for jurisdiction (cf. 129 § 1) to the extreme of excluding on principle the remaining faithful from its exercise. In this sense, c. 129 § 2 will permit at most a certain cooperation in the process of formation of the jurisdictional acts (e. g., through participation in consultative organs). Other authors continue to point out, with a greater basis, in my judgment, the real possibilities of jurisdictional cooperation opened by c. 129 § 2.

3. At the same time, that lack of interpretive agreement has caused several uncertainties and hesitations in the special legislation after the *CIc*. Thus, for example, *Pastor bonus* allows in articles 3 §§ 2 and 7 that non-ordained faithful be named members of certain dicasteries of the Roman Curia. Nevertheless, its article 7 provides "that matters requiring the exercise of power be reserved to those in holy orders." It would appear more coherent with the recognition of the possible adscription into the dicastery (collegial organ) of non-ordained faithful as members, not to limit their voting on certain subjects.

4. Canon 129 refers to the "law" (§§ 1 and 2) as a determining source of the holding and exercise of jurisdiction. As Lombardía opportunely observed "dealing with the canonical order, by law must be meant the harmonic conjunction of the current human law in each historical moment, with divine law."[5] Therefore, in the interpretation of c. 129 the reference to the hierarchical organization of the Church established by its Founder

4. P. LOMBARDÍA, *Lecciones de Derecho Canónico* (Madrid 1984), p. 102.
5. Ibid., p. 103.

is necessary, which implies the constitution of capital offices: the Roman Pontiff and the bishops received directly from Christ (the Pope by divine mission, tied to his election and acceptance; the bishops through sacramental and canonical mediation in the Church) the plenitude of the *tria munera* (*docendi, sanctificandi, et regendi*), including power of jurisdiction in its various manifestations (cf. c. 331 and 391). They externally represent Christ, the head of the Church, as visible foundations of unity in the universal Church and in the various particular churches (cf. *LG* 23). Without considering the case of the collegial exercise of supreme power, e.g., through an ecumenical council, what is important to point out now is that, in the case of the Pope and bishops at the head of particular churches, the holding of power of jurisdiction has a capital, original meaning, one not derived or shared with other ecclesiastical authorities. In contrast, dealing with other subjects, power is shared, pursuant to law, through an instrument of ecclesiastical office or else by personal delegations (cf. c. 131). It amounts to saying that the exercise of jurisdiction is communicable by itself.

In this sense, c. 129 § 2 permits various possibilities for cooperation in the exercise of power of jurisdiction, pursuant to law established in the canons corresponding to the various ecclesiastical offices and in the norms that regulate the exercise of the delegation of power.

Both clerics and the other faithful can cooperate in the exercise of power of jurisdiction that originally resided in the capital offices. In the case of non-ordained faithful, nevertheless, the holding of offices and functions that objectively require holy orders or that historically have been attributed to the members of the *ordo clericorum* is excluded.[6] In any case, and this is the principal practical solution in the interpretation of c. 129, it is the divine and human law that establish the personal conditions for holding and cooperation in the exercise of power of governance.

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6. Cf. in J. HERVADA, *Elementos de Derecho Constitucional Canónico* (Pamplona 1987), pp. 212–220, the distinction between functions necessarily, normally, and historically reserved for the *ordo clericorum*.

130 **Potestas regiminis de se exercetur pro foro externo, quandoque tamen pro solo foro interno, ita quidem ut effectus quos eius exercitium natum est habere pro foro externo, in hoc foro non recognoscantur, nisi quatenus id determinatis pro casibus iure statuatur.**

Of itself the power of governance is exercised for the external forum; sometimes however it is exercised for the internal forum only, but in such a way that the effects which its exercise is designed to have in the external forum are not acknowledged in that forum, except in so far as the law prescribes this for determinate cases.

SOURCES: cc. 196, 202; *SAP* Ind., 4 nov. 1927; *SAP* Ind., dec. 1927; *SAP* Rescr., 11 apr. 1962; Princ. 2; *SAP* Rescr., 19 iun. 1970

CROSS REFERENCES: cc. 64, 74, 142 § 2, 508, 976, 1079 § 3, 1080 § 1, 1082, 1357

COMMENTARY

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1. The exercise of power as a juridical phenomenon that exists in the Church as a divine institution binds the faithful in as much as they are considered to be members of a community: the *communitas fidelium.* The peculiar nature of the Church as simultaneously a visible and invisible reality (cf. *LG* 8), however, forces the canonical system to touch not only upon social behavior, but also, upon individual aspects of the faithful person's conscience and behavior that do not have external manifestations.

2. The traditional distinction between the internal and external forum refers to the personal ambit or reach of the power of governance or jurisdiction. It has been frequently argued in the interpretation of this distinction that the external forum is the proper ambit of the law, whereas the internal forum would be the ambit of the faithful person's conscience. An example of this classical manifestation was c. 196 of the *CIC*/1917 that considered the internal forum as "forum conscientiae." Without denying the properly juridical meaning of external forum, we should not, however, reduce the internal forum to the ambit of morality. Furthermore, this conception entails the danger of separation between the Church as a salvific community and the Church as a juridical society.[1] It is evident that ecclesi-

1. A danger already signaled by K. MÖRSDORF: Cf. A. CATTANEO, *Questioni fondamentali della canonistica nel pensiero di Klaus Mörsdorf* (Pamplona 1986), p. 78.

astic dispositions normally bind in conscience independently of whether they are adopted in one or the other forum. On the other hand, this distinction refers to the fact that the power of governance itself is capable of manifesting public effects, by means of juridical acts that can be determined by the habitual means of proof (external forum), or in an occult manner (internal forum), when the *salus animarum* renders the disclosure of these juridical acts unnecessary or even harmful. This is what happens, for instance, in the case of the dispensation of an occult marital impediment. Consequently, we are neither talking about different powers nor the contrast of the external juridic order and the moral order nor about different ambits of the same power of governance, depending on whether the exercise of the power is public or not, in view of the objective needs of the faithful

3. In the present canon, the attempt to make public the habitual exercise of the power of governance that *per se* is exercised in the external forum (especially when one considers the social nature of the Church and the necessary certainty of juridical acts of power) is very important. An exorbitant or unlimited exercise of the power in the internal forum would present numerous problems, especially as far as the difficulty of proof of the distinct acts is concerned. Thus, the excessive proliferation of the *latae sententiae* penalties in the *CIC*/1917 together with the broad faculties granted to confessors for the remission of the penalties, promoted an excessive employment by confessors in the canonical penal system to the detriment of ecclesiastical judges.[2]

Due to these problems, the directive principle no. 2 of the reform of the *CIC*/1917, approved by the episcopal synod of 1967, was expressly aimed to promote the necessary coordination of both forums.[3]

Consequently it is the norm that the power of governance provide juridical efficacy in both forums. In specific cases, however, and when the *salus animarum* requires it, it is possible that this effect not be recognized externally. It is also possible (this is how it is provided for in the *in fine* of c. 130) that the law may expressly provide in some specific case that the power exercised in the internal forum may have juridical consequences in the external forum. This is the case, for instance, in the regulation provided for by c. 1082.

4. The power of governance for the internal forum can be sacramental or extra-sacramental. In the first case, it is exercised through the sacrament of penance (cf. cc. 508, 1079 § 3, 1357, etc.); in the second case, the power of governance is exercised without publicity, but not by means of sacramental confession (i.e., the dispensation of an occult marital impediment granted for the internal forum. Cf. cc. 1079 § 3, 1080 § 1, 1082).

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2. Cf. ibid., pp. 102–104.
3. Cf. *Comm.* 1 (1969), p. 79.

5. The distinction between internal and external forum is especially relevant in the ambit of matrimonial law (mainly in the dispensation of occult impediments) and of penal law (remission of penalties in the internal forum). In the context of ecclesiastical organization, it is used as a principle for the exercise of the power, and also has some consequences as far as the competencies attached to the ecclesiastic offices is concerned. It is a presumption that whoever has a title of power of governance, be it ordinary or delegated, can exercise it in both in the internal and external forum, unless the law or the nature of the matter establishes otherwise. This general presumption is deduced from the former law, provided for in c. 202 *CIC*/1917, and from the general criterion implicit in the present c. 130. It is obvious that this presumption is not applied in those cases in which the power is granted only for the internal forum; in other words, we cannot presume that the power granted for the internal forum is also valid for the external forum (cf. c. 74).

6. Finally, it should be noted that there is an existence of a minimal organization surrounding the activities of the internal forum. In the diocesan ambit, the canon penitentiary (or any other priest so designated, wherever there is not a chapter) is competent *vi officii* to absolve in the sacramental forum *latae sententiae* censures that are neither declared nor reserved to the Holy See (cf. c. 508; cf. also c. 566 § 2 for the singular faculty of the chaplain in this same sense). In the universal ambit, "For the internal forum, whether sacramental and non sacramental, [the Apostolic Penitentiary] grants absolutions, dispensations, commutations, validations, condonations, and other favors (*PB* 118).

131 **§ 1. Potestas regiminis ordinaria ea est, quae ipso iure alicui officio adnectitur; delegata, quae ipsi personae non mediante officio conceditur.**

§ 2. Potestas regiminis ordinaria potest esse sive propria sive vicaria.

§ 3. Ei qui delegatum se asserit, onus probandae delegationis incumbit.

§ 1. Ordinary power of governance is that which by virtue of the law itself is attached to a given office; delegated power is that which is granted to a person other than through an office.

§ 2. Ordinary power of governance may be proper or vicarious.

§ 3. One who claims to have been delegated has the onus of proving the delegation.

SOURCES: § 1: c. 197 § 1; SCDS Decr. *Catholica doctrina,* 7 maii 1923, 4 (*AAS* 15 [1923] 392); CodCom Resp. IV, 26 mar. 1952 (*AAS* 44 [1952] 497)
§ 2: c. 197 § 2; CodCom Resp. IV, 26 mar. 1952 (*AAS* 44 [1952] 497)
§ 3: c. 200 § 2

CROSS REFERENCES: cc. 134, 136ff, 145 § 1

COMMENTARY

Antonio Viana

The distinction made in c. 131 § 1 presents the instruments envisioned by the canonical system for the transmission of and participation in the exercise of the power of governance. On the one hand, the channel is the ecclesiastical office; on the other hand, the instrument is the delegation of power. These are the typical manifestations of the canonical mission.

1. *Ordinary power*

In the legal concept of ordinary power one can distinguish two main characteristics. In the first place is the connection of power with an office. Any manifestation of ordinary power requires the proper title of an

ecclesiastical office (cf. c. 145), although not all ecclesiastical offices entail the exercise of the power of governance.

Secondly, it is characteristic of ordinary power that the connection of power to the office be directly established by the law, *ipso iure*. By "law," we mean here objective law, in other words, divine and human norms that constitute the diverse ecclesiastical offices. The appointment of the officeholder by the authority does not properly grant the ordinary power, which is already objectively connected to the office by the norms that constitute it. This is why the authority that appoints cannot freely alter the proper characteristics of an office endowed with ordinary power (rights of the titleholder, obligations proper to the position, objective competencies) unless the authority is competent to establish and modify the constitutive norms.[1]

The juridical system specific to ordinary power is established with the regulation of each office. Nonetheless, the *CIC* determines some aspects that constitute the general juridical system. As a result of how diverse the extent and content of the power of diverse ecclesiastical offices are, the *CIC* establishes a prior classification identifying some subjects of ordinary power with the terms "ordinary, "local ordinary," and "diocesan bishop" (cf. c. 134). Other dispositions of the *CIC* acknowledge the fact that ordinary power can be delegated within certain limits (cf. cc. 135 §§ 2 and 3, 137). There are also some general norms about the sphere of exercise, interpretation and suspension of ordinary power (cf. cc. 136, 143 § 2, 138, 139). In a manner that parallels its acquisition, the exercise of ordinary power ceases when there is cause for loss of office provided by the canonical system (cf. c. 143 together with cc. 184ff).

a) *Proper ordinary power*

The classification of ordinary power into proper and vicarious has not always been peaceful, most of all due to the historical discussions about certain aspects that present similarities between vicarious and delegated power.[2] Today, however, one can consider the matter as definitively settled with the division recognized in cc. 197 § 2 *CIC*/1917 and 131 § 2 *CIC*.

This distinction is of interest not only because it implies certain differences in the juridical system of one or the other type of ordinary power, but also, and in a broader sense, in as much as it is an attribute of the hierarchical structure of the Church. It expresses a particular distribution of

1. Cf. G. MICHIELS, *De potestate ordinaria et delegata* (Tournai 1964), p. 122; A.M. STICKLER, "Le pouvoir de gouvernement. Pouvoir ordinaire et pouvoir délégué," in *L'Année Canonique* 24 (1980), p. 71. Cf. also here the special case of c. 145 § 2 *in fine*.

2. Cf. M. CABREROS DE ANTA, "Concepto de potestad ordinaria y delegada," in *Estudios Canónicos* (Madrid 1956), pp. 200ff.

ecclesiastical offices based on the title or theological and juridical justification of the power attached to the most important ecclesiastical offices.

Traditionally, proper ordinary power is defined as that which is exercised in one's own name as opposed to vicarious power which is exercised on someone else's behalf. This definition is correct, but it must be completed by referring to the structural relevance of the distinction between proper and vicarious power. Indeed, this distinction parallels the distinction between *capital* (or principal) and *auxiliary* ecclesiastical offices that was disseminated especially by Klaus Mörsdorf and other representatives of the German school.[3] In reality, proper power is that which is attached *ipso iure* to the offices which have capital status. Let us take a brief look at this aspect.

In accordance with the hierarchical structure of the Church, established by its divine Founder and corresponding to a certain extent to the image of the Mystical Body of Christ, some offices receive the mission of representing externally Christ-Head and exercising in his name functions of capital status over the other members (*viatores*) of the Mystical Body. The prototype of these capital offices is naturally constituted by the Roman Pontiff and the bishops that preside over the particular churches. By divine law they occupy a juridical, capital position, because they are proper titleholders, although always in the name of Christ, of the functions of teaching, sanctifying, and ruling the faithful that in a moment of history belong to the universal Church and to the different particular churches. More specifically, the power of governance that they exercise is proper, because it neither derives from any human authority, nor is it a participation in that which corresponds to other offices. Pontifical and episcopal power are originally received from Christ through the mediation of the Church.

Besides these capital offices by divine law, canon law has traditionally recognized (this is also true for the law currently in force) the existence of other offices with proper power. We are dealing in this case with capital offices with power that is proper by human law; that is to say, as a consequence of the development of the ecclesiastical organization; from the transmission of functions by the sacrament of orders and canonical mission, beginning, above all, with the pontifical primacy.

Those who have title of offices provided with proper power by pontifical law carry out capital functions of an episcopal nature that they exercise on their own behalf in communities of the faithful that are canonically equivalent with dioceses and are limited territorially or personally. In the current universal law these offices are the territorial prelature and territorial abbacy on the one hand (cf. c. 370), and military

3. Cf. a summary of his teaching in A. CATTANEO, *Questioni fondamentali della canonistica nel pensiero di Klaus Mörsdorf* (Pamplona 1986), pp. 272ff. Also R.A. STRIGL, *Grundfragen der kirchlichen Ämterorganisation* (Munich 1960), pp. 63ff.

ordinaries and personal prelature on the other.[4] To designate the power of these positions, the former law used the expression "quasi-episcopal" or prelature power, which emphasized above all its canonical equivalence with the power of diocesan bishops, within certain limits and in accordance with pontifical law.[5]

Even though they are not part of the hierarchical organization of the Church, the major superiors of clerical religious institutes of pontifical right and the superiors of societies of apostolic life with the same characteristics are also titleholders of proper power through pontifical communication. These major superiors share the canonical denomination of "ordinaries" with jurisdiction (cf. c. 134 § 1) and cannot be considered as vicars of the Pope.

The German school mentioned above also asserts a power proper to the office of parish priest, in as much as he is in charge of the specific and autonomous community of the faithful that is the parish. In this sense, c. 519 considers the priest as a "proper pastor" of the parish, subordinate to the diocesan bishop. Properly the term "power," however, always implies specific contents of jurisdiction, so that it is only applicable to the parish priest taking into account his power of internal forum and the limited aspects of the power of external forum that he can exercise over the faithful entrusted to him.

b) *Vicarious ordinary power*

Vicarious power is a manifestation of ordinary power. It is expressed by means of some *auxiliary* offices and those subordinate to offices with capital and proper power. Vicarious offices are structurally connected with capital offices and exercise their power of governance in their name. Unlike delegation of power, this vicarious power is exercised in someone else's name, but always through the office.

Authors have argued at great length throughout history about the juridical nature of vicarious power, or, from a different perspective, the meaning of vicarious participation as an informing principle of ecclesiastical organization (theories of representation and of juridical identity, doctrine of the organic de-concentration of power).[6] Nowadays, we can indicate that vicarious power expresses an "organic participation in the proper power of a capital office."[7] To say that vicarious power is *participated* amounts to indicating that it derives, by virtue of the law, from the

4. Cf. *SMC*, II § 1: "Ordinariatui militari, ut proprius, praeficitur Ordinarius..." (cf. also IV, 3°); c. 295: "Praelatus ut Ordinarius proprius...."

5. There is a summary of this doctrine in A. VIANA, *Territorialidad y personalidad en la organización eclesiástica. El caso de los ordinariatos militares* (Pamplona 1992), pp. 148–155.

6. Cf. A. VIANA, "Naturaleza canónica de la potestad vicaria de gobierno," in *Ius Canonicum* 28 (1988), pp. 99–130 (pp. 105ff).

7. Ibid., pp. 122ff.

capital office endowed with proper power. The power of the vicar is not different from that of capital proper power in its content. It is, however, a different title that justifies its exercise (participation). This is a limited participation in the sense that it is not extended to all the aspects of proper power. Besides, vicarious power is *subordinate* or *dependent*, since the titleholder of the proper office is a hierarchical superior to the vicar and has the corresponding powers of control, direction of the activity, appointment, revision of vicarious acts, etc. Thus, for instance, the power that the law recognizes in favor of the vicar general is the same power of governance as that of the diocesan bishop, though limited to the administrative ambit and thus excluding the legislative and judicial power of the bishop. At the same time, the vicar general is hierarchically subordinate to the bishop. The bishop is the one who appoints him, directs his activities, and, reviews his acts *ex officio* or by hierarchical recourse (cf. cc. 475ff).

It is also said that vicarious power expresses an *organic* participation in capital power. This term is intended to remind us that vicarious power is exercised *vi officii*. The norms establishing the juridical system of the delegation of the power of governance are not applicable, consequently, to vicarious offices (ordinary power), even though delegation and vicarious participation may present certain similarities.

We can name some of the most common features that characterize vicarious offices and inform their juridical system. The most important features are those that are derived from the subordination of the vicarious office to the capital office. This position of dependency has certain consequences for the development of the functions that the vicar exercises and also for the objective characteristics of the vicarious office itself.

A typical manifestation of that subordinate position is the freedom that the proper titleholder enjoys in the selection, appointment, and removal of the titleholder of the vicarious office. These acts are subject neither to special procedures nor to prior consultations, as it is the case with other positions. It is also characteristic that these vicarious offices have a special relationship with the titleholder of the capital office, because they are both positions "of trust," being habitual collaborators in governing and administration.[8] The law frequently outlines the duty of submitting periodic reports and promotes the necessary coordination of the activities of the vicar with the proper pastor's will and intentions.[9]

Furthermore, the proper pastor has true power of direction over the activity of the vicar and can control his performance by means of reservation and special mandate. Through the exercise of reservation the

8. That is why the vicarious offices are normally located in the same see as the capital office, although some exceptions do apply as in the case of apostolic Vicars and Prelates (cf. c. 371 § 1).

9. Cf. c. 480, c. 407 together with c. 406, cc. 65 and 473 § 4. For the central organization, cf., e.g., *PB* 18c.

titleholder of the capital office can take upon himself the exercise of some tasks that would normally be the vicar's duty or that would at least in theory belong to him. The special mandate consists of a prior authorization of the proper pastor so that the vicar can act validly in some matters of special importance. Both institutions, reservation and special mandate, have been expressly provided for in the *CIC* taking into account vicarious administrative power in diocesan governance.[10]

Another important feature is that the vicar has the same fate as the titleholder of the capital office (unlike the general principle provided for in c. 184 § 2), so that the vicar is terminated when a situation of vacant or impeded see occurs (cf. c. 481 §§ 1 and 2; *PB* 6).

The characteristics mentioned here are present most of all in executive administrative vicars. Vicarious judges constitute, on the other hand, a single authority, *unum tribunal*, with the capital office in whose power they definitely participate.[11] Furthermore, the nature of and specialization proper to judicial power exclude the effective direction and controls that take place in the executive governance. Judges, both vicarious and delegates, only obey the law and their conscience in the exercise of their office. Thus, the diocesan judicial vicar does not cease from his office in the case of vacant see (cf. c. 1420 § 5), and neither he nor the other judges can be removed, unless there is a legitimate and grave cause for it (cf. c. 1422).

Finally, we could enumerate the most important vicarious offices instituted by universal law. We should basically differentiate between pontifical vicars and vicars of the diocesan bishop. In the first group we have vicars, prefects, and apostolic administrators that govern their communities in the name of the Roman Pontiff and are canonically equivalent in their functions to diocesan bishops.[12] The dicasteries of the Roman Curia and especially the members of the congregations (for the administrative sphere) and the judges of the pontifical tribunals (for the judicial sphere)[13] also exercise pontifical power in a vicarious manner. Among the diocesan vicars, the vicars general and episcopal vicars deserve special mention in the executive sphere, as does the judicial vicar in the sphere of processes.[14]

10. Cf. cc. 134 § 3, 406 § 1 and 479 §§ 1 and 2. For the Roman Curia cf. above all *PB* 18a. Regarding reservation in the diocesan judicial ambit, cf. c. 1420 § 2.

11. "Vicarius iudicialis unum constituit tribunal cum Episcopo..." (c. 1420 § 2).

12. Cf. c. 371. Regarding the canonical equivalence with the diocesan bishop, cf. 134 § 3 together with cc. 381 § 1 and 368. On the significance of vicarious power in such cases, cf. *Comm.* 18 (1986), p. 66.

13. Cf. cc. 360 and 1442; *PB proemio*, 8

14. Cf. cc. 391 § 2, 475ff, 1420.

2. *Delegated power of governance*

The delegation of power can be interpreted in several ways: the act of delegation itself, its content, or the objective reality of the power that has been delegated and that is not granted through the office: "quae ipsi personae non mediante officio conceditur" (c. 131 § 1).

a) *Objective characteristics*

As the channel or instrument of the participation in the exercise of the power of governance, delegation entails a reversible, inorganic communication of the exercise of jurisdiction. Along these lines, one can distinguish the following objective characteristics of delegation.

First, we should always emphasize the independence of delegation from the ecclesiastical office. Delegated power is not received nor exercised through an office, unlike ordinary power, and independently of the fact that the same individual may be able to exercise both powers proper to his office and others received by delegation (for instance, in the case of the metropolitan that receives particular delegations from the Holy See; cf. c. 436 § 2). The transmission of delegated power does not depend on the organization of the offices established by law. This is why it is said to be an "inorganic" transmission of power.

Second, delegation entails a communication of the *exercise* of power. This characteristic is related to the former one, since not depending on the office, the proper title of the power is not delegated. The proper title of the delegated power belongs in actuality to the delegating person. The delegate exercises a power that is not proper, nor entails the title proper of a function constituted in a stable manner in the ecclesiastical system. The fact that the delegating person preserves his proper title does not mean, however, that the delegate acts in someone else's name, exercising a juridical representation. The delegate acts as a subordinate of the delegating person, but in his own name.[15]

Third, an objective characteristic of delegation is the establishment of a hierarchical relationship between the active subject and the passive subject of the delegation (delegating person and delegate). This relationship of dependency is specified in the so-called "mandate" that contains the characteristics and conditions of a delegation provided by the delegating person. Normally, it is formalized with an administrative decree. Inasmuch as it affects the external forum, it must be committed to writing, though according to the general norms for administrative acts, the contrary would not be grounds for a sanction of invalidity (cf. c. 37). All things considered, delegation is not advisable because it can present problems of evidence (whoever claims to be the delegate is forced to demonstrate that the

15. Cf. H. SOCHA, commentary on c. 131, p. 5, in K. LÜDICKE (Ed.), *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1985ff).

delegation has taken place, because, unlike ordinary power, the delegation is not presumed: cf. c. 131 § 3).

The mandate of delegation is essentially revocable,[16] because, on the one hand, it is issued freely, and, on the other hand, it only transmits the exercise of jurisdiction, the title ownership of which is always held by the delegating person. The mandate of delegation authorizes one for one case or for the majority of cases of the same kind (*ad universitatem casuum*). In the latter case, one is dealing with universal delegation, a juridical figure which must be interpreted broadly (cf. cc. 137 § 1 and 138).

b) *Subjective characteristics*

Delegation implies a juridical relationship between the delegating person and the delegate. The delegating person has authority and holds title to the power, the exercise of which he delegates. It can be the legislator, the administrator or even the judge in some limited cases (cf. c.135 § 3). This is the so-called delegation *ab homine*.

A classic disputed question concerns the admissibility of delegation *a iure*.[17] It ends up being an "impersonal" delegation in the sense that the delegating person would not be here a specific ecclesiastical authority but the law itself which would communicate the power once the case provided for in the corresponding norm had occurred, independent of the office and the specific intervention of the authority. The authors that defend the existence of delegations *a iure* base their argument on some norms of the *CIC*/1917 and the present *CIc*. Thus, for example, when a penitent is at risk of death, any priest can validly and legally absolve him not only of any sin, but also of any censure, a faculty which without a doubt expresses a specific exercise of jurisdiction.[18] In this and other cases, it is the law which assigns the power, independent of the office and of the intervention of any authority. Other authors argue, however, that the only real delegation is that which occurs when the requirements of delegation *ab homine* have been met. As we can see, the problem of delegation *a iure* in the canonical system is in fact a problem of qualification, a problem that depends on the concept of delegated power being used. The existence of specifically attributing power provided for in the system without the mediation of an office or the intervention of an authority cannot be questioned. It is an entirely different matter whether those cases should be considered as delegations, most of all when one considers that in the so-called delegation *a iure* the interpersonal, hierarchical relationship (normally between

16. "Potestas delegata extinguitur ... revocatione delegantis delegato directe intimata" (c. 142 § 1).

17. Cf. M. CABREROS DE ANTA, *Concepto de potestad ordinaria y delegada*, cit., pp. 194ff, 207ff, 212ff.

18. Cf. cc. 976 *CIC*, and 882 *CIC*/1917. Other typical examples are the current cc. 1079 § 3, 1357, 1354 § 2, and also the dispositions for cases of a vacant or impeded see: cf., e.g., the expression "a iure quidem collatam" of c. 409 § 2.

two physical persons) typical of delegation is missing. Accordingly, it seems more appropriate to say that those instances that would justify delegations *a iure* are legal authorizations to exercise the power in those specific cases which is provided by the norms. If someone argues, on the other hand, that the delegation is defined by the attribution of the exercise of the power independent of the office, not taking into account whether this attribution originated in the norm or in an administrative act of the authority, he would logically consider the mentioned cases as delegations *a iure*.

The delegate is the passive subject of the delegation. This is normally an individual, but there is no theoretical impediment for the delegate to be a juridical person. This is what happens, for instance, when a bishops' conference receives a special mandate from the Holy See to publish a general decree (cf. c. 455 § 1).

We can differentiate between singular delegation and plural delegation, depending on whether the delegate is one individual or a group of people that may or may not constitute a college. The *CIC* provides in cc. 140 and 141 some norms concerning plural delegation, differentiating among joint, collegial and successive delegation.

The delegate is given a position canonically subordinate to the delegating person, and must strictly meet the conditions provided for in the mandate (cf. c. 133 § 1). The *CIC* provides in the canons of this title several determinations concerning the performance of the delegate.

The general norms of the *CIC* concerning delegation refer mainly to the delegation of executive power (evidence, subdelegation, interpretation, suspension, and expiration). This special regulation is due to the great importance of the delegation in the administrative sphere.[19] The means of the delegation constitutes a complementary element of the tasks and the power which the proper titleholders of ecclesiastical offices exercise. The possibility of delegating the exercise of power reduces the number of tasks proper to the constituted offices (that, excepting some particular organizations with an excessive bureaucracy, are not very numerous); at the same time it avoids the burdens of a structural, bureaucratic, and economical nature that tend to be attached to the regular constitution of these offices. Accordingly, it has been said, with some justice,[20] that delegated power is subsidiary and auxiliary to the ordinary power related to the offices of governing.

19. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd expanded ed. (Pamplona 1993), p. 131.
20. Cf. F.J. URRUTIA, "Delegation of the executive power of governance," in *Studia Canonica* 19 (1985), p. 353.

132 **§ 1. Facultates habituales reguntur praescriptis de potestate delegata.**

§ 2. Attamen nisi in eius concessione aliud expresse caveatur aut electa sit industria personae, facultas habitualis Ordinario concessa non perimitur resoluto iure Ordinarii cui concessa est, etiamsi ipse eam exsequi coeperit, sed transit ad quemvis Ordinarium qui ipsi in regimine succedit.

§ 1. Habitual faculties are governed by the provisions concerning delegated power.

§ 2. However, unless the grant has expressly provided otherwise, or the ordinary was deliberately chosen as the only one to exercise the faculty, an habitual faculty granted to an ordinary does not lapse on the expiry of the authority of the ordinary to whom it was given, even if he has already begun to exercise the faculty, but it passes to the ordinary who succeeds him in governance.

SOURCES: § 2: c. 66 § 2; *SCCong* Decr. *Proxima sacra*, 25 apr. 1918 (*AAS* 10 [1918] 190–192) *SCCong* Resp., 1 iul. 1918 (*AAS* 10 [1918] 325); Pius PP. XI, mp *Post datam*, 20 apr. 1923 (*AAS* 15 [1923] 193–194)

CROSS REFERENCES: cc. 131 § 1, 134, 479 § 3, 883ff, 966ff, 1111

COMMENTARY

Antonio Viana

The law in force uses the term *faculty* frequently. Normally, this is due to the desire to differentiate activities proper to the power of governance from other operative cases that are similar but distinct. Thus, for example, when we talk about a priest's *faculty* for confession (cf. cc. 966ff) the intent is not to consider that activity as proper to the power of orders as if it were a case of the power of governance. For this reason, c. 144 makes an express distinction between supplying for the executive *power* of governance (§ 1) and the application of supplying for the *faculties* of confirmation, confession, and assisting at marriages (§ 2).

In general *faculty* means the ability to act in a licit or juridically efficacious manner. In the context of the norms on the power of governance the relationships between the subjects that grant, receive, or exercise the faculties take on the highest importance.

Some faculties are granted by law (e.g., those that are attached to certain offices, according to the norms of the *CIC*), and others that are granted through acts of a competent authority (i.e., those granted by the Holy See). In a parallel way, the receiver of the faculties can be a person by virtue of an office (thus in c. 566 § 1 the faculties that belong to the chaplain *vi officii* are dealt with) or without the mediation of an office. In the second case, it can happen that the recipient is the titleholder of a *munus*, of a function that does not constitute an office, but, that, at the same time, justifies the faculty that is assigned (i.e., the confessor). It can also happen that it is precisely the personal qualities of the addressee that justifies the concession of the faculties (this is the case, for instance, when habitual faculties are granted to the diocesan bishop because of his personal qualities, *industria personae*; cf. c. 132 § 2).

In this canon the *CIC* regulates the concession *ab homine* (through the competent authority in each case) of habitual faculties to one or several people without the mediation of the office. The concession and exercise of such faculties is guided by the norms of delegated power (c. 132 § 1). Canon 132 § 2 also regulates the special case of habitual faculties granted to ordinaries (cf. c. 134).

These faculties are called *habitual* because, as c. 66 § 1 *CIC*/1917 indicated, they are granted in perpetuity or for a fixed term, but without specifying the cases. On the other hand, *actual* faculties are granted "for cases determined on an individual basis" as far as persons, matters, or the number of cases are concerned.[1] During the sessions of Vatican Council II and also after it, several norms were published by which the Holy See granted different faculties to bishops and religious superiors.[2]

Habitual faculties vary in content from one to another. Some consist of real powers; for instance when the power is granted to dispense in a certain matter without specifying the individual cases. In such cases, the concession is equal to a delegation of power. In other cases, habitual faculties consist of authorization or permissions to exercise activities, normally related to the sacrament of orders. For example, in the case for faculties of confirmation, confession or assisting at marriage (cf. cc. 883, 884 § 2, 966, 1111 § 1).

1. Cf. M. CABREROS DE ANTA, commentary on c. 66, in *Código de Derecho Canónico y legislación complementaria*, 10th ed. (Madrid 1976), p. 31.

2. Cf. mp *Pastorale Munus*, November 30, 1963, in *AAS* 56 (1964), pp. 5–12; Rescr. *Cum Admotae*, November 6, 1964, in *AAS* 59 (1967), pp. 374–378; Decr. *Religionum laicalium*, May 31, 1966, in *AAS* 59 (1967), pp. 362–364; mp *De Episcoporum Muneribus*, June 15, 1966, in *AAS* 58 (1966), pp. 466–472.

133 **§ 1. Delegatus qui sive circa res sive circa personas mandati sui fines excedit, nihil agit.**

§ 2. Fines sui mandati excercere non intellegitur delegatus qui alio modo ac in mandato determinatur, ea peragit ad quae delegatus est, nisi modus ab ipso delegante ad validitatem fuerit praescriptus.

§ 1. A delegate who exceeds the limits of the mandate, with regard either to things or to persons, performs no act at all.

§ 2. A delegate is not considered to have exceeded the mandate when what was delegated is carried out, but in a manner different to that determined in the mandate, unless the manner was prescribed for validity by the delegating authority.

SOURCES: § 1: c. 203 § 1
§ 2: c. 203 § 2

CROSS REFERENCES: cc. 124 § 2, 131 §§ 1 et 3, 142 § 1

COMMENTARY

Héctor Franceschi

1. Delegated power has its own limits and interpretative criteria, one of which is determined in the present canon. This corresponds almost word for word with the minor modifications indicated later, namely c. 203 of the *CIC*/1917. Although it was considered by some authors as an *interpretative criterion* for delegated power[1] others, such as Michiels, understood it as a *limitation* on delegated power of jurisdiction on account of its scope.[2] According to Wernz-Vidal, it is a matter of the *scope* within which the delegated power is exercised.[3]

Canon 131 (see commentary) defines delegated power as that which is granted to a person other than through an office, a concept that allows for such versatility that the legislator must establish some criteria to determine its limits. This is precisely the task of the present canon. As the canon establishes in § 1, the act of delegation, by means of which the titleholder of the power of governance delegates or subdelegates the power, determines the scope within which the delegated power is to be exercised:

1. Cf. M. CONTE A CORONATA, *Compendium Iuris Canonici*, I (Turin 1937), p. 330.
2. Cf. G. MICHIELS, *De potestate ordinaria et delegata* (Tournai 1964), pp. 234–237.
3. Cf. F. WERNZ-P. VIDAL, *Ius Canonicum*, II (Rome 1943), p. 436.

"A delegate who exceeds the limits of the mandate, with regard either to matters or to persons, performs no act at all."

2. The phrasing of this canon seems to suggest that the delegate is a representative of the delegating person. If his acts exceed his authority what he does is null, although § 2 of the canon allows for a certain margin of discretion since it permits that the execution of the acts be done in a different way from that established by the mandator. In any case, other norms seem to suggest that the power of the delegate is different from that of the delegating person. Of all these norms, it is important to mention c. 142 § 1 *in fine* which establishes that the power of the delegate does not come to an end coinciding with the extinction of the power of the delegating person, unless it is thus stated in the clauses of the mandate. Something similar can be deduced from the possibility of appealing to the delegating person regarding the acts of the delegate (cc. 1732ff). The distinction made by Labandeira is relevant in determining the relation between the delegating person and the delegate: the power of the delegating person would be the material cause of the power of the delegate, while the mandate or concession would be the formal cause.[4] Thus, although it is true that the power of the delegate depends on that of the delegating person, we can say that we are dealing with two powers with a great degree of autonomy.

Michiels, discussing the canon referred to in the *CIC*/1917, says that the principles enunciated in this norm are also valid for the superiors with ordinary power,[5] who cannot exceed the limits of their power. Why, then, is the delegate the only one that is mentioned? The above mentioned author argues that, due to its nature and the peculiar way in which delegated power is transmitted given the versatility and the personal nature of this power, there is a higher risk of neglecting the determination of the ambit of its practice on behalf of the delegating person, and for this reason the legislator points out the need to determine the best possible manner. On the other hand, in the case of the ordinary power, which comes with the granting of an office, the risk of imprecision is less, since the laws or decrees which govern those offices tend to be clear and the determination of the competence precise.

As Bender states in his commentary on c. 203 *CIC*/1917, this precept "contains a warning not only for the delegates, but also for the delegating persons. According to the arguments presented in c. 203 § 1, the delegating persons should make sure: 1. That each time they deal with a restricted habitual delegation, it be done in writing, clearly phrased so that the extent of the power is determined... 2. That only when there is a real and serious need or use for it, should the granted power be restricted with

4. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd expanded ed. (Pamplona 1992), pp. 132–133.
5. Cf. G. MICHIELS, *De potestate ordinaria et delegata...*, cit. p. 235.

clauses or other limitations, exceptions, etc., which are not customary in this type of delegation."[6] Certainly, if these indications are followed, it will be easier to avoid the problems of interpretation and diminish the risk of acts that are null.

3. After the precept has been considered in general terms, we shall move on to analyze separately the problems that each of the paragraphs presents. In § 1 a general principle is established which does not require further explanation. However, it is important to remember that the faculties that are transmitted to the delegate are subject to the limits of the original power. Thus, a delegation that exceeded the delegating person's power would be null, as would the ensuing acts of the delegate. But, on the other hand, the terms in which the delegation may be established are many. The possessor of ordinary power can delegate all faculties, or, on the other hand, may restrict the terms of the delegation to some specific acts or over a specific group of people. Thus, if the delegate acted outside the ambit that was assigned, either performing acts for which power had not been granted, or performing them on people for whom it had not been granted, the person would act invalidly.

This demonstrates the importance of performing the action of delegation accurately, both to show evidence that a delegation of power has been enacted, and to certify the object and limits of the delegation. This is even more so when delegation is not presumed and the legislator has established that the proof of the delegation is the responsibility of the delegate (c. 131 § 3). Consequently, it is advisable that the granting be done in writing both for the juridical safety of the delegate, and for that of the passive subject of the power.

4. Paragraph 2 of the canon establishes a principle depending on the previous one. Since determination of the extent of delegated power essentially depends on the decision of the delegating person, it is not only able to be limited to certain acts or groups of people, but also to prescribe to a greater or lesser extent the modalities of the exercise of this power, thus presenting us with the problem as to whether the delegate is supposed to follow these directions. For the legislator, when the delegating person establishes the specific mode in which the delegation should be done, to act in a different way does not affect the validity of the act unless the delegating person had established this as a requisite for validity.

On this particular point, the precept presents a small variation in respect to the phrasing of c. 203 § 2 of the *CIC*/1917 which said: "nisi modus ipse fuerit a delegante praescriptus tanquam *conditio*." The current phrasing, "nisi modus ab ipso delegante *ad validitatem* fuerit praescriptus," is clearer. The phrasing of the *CIC*/1917 presented a problem of interpreta-

6. L. BENDER, *Potestas ordinaria et delegata* (Rome 1957), pp. 70–71.

tion which doctrine had to solve[7]: what happened when the mode posed as a condition did not take place as absolutely obligatory? Concerning this, Michiels said that "the non-observance [of the established mode] does not invalidate the act of jurisdiction, unless this has been prescribed by a written mandate or orally by the delegating person as *substantial*, as an *essential* condition. In other words, according to c. 39 [*CIC*/17], if the condition was expressed with the particle *si*, *dummodo*, or others with the same meaning."[8]

The problem has now been solved with the modification to the *CIC*: an act is only null if the mode has been requested by the delegating person as a requisite for its validity; or, in other words, if the mode was given as a *condition* for validity. When in doubt, it seems that one should support the validity of the act (cf. c. 124 § 2).

5. Finally, it is important to note that this canon corresponds to c. 983 of the *CCEO*, which includes proof of the delegation, that in the *CIC* was dealt with in c. 131 § 3, after having defined ordinary and delegated power. The placement of that paragraph which deals with the limitation of the exercise of power seems to be more appropriate in the *CCEO* than in the *CIc*. In any case, this paragraph would have been better placed in one of the canons about the interpretation or about the limitations of the delegation, as the *CIC*/1917 did in c. 200 § 2.

7. Cf. P. GEFAELL, *El régimen de la potestad delegada de jurisdicción en la Codificación de 1917* (Rome 1991), pp. 186–188.
8. G. MICHIELS, *De potestate ordinaria et delegata...*, cit. p. 237.

134 **§ 1. Nomine Ordinarii in iure intelleguntur, praeter Romanum Pontificem, Episcopi dioecesani aliique qui, etsi ad interim tantum, praepositi sunt alicui Ecclesiae particulari vel communitati eidem aequiparatae ad normam can. 368, necnon qui in iisdem generali gaudent potestate exsecutiva ordinaria, nempe Vicarii generales et episcopales; itemque, pro suis sodalibus, Superiores maiores clericalium institutorum religiosorum iuris pontificii et clericalium societatum vitæ apostolicae iuris pontificii, qui ordinaria saltem potestate exsecutiva pollent.**

§ 2. Nomine Ordinarii loci intelleguntur omnes qui in § 1 recensentur, exceptis Superioribus institutorum religiosorum et societatum vitæ apostolicae.

§ 3. Quae in canonibus nominatim Episcopo dioecesano, in ambitu potestatis exsecutivae tribuuntur, intelleguntur competere dumtaxat Episcopo dioecesano aliisque ipsi in can. 381 § 2 aequiparatis, exclusis Vicario generali et episcopali, nisi de speciali mandato.

§ 1. In law the term ordinary means, apart from the Roman Pontiff, diocesan bishops and all who, even for a time only, are set over a particular Church or a community equivalent to it in accordance with can. 368, and those who in these have general ordinary executive power, that is, Vicars general and episcopal Vicars; likewise, for their own members, it means the major superiors of clerical religious institutes of pontifical right and of clerical societies of apostolic life of pontifical right, who have at least ordinary executive power.

§ 2. The term local ordinary means all those enumerated in § 1, except superiors of religious institutes and of societies of apostolic life.

§ 3. Whatever in the canons, in the context of executive power, is attributed to the diocesan bishop, is understood to belong only to the diocesan bishop and to those others in can. 381 § 2 who are equivalent to him, to the exclusion of the Vicar general and the episcopal Vicar except by special mandate.

SOURCES: § 1: c. 198 § 1; *SCCong* Decl., 20 ian. 1919 (*AAS* 12 [1920] 43); SCPF Let., 8 dec. 1919 (*AAS* 12 [1920] 120); *SCCong* Decr. *Ad Sacra Limina*, 28 feb. 1959 (*AAS* 43 [1959] 272–274)
§ 2: c. 198 § 2

CROSS REFERENCES: c. 107 § 1, 129, 131, 135–137, 265, 266 § 3, 268ff, 295 § 1, 296, 368, 372 § 2, 381 § 2, 413, 419, 420ff, 475, 476, 479, 596 § 2, 620, 734

COMMENTARY

Héctor Franceschi

1. The present canon determines the specific content of the three notions used in the *CIC*: the concepts of ordinary, local ordinary and diocesan bishop, the limits of which need to be distinguished so that we can properly understand the competence that the legislator assigns to the different organs of governance of the Church.

The origin of the norm is c. 198 of the *CIC*/1917 which refers to the concepts of the ordinary and local ordinary. The *CIC* adds § 3 which refers to the diocesan bishop, and introduces an interesting modification to the competencies of the vicar general.[1] Other differences between the previous norm and c. 134 respond also to the new figures created by Vatican II and later legislation.[2]

2. The term *Ordinarius*, says Michiels,[3] was already used in the decrees of the Council of Trent, as well as in the documents of Benedict XIV, to designate the bishops. The Roman Pontiff was sometimes given the name of *Ordinarius Ordinariorum*. The concepts of *Ordinarius* and *Ordinarius loci* were preferentially used for diocesan bishops, until Leo XIII, in an interpretation of the term in relation to matrimonial dispensations, argues that ordinary means: "the bishops, the administrators or apostolic vicars, the prelates or prefects that have jurisdiction with separate territory, the officialis or the vicars general in spiritual matters, and, in a vacant see, the vicar capitular or the legitimate administrator."[4] That notion of ordinary, with some exceptions, such as the Constitution *Officiorum et munerum* of January 25, 1897 which only considered the bishops that governed the diocese and quasi-diocese,[5] was kept until it was included in c. 198 of the *CIC*/1917; this inclusion broadened the term to include the major superiors of exempt clerical associations.[6]

The *CIC*/1917 considered the ordinary as that person who had episcopal, or quasi-episcopal, ordinary power in the external forum, both proper and vicarious. It was not specified whether it had to be executive power;

1. Cf. H. MÜLLER, "De speciali Episcopi mandato iuxta *CIC*/1983," in *Periodica* 79 (1990), p. 229.
2. Cf. A. VERA, *El concepto de Ordinario en el Código de Derecho Canónico de 1983* (Rome 1989), *pro manuscripto*.
3. Cf. G. MICHIELS, *De potestate ordinaria et delegata* (Tournai 1964), pp. 136–137. Also, E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd expanded ed. (Pamplona 1992), p. 129.
4. *Collectanea S. c. de Propaganda Fide*, II, no. 1685.
5. *Codex Iuris Canonici Fontes*, III, no. 632, p. 509.
6. Cf. M. CONTE A CORONATA, *Compendium Iuris Canonici*, I (Turin 1937), pp. 324–325.

we have to take into account that the differentiation of the functions of the Church governance was not completely developed until the *CIC*.[7]

On this matter, the *CIC* is more precise: not all those who govern with ordinary power are known as *Ordinaries* as noted in a great number of canons. There are those who enjoy an executive, ordinary power, be it proper or vicarious, that must be general (cf. c. 479) which differentiates them from ordinaries who due to their office have some (ordinary) power which is not *general*, but specific or one referred to certain sphere of competence.

3. Thus the essential elements of the concept of *Ordinary* seem to be the following ones: ordinary, executive power (proper or vicarious) of a general character[8] and the juridical bond of authority-subject, to which c. 136 refers. In ecclesiastical circumscription the executive power of a general character corresponds, besides the "capital offices," to the vicar general and episcopal vicars. The condition of ordinary thus corresponds to those who, *vi officii*, exercise jurisdictional functions particularly related to those of the capital office,[9] without implying that this notion be identified with that of "capital office," as we can easily deduce from § 3 of this canon, which distinguishes the concept of diocesan bishop from that of ordinary.

The other part of the concept of *Ordinary* is the relationship of authority-subject existing between the ordinary and the faithful that are under his jurisdiction (cf. c. 136). This relationship of subordination, based on the sacramental character of the Church and on the functional diversity that results from the relationship existing between baptism and sacred orders, is normally determined by means of the domicile or quasi-domicile with which the parish priest himself and the ordinary are individuated for each of the faithful (c. 107 § 1).

The authority-subject bond that is originally determined by the domicile and quasi-domicile can be specified by means of other juridical forms contained in the canonical system. Such is the case of those who, because of their relationship with military institutions, are part of the military ordinariate. For them the military ordinary is their own ordinary, together with the diocesan bishop, since jurisdiction is cumulative;[10] or in the case of the faithful that join or are ascribed to a personal prelature, for whom the prelate is an ordinary in as much as the objectives of the prelature are concerned (c. 296); or in the case of those who are admitted to the seminary of

7. Cf. *Principles for the revision of the CIC*, no. 7, in *Preface* to the *CIC*, in *Pamplona Com.*

8. Cf. *Comm.* 21, (1989), p. 253; 22 (1990), pp. 15ff.

9. Cf. J.I. ARRIETA, *Organizzazione Ecclesiastica* (provisional text *ad usum scholarum*) (Rome 1992), pp. 175–176.

10. Cf. JOHN PAUL II, Ap. Const. *Spirituali militum curae*, April 21, 1986, in *AAS* 78 (1986), pp. 481–486.

a diocese other than that to which they originally belong, thus establishing a new relationship with the bishop. Furthermore, from the sacrament of orders there is a relationship of subordination, determined by the incardination of deacons and presbyters (c. 265), that define the terms of the cleric-subject and ordinary.

4. On the other hand, the present canon establishes that, besides the capital offices of the ecclesiastical circumscription, the superiors of the religious institutes and clerical societies of apostolic life of pontifical right also ought to be considered ordinaries. Strictly speaking, these are not ordinaries because they are superiors of the members of a religious order. In the internal scope of the institute marked by the vow of obedience, a power is exercised that used to be called dominative, which is *conceptually* different from the hierarchical or secular power (that, for instance, bonds the faithful to the bishop upon the basis established by the sacraments), although the same norms of the code are applied to this relationship (cf. c. 596 § 3). It could be argued that in these institutes the superiors are ordinaries in as much as they have been granted by the legislator an ordinary executive power over the members of their religious order in the material sphere of competence that the legislator assigns to ordinaries. This is why the legislator has restricted the notion of ordinary to the superiors of the clerical institutions, considering that the exercise of the power of governance in the Church is reserved to those with the sacred orders (c. 129). This does not happen in the case of the power related to religious obedience.

However, it is necessary to explain this matter further: there are clerical institutions, with the faculty of incardinating clergy, whose major superior is not mentioned as an ordinary in the present canon, as would happen in the case of religious institutes or clerical societies of apostolic life of pontificial right (c. 266 § 2). Their members would have the diocesan ordinary as their proper ordinary. The reason for distinguishing the institutes of pontificial right seems to be for unity in the rule of the institute and the inconvenience of disseminating the power of governance among several diocesan ordinaries. This would happen if the institution of pontificial right were present in several dioceses, and if the ordinary of those who belong to this institute were, in each case, that of the diocese in which they are domiciled. This seems to be the reason why the legislator has decided to remove these institutes from the power of governance of the diocesan ordinary, subjecting them to the governance of their own religious superiors, who are the proper ordinaries with an executive power of governance. This obtains analogous juridical results—in order to guarantee the unity of the rule of governance in these institutes of pontificial right—with those obtained before with the power of exemption. On the other hand, as long as the statutes of the institute do not establish otherwise, the institutes of diocesan right are not entrusted, in accordance to the canonical system, to the care of diocesan bishops (cf. cc. 586, 594).

5. Another important point to be taken into account for the interpretation of c. 134 is the modification which took place regarding the principle of territoriality as a criterion for the circumscription of ecclesiastical governance. The eighth principle for the reform of the *CIC*/1917 included in the preface to the *CIC* clearly establishes the need for this modification, promoting the creation of personal jurisdictional entities that respond to all the new demands of the apostolate.[11] In the previous legislation the ecclesiastical governance was linked to a territorial criterion, to such an extent that c. 198 of the *CIC*/1917 referred to the ordinary *pro suo quisque territorio,* whereas it referred to religious superiors with the expression *pro suis vero subditis.*[12] It could be argued that c. 134 follows the same pattern and that, accordingly, the enumeration of the canon is limited; however, this is not the case.

In the new discipline of the Code we find, as legal entities of common law, ecclesiastical offices and jurisdictional structures configured to a personal criterion. This is the case of the personal dioceses (c. 372 § 2) and of the personal prelatures (c. 294), as well as the military ordinariate, not regulated in the *CIc.* On the other hand, the legal figure of the episcopal vicar is a clear example of an office of great formal flexibility that can be constituted not only for a part of the territory but also for people of a specific rite or for specific groups of the faithful (c. 476).

6. Accordingly, in summary, we can argue that the present canon establishes a general criterion about the three concepts mentioned before: *ordinary, local ordinary* and *diocesan bishop* which the legislator uses to attribute competence through determined bodies in the Church. The three notions represent three distinct grades of juridical competence, in as much as the inferior degrees are included in the superior ones: the *diocesan bishop* has all the competences of the *local ordinary,* and the latter has all those that belong to the *ordinary,* but not vice versa. Furthermore, as the legislation as a whole implies, the enumeration of the canon is not restrictive, or, at least, it is necessary to apply analogously these very concepts to other legal entities that are not mentioned here. We can see in this the need to understand the technical criterion followed by the legislator when constructing the norm, so that we can identify in this place other legal entities that correspond and are contemplated in the Code or that may appear in later legislation.

7. Having said this, we can now determine what are the bodies of governance included in each one of the paragraphs of the present canon, beginning with the concept of ordinary (c. 134 § 1):

a) In the hierarchical structure of the Church, besides the Roman Pontiff , there are ordinaries by virtue of their relation to the "capital" bod-

11. Cf. *Principles of revision for the CIC,* no. 8, in the *Preface* to the *Pamplona Com.*
12. Cf. G. MICHIELS, *De potestate ordinaria...*, cit., pp. 137–140.

ies of an ecclesiastical circumscription, territorial or personal, which follow the authority-subject relationship, characteristic of the functional diversity of the Church:

— In *territorial* ecclesiastical circumscriptions, these are: the diocesan bishop, the territorial prelate, the territorial abbot, the vicar, the prefect and apostolic administrator of each circumscription erected in stable manner (cc. 268ff, 381 § 2) and the superior of the mission *sui iuris*; those elected to substitute temporarily for those mentioned above (cc. 413, 419, 420); the diocesan administrator (cc. 421ff); the immediate collaborators that have at least general ordinary executive power, such as the vicar general and episcopal vicar. The last does not have territorial competence except over a certain matter or group of faithful, and, accordingly, does not have all the competence that the norms attribute to the local ordinaries (c. 476). More problematic is the qualification as ordinary of the delegate vicars or delegate prefects that function as a vicar general in all the vicariate jurisdictions.

In the *personal* ecclesiastic circumscriptions, the ordinaries are the military ordinary and the prelate of a personal prelature (cc. 295 § 1). The main organ is a Latin rite ordinary who attends to the pastoral needs of the Eastern faithful, etc.; those who govern these structures in the interim and the vicars have at least general executive power. Anyway, in all these cases they will be subject to the norms referred to the *ordinary*, taking into account the kind of jurisdiction and the specific competence of each structure.

— Besides the hierarchical structure of the Church, ordinaries are also, in as much as they govern clerical institutions of supradiocesan ambit, the major superiors of clerical religious institutes of pontifical right and the clerical societies of apostolic life of pontifical right that have, at least, general ordinary executive power over the members of this institution. This is the case in the following situations: the general and provincial superior of an autonomous house (c. 613 § 2), to whom we should add their vicars; the abbot primate and the superior of a monastic congregation (c. 620). Societies of apostolic life are subject, as far as governance is concerned, to the same criteria of c. 620 in an analogous manner, in accordance with their constitutions and respecting the nature of the institution (c. 734).

b) All of the above refers to the technical concept of *ordinary. Local ordinaries* (c. 134 § 2) are, however, also considered, besides the Roman Pontiff and the diocesan bishops, the general and episcopal vicar (c. 134 § 2). Taking into account what we mentioned before, we should include in this concept the remaining "capital" organs of territorial structure. The norm excludes from the notion of *local ordinary* the superiors of religious institutes and societies of clerical apostolic life of pontifical right.

Besides, we need to include in the category of *local ordinary*, at least by equivalence and considering each case, all those with hierarchical jurisdiction over a place. This is the case of the military ordinary in those places pointed out by *SMC*, V: "headquarters and places reserved to the military are primarily and principally subject to the jurisdiction of the military bishop;" accordingly, even though the diocesan bishop can act on them "by his own right" as a local ordinary, it should be said that the military ordinary, even though he has personal jurisdiction, is granted in those ambits the juridical condition of local ordinary. The same thing happens with the prelate of a personal prelature and of those that have personal jurisdiction, at least in relation to the places that cannot be dissociated from their jurisdiction. For instance, by sheer logic, all of them must be granted the recognition that they have a condition equivalent to that of the local ordinary in the Church-see itself, in the curia, and, if it exists, in the seminary itself, thus following the logic of c. 262 that, in the diocesan ambit, leaves the seminaries outside the parish jurisdiction.

c) Finally, the term diocesan bishop (c. 134 § 3) is interpreted in law as the "capital" organ of the ecclesiastical circumscriptions (c. 381 § 2), and those that *ex natura sua* are always ranked equally with them provided that, according to each specific circumstance, the equivalence be reasonable. On that score, the special legislation of the military ordinariates makes military ordinaries equivalent to diocesan bishops (*SMC* II § 1); and the same things happens with the capital offices of the personal, ecclesiastical circumscriptions in the particular statutes and erection decrees of whom, as juridical experience in the personal prelatures and in the Latin ordinariates respectively show, the same competence of the diocesan bishop are attributed to those that exercise the capital office.

As far as executive power is concerned, the vicar general and episcopal vicar are excluded from the competences that are attributed to the diocesan bishop, unless they have a special mandate, as the norm establishes. Paragraph 3 is particularly relevant, especially when considered with c. 479 § 1, since it demarcates and restricts the executive power of the general and episcopal vicar. It can be deduced from here that these vicars do not have as much executive power as the diocesan bishop, as c. 479 § 1 seemed to indicate, but only as much power as belongs to them as local ordinaries, needing in the remaining cases (those that the law attributes to the diocesan bishop) a special mandate from the bishop.

This distinction raises, in turn, a new question: that of the nature of the vicar's power when it is a power acquired by special mandate, and whether delegation is possible and what its limitations would be (c. 137), considering that since we are dealing with a special and singular mandate, subdelegation is not possible without an explicit concession from the delegating person (c. 137 § 3). Some of the authors who wrote before the *CIC* argued that this power could be ordinary when granted bestowing an office; other authors argued that we were always dealing with a delegated

power. In the current legislation the condition of delegated power should apparently be maintained. The legislator seems to be trying to establish as a general principle that what is granted to the diocesan bishop is specific to him, thus requiring a special mandate so that the vicar general or episcopal vicar can act in these matters or for these acts. The *CIC*/1917, however, established the specific cases in which the special mandate was necessary. The norm can be accordingly interpreted as a form of entitlement to exercise a power in the specific cases that required this "previous authorization."[13]

8. Canon 984 of the *CCEO*, corresponding to 134 of the *CIC*, shows an important modification in its structure. As it is well known, the regulation of the jurisdiction in Eastern Catholic Churches is more complex than in the Latin Church because of the interweaving of territorial and personal criteria in the determination of the ordinary or the parish priest himself.[14] Canon 984 *CCEO* makes a distinction between hierarch and local hierarch, defining the legal entities that correspond to each concept. In § 1 of this canon religious superiors are not mentioned. A whole paragraph (§ 3) is devoted to them, and it states that they are hierarchs, but not local hierarchs, which seems to express more clearly the criteria for distinguishing between ecclesiastical circumscriptions and associative structures capable of incardinating clerics, better reflecting the criteria used by the legislator in the determination of the content of each one of the notions we have analyzed. The equivalent of § 3 of c. 134 of the *CIC* is contained in c. 987 of the *CCEO*.

13. Cf. H. MÜLLER, *De speciali Episcopi mandato...*, cit., pp. 228–241; E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico...*, cit., pp. 126–127.

14. Cf. P. GEFAELL, "L'ambito territoriale della giurisdizione dei Patriarchi orientali," in *Ius Ecclesiae* 5 (1993), pp. 245–268.

135 **§ 1. Potestas regiminis distinguitur in legislativam, exsecutivam et iudicialem.**

§ 2. Potestas legislativa exercenda est modo iure praescripto, et ea qua in Ecclesia gaudet legislator infra auctoritatem supremam, valide delegari nequit, nisi aliud iure explicite caveatur; a legislatore inferiore lex iuri superiori contraria valide ferri nequit.

§ 3. Potestas iudicialis, qua gaudent iudices aut collegia iudicialia, exercenda est modo iure praescripto, et delegari nequit, nisi ad actus cuivis decreto aut sententia praeparatorios perficiendos.

§ 4. Ad potestatis exsecutivae exercitium quod attinet, serventur praescripta canonum qui sequuntur.

§ 1. The power of governance is divided into legislative, executive and judicial power.

§ 2. Legislative power is to be exercised in the manner prescribed by law; that which in the Church a legislator lower than the supreme authority has, cannot validly be delegated, unless the law explicitly provides otherwise. A lower legislator cannot validly make a law which is contrary to that of a higher legislator.

§ 3. Judicial power, which is possessed by judges and judicial colleges, is to be exercised in the manner prescribed by law, and it cannot be delegated except for the performance of acts preparatory to some decree or judgment.

§ 4. As far as the exercise of executive power is concerned, the provisions of the following canons are to be observed.

SOURCES: § 1: cc. 201 §§ 2 et 3, 335 § 1, 2220 § 1, 2221; Pius PP. XI, Enc. *Quas primas*, 11 dec. 1925 (*AAS* 17 [1925] 599); SCDS Litt. circ., 15 iun. 1952; *CS* 399 § 1; *LG* 27; *REU* 106, 107; Princ. 7

CROSS REFERENCES: cc. 7ff, 29ff, 35ff, 136ff, 331, 391, 466

COMMENTARY

Antonio Viana

1. The division of powers constitutes a fundamental principle of the modern legal system, although its application has varied considerably

since its original formulation in the seventeenth and eighteenth centuries. The division of powers in the state is mainly expressed through the institution of independent organizations (Parliament, Government, Judicial Power) to guarantee a fair balance among the diverse forms of creation and application of the law, and also to avoid the unsuitability of the concentration of power in a single person or organization. Thus, it is possible to control the exercise of power through the independent organs, the formalization of the juridical acts, and, in short, greater guarantees of the citizen's rights.

2. Canon law does not contemplate a separation of powers with its corresponding unitary and independent organizations,[1] due to the constitutional principle of concentration of the *sacra potestas* in the Roman Pontiff and in the bishops. The Roman Pontiff and the bishops in their dioceses are at the same time and by nature, legislators, judges, and administrators.[2]

Overall, the canonical system recognizes and promotes the distinction among different forms of exercise of the power of governance.[3] Canon 135 § 1 is quite explicit in this respect. In its official version it uses the verb "distinguish" to refer to the exercise of legislative, executive, and judicial powers. In the law of the Church, there is no separation of powers, but there is a differentiation of how they are exercised. The application of this principle is particularly relevant in the area of the activities subordinated to capital offices.

In effect, the differentiation of powers is, above all, a reality in the canonical ambit because throughout history, the application of law has been entrusted to different positions or offices constituted to collaborate with the capital offices: Roman and diocesan curia, vicarious offices, judges and tribunals. In the present law administrative or judicial competence is expressed more clearly than it used to be.[4] This greater clarity is the result of a wider criterion that inspired the elaboration of the *CIC*. In fact, the directive principle no. 7 of the reform of the *CIC*/1917, approved by the synod of the bishops of 1967, promoted the differentiation of *functions* in the power of governance, and a clear distribution of these functions in different organs.[5]

1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd expanded ed. (Pamplona 1993), p. 144.
2. Cf. cc. 331, 333 § 2 and 1442 regarding the Roman Pontiff; 391 and 1419 regarding the diocesan bishop.
3. Cf. E. LABANDEIRA, "La distinción de poderes y la potestad ejecutiva," in *Ius Canonicum* 28 (1988) pp. 85–98.
4. So, for example, when it is established that Vicars general and episcopal hold administrative power—"ad ponendos scilicet omnes actos administrativos," as specified by c. 479 § 1—though it is subordinate to the diocesan bishop, or when it is said in reference to the judicial Vicar of the diocese that he acts "cum potestate ordinaria iudicandi" (c. 1420 § 1).
5. Cf. *Comm.* 1 (1969), p. 83.

According to the principle mentioned before, "the various functions of ecclesiastical power (i.e., the legislative, administrative, and judicial functions) must clearly be distinguished and individual functions are to be exercised by which governing organs must be adequately defined." The goal was to facilitate the juridical protection of superiors and subjects, and, to be able to avoid any suspicion of arbitrariness in ecclesiastical administration. Furthermore, the protection of subjective rights should be demonstrated in practice by means of the appropriate procedures in the administrative ambit (regulation of the administrative recourses) and the procedural ambit.

The principle of the distinction of *functions* (here it is observed that the public functions expressing the stable and organized exercise of the jurisdiction are, in fact, the real powers) was conceived, accordingly, in the preparation of the *CIC*, as a technical and juridical instrument serving the protection of the rights of the faithful and an ordered exercise of power in the Church.

In fact, the distinction of powers: *a*) promotes the necessary juridical order and security in the creation and application of the law (easily avoiding, for instance, the interference of administrative authorities in tasks that belong to the legislative power that was manifested in this century by the activity of the Congregations of the Roman Curia);[6] *b*) is a requirement for the establishment of a proper system of administrative and procedural recourse, with its corresponding organization (authorities and, when necessary, administrative tribunals, judicial organization); *c*) allows for a formal differentiation among the actions resulting from the exercise of the three powers (legislative norms, administrative norms and acts, procedural acts) and the establishment of a normative hierarchy that can solve the problem of a possible contradiction among norms coming from different authorities (cf. c. 135 § 2); *d*) makes the identification of competence possible, the area of power, attributed to each ecclesiastical office or authority.

3. It becomes evident that the principle of differentiation of powers involves different aspects. We are not referring to the *material* aspect of the principle, namely, the determination of the specific and differentiating features of each power in relation to the others. This task presents an undeniable scientific interest, but it goes beyond the scope of this exegetical commentary. It is more practical, however, to refer to the *formal* and *organizing* aspects of the principle of differentiation of powers following the norms of the *CIc*. In accordance with this approach, we can distinguish in the *CIC*:

6. Cf. A. VIANA, "El Reglamento General de la Curia Romana. Aspectos generales y regulación de las aprobaciones pontificias en forma específica," in *Ius Canonicum* 32 (1992) pp. 510ff.

— the general formulation of the principle of differentiation itself in c. 135 § 1, developed for the diocesan level by c. 391 § 1;

— the regulation of the exercise of legislative, executive, and judicial power according to the general criteria of c. 135 § 2ff;

— the distinction and formalization of the legislative norms (laws: c. 7ff; general legislative decrees: c. 29) and the general administrative actions (general executive decrees: c. 31ff; instructions: c. 34) and singular administrative acts (decrees: c. 48; precepts: c. 49; rescripts: c. 59; privileges: c. 76ff; dispensations: c. 85ff), with its corresponding juridical governance;

— the regulation of some recourses and administrative procedures (cc. 1732ff, 1740ff), as well as the judicial procedures and recourses in book VII;

— the indication of the offices and colleges with legislative, executive, and judicial power. At the diocesan level, this indication is established in a general way in c. 391 § 2.

4. Regarding the *title ownership* of the three powers, we can say that it belongs to the Roman Pontiff as far as the universal Church is concerned, and to the diocesan bishop in each individual Church. According to c. 381 § 2, pastors that preside over circumscriptions assimilated to the diocese are equivalent to the diocesan bishop, unless the nature of the matter or legal prescription state otherwise.

a) Besides the Roman Pontiff and the bishops individually considered, the ecumenical council (c. 337 § 1), the particular councils (c. 445), the bishops' conferences in some cases (c. 455), and the diocesan synods (c. 466) have *legislative* competence. Consequently, independently of the legislative delegation system (cf. c. 135 § 2 *a sensu contrario*), the exercise of legislative power can be personal or collegial. In the second case, we should distinguish between those colleges constituted by members with the same basic juridical position (for instance, a Bishops' Conference) and other multipersonal institutions that are organized according to a certain hierarchy (this is the case of the ecumenical council, where the Roman Pontiff maintains his capital position in relation to the members, and, it is also the case of the diocesan synod, where the bishop is the whole titleholder of the legislative power).

b) In turn, congregations and some other dicasteries of the Roman Curia are holders of administrative or *executive power* (cf. c. 360 and the dispositive part of *PB*); so are metropolitan archbishops in some cases concerning the administration of the ecclesiastical province and of the suffragan dioceses (cf. cc. 436 § 1, 442, etc.); coadjutor and auxiliary bishops, according to the letters of appointment and also since their designation as diocesan vicars (cf. cc. 405 and 406); the diocesan administrator in vacant see (cf. c. 427 and also c. 414 in the case of an impeded see); some offices

of the diocesan curia, especially vicars general and episcopal vicars (cf. c. 479); the parish priest in some of the cases concerning the governance of the parish (cf. c. 519). Some superiors of institutes of consecrated life and societies of apostolic life are also holders of executive power of jurisdiction regarding the members of the institute (cf. cc. 134 § 1 and 596).

c) The organization of *judicial power* presents in the Church some specialized channels, principally elaborated in book VII of the *CIc*. A series of judges and tribunals exercise judicial power besides the Roman Pontiff (cf. c. 1442) and the diocesan bishop (cf. c. 1419 § 1): the judicial vicar and other diocesan judges (cf. c. 1420ff), the tribunals of first and second instance (cf. cc. 1423ff, 1438), and, finally, the tribunals of the Roman Curia: the Roman Rota (cf. c. 1443ff), the Supreme Tribunal of the of the Apostolic Signatura (cf. c. 1445), and, with its distinguishing characteristics, the Tribunal of the Apostolic Penitentiary (cf. *PB* 117–120).

5. Canon 135 § 2 presents a series of criteria about the exercise of legislative power: exercise *more iure praescripto*, the impossibility of delegating legislative power corresponding to legislators different from those of supreme authority, and, finally, a hierarchy of norms. Regarding the prohibition to delegate inferior legislative power, most authors tend to recognize, interpreting c. 135 § 2 *a sensu contrario*, the delegating nature of supreme legislative power.[7]

6. *Pastor bonus* determined the organ in charge of promoting, normally through interpretation, the fulfillment of the criteria established in c. 135 § 2. This organ is the Pontifical Council for the Interpretation of Legislative Texts, regulated by arts. 154–158 of *Pastor bonus*. One of their functions is the revision of general administrative norms of the dicasteries of the Roman Curia before their publication, and also the revision of general decrees of episcopal organs (cf. arts. 156–157). In order to promote the effective operation of the principle of normative hierarchy "at the request of those interested, this Council determines whether particular laws and general decrees issued by legislators below the level of the supreme authority are in agreement or not with the universal laws of the Church" (art. 158).

Besides c. 135 § 2, paragraphs 3 and 4 of the same norm determine several aspects of the exercise and delegation of judicial and executive power.

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7. A synopsis of that doctrine can be found in V. GÓMEZ-IGLESIAS, "La 'aprobación específica' en la Pastor Bonus y la seguridad jurídica," in *Fidelium Iura* 3 (1993), pp. 371ff.

136 Potestatem exsecutivam aliquis, licet extra territorium exsistens, exercere valet in subditos, etiam a territorio absentes, nisi aliud ex rei natura aut ex iuris praescripto constet; in peregrinos in territorio actu degentes, si agatur de favoribus concedendis aut de exsecutioni mandandis sive legibus universalibus sive legibus particularibus, quibus ipsi ad normam can. 13 § 2, n. 2 tenentur.

Persons may exercise executive power over their subjects, even when either they themselves or their subjects are outside the territory, unless it is otherwise clear from the nature of things or from the provisions of law. They can exercise this power over *peregrini* who are actually living in the territory, if it is a question of granting favours, or of executing universal or particular Laws by which the *peregrini* are bound in accordance with can. 13 § 2 n. 2.

SOURCES: c. 201 §§ 1 et 3

CROSS REFERENCES: cc. 12, 13 § 2, 100, 102, 103, 105–107, 134 § 1, 135, 138

COMMENTARY

Héctor Franceschi

1. Executive power is exercised in a specific personal and territorial ambit specified in this canon, in which the active and passive subject of this power is pointed out. The analysis of this norm is of great help in understanding the nature of power in the Church and of its territorial or personal characteristics.

It corresponds to c. 201 of the *CIC*/1917, although it does present certain modifications. In the first place, it does not refer to judicial power; it is logical that it may happen this way since c. 135 distinguishes clearly among the three kinds of powers in the Church: executive, legislative and judicial, arguing later in § 4 that the following canons referred to executive power. On the other hand, this canon makes a positive declaration. It does not say, like the *CIC*/1917, that power "can only be exercised over one's own subjects," going on to establish the exceptions, but argues that the titleholder of the power can exercise it, even when he is outside of the territory, over his own subjects, the exception being made of the cases in which either the nature of the matter or legal prescription provides

otherwise,[1] whether they are in the territory or not, and over the *peregrini*, in certain cases. Regarding the latter, c. 136 amends the omission of c. 201 *CIC*/1917, that did not mention them and seemed to suggest that power could not be exercised over them, particularly if the first impression of the canon was taken into account.

Labandeira argues about this case: "Regarding the people, executive power,—as any other power of governance—can be territorial or personal; in both cases it can be exercised over the subjects wherever they are. When the power is territorial, it can also be exercised over the *peregrini* that live in the territory if it entails granting favors or executing universal or particular laws that oblige them according to c. 13 § 2, 2°."[2]

2. In specifying the ambit of executive power, the personal element seems to play an important role. The conditions of the *faithful* from a given particular church accompany those persons even when they are outside the territory of their diocese; in effect, the juridical relation between the authority and the passive subject of the power is a personal one. The territory is only a factor for determining or a defining element in this relation. Rather than an authority-territory-subject relation, as a certain doctrinal sector thought before the conciliar definitions about the particular church, we are dealing with a relation between subjects that are organically cooperating for the same objective, based on the *communio fidelium* and the *communio hierarchica*. In the ecclesiastical circumscriptions, the most common manifestation of which is the diocese, there is a capital organ and a faithful people over which he exercises his power in order to achieve the goals of the Church. Both the authority and the faithful are active subjects in the search for this goal. The role of the territory is, accordingly, to determine who is the active subject and who is the passive subject of power.

Canon 107 says that both the domicile and the quasi-domicile determine the condition of faithful in a particular church. On the other hand, there are possible relations that can modify this condition or specify it in a specific way (see commentary on c. 134). We can argue, however, that, even in the case of territorial circumscriptions, the relation between the authority and the faithful is not mediated *by* the territory; on the contrary, it is a personal relation.

This is an idea that had become blurred and that was recovered by Vatican II, as Del Portillo argues, in an article written shortly after the Council, analyzing the evolution that was taking place, throughout the centuries, toward a *territorialist* consideration of the Church. He argued that, due to this consideration, the "areas of competence will be determined according to the territory; the dioceses, the parishes, etc., are considered not as communities defined by territories, but as simple territories

1. Cf. M. CONTE A CORONATA, *Compendium Iuris Canonici*, I (Turin 1937), p. 326.
2. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd expanded ed. (Pamplona 1992), p. 151.

with a people and a priest. The strengthening of this idea will be due in no small measure to the ... principle *Ecclesia comparatus reipublicae*."[3]

In the new legislation of the Church, that is to a great extent a result of the council ecclesiology, the principle of territoriality is substantially modified. Hervada provides the following characteristics for the modern principle of territoriality: *a*) it is an *extrinsic* principle that limits the ecclesiastical circumscriptions or divisions; *b*) it is also the more frequently used criterion in the pastoral organization of the Church due to the prevalent sedentary nature of humanity; *c*) it is not the only criterion, and it is qualitatively, not quantitatively, equal to the personal criterion. Two corollaries can be deduced from these features: 1) territoriality is not an essential element of ecclesiastical circumscriptions, which are *essentially* communities, in other words, groups or coetus of people; 2) territorial and personal ecclesiastical circumscriptions are essentially equal, differing only in the limiting extrinsic criterion.[4]

This limiting, non-essential, role of the territory is present in *Christus dominus*, 11. The *Portio populi dei* that is the particular church presents the following substantial or constitutive elements: the episcopal office as head, the presbyterium and the community of the faithful.[5] Here is a logical explanation of why the authority-subject relationship prevails even when the faithful is out of the territory and even when the authority is also out of it: once determined by the domicile or quasi-domicile, the relationship *becomes independent* of the territorial element.

On the other hand, as we said before, the territory is not the only determining element of the relationship. There are many other possible ways to determine the relationship of a personal and non-territorial type, even within the jurisdictional structures, in addition to those which arise from the phenomena of associations in the Church, as religious institutes do, in which, as in c. 134 § 1, the authority-faithful relationship occurs. The commentary on c. 201 *CIC*/1917 which Wernz-Vidal make in regard to these effects is interesting because as they accentuate the *personal* aspect of the power of governance they receive support in their thesis from the fact that there are numerous cases in which a relationship of power between two subjects arises independently of a territorial element. This would be the case, they argue, in a relationship which comes into being as a result of a contract or of a delict.[6]

3. Later in the canon, it is established that the exercise of executive power reaches also "*peregrini* who are actually living in the territory, if it is a question of granting favors or of executing universal or particular laws

3. A. DEL PORTILLO, "Dinamicidad y funcionalidad de las estructuras pastorales," in *Ius Canonicum* 9 (1969), pp. 312–313.
4. Cf. J. HERVADA, "Significado actual del principio de territorialidad," in *Fidelium Iura* 2 (1992), p. 235.
5. Cf. A. DEL PORTILLO, "Dinamicidad y funcionalidad...," cit., pp. 325–326.
6. Cf. F. WERNZ-P. VIDAL, *Ius Canonicum*, II (Rome 1943), pp. 435–436.

by which the *peregrini* are bound in accordance with c. 13 § 2, 2°." This does not mean that the origin of this power is the fact of being in the *territory of dominion* of that particular authority. The mere fact of being in the territory does not make the individual member of a given Church in its limits, since it is necessary that one has domicile or quasi-domicile in it (c. 107 § 1). We can argue that in these cases power results from the determination of the law, since the legislator considered it convenient to grant the authority power over *peregrini*, that ordinarily do not depend on him, for pastoral purposes. In this situation, the territory is also an element of determination of power although not through the domicile or quasi-domicile, but, through a specification of the law, that provides that for certain matters the one with executive power has competence over *peregrini* in the territory.

4. The last aspect that requires clarification in the interpretation of the canon is the usage of the term "subject;" that seems to indicate that the precept refers only to those persons who, enjoying executive power, can be juridically considered to have subjects allocated to them. Thus, the canon would only affect the ordinaries mentioned in c. 134 § 1, and not to all those that have an ordinary executive power. It would also be questionable whether the norm can be applied to those that enjoy a delegated power.

It is not clear whether the canon refers to executive power in general, or whether, on the contrary, it must be restricted to the ordinaries to which c. 134 refers. Some authors, commenting on the corresponding c. 201 of the *CIC*/1917, consider that the norm cannot be restricted to ordinaries. This is the case of Alfonso Lobo, who argues: "The clerics that have both ordinary and delegated power can exercise it, when they are in the territory where it was delegated to them, and, when they are outside of it. It is even valid and licit to exercise it on individuals who are not physically present, as long as there is no circumstance that requires the opposite."[7]

This can be more clearly understood when comparing the phrasing of c. 134 with that of c. 136: unlike c. 134 § 1, that refers to *ordinary* executive power explicitly, c. 136 that only refers to executive power, without restricting the norm to those that have ordinary power. We cannot establish a restriction where the legislator has established none.

On the other hand, when analyzing the canons that deal with power, as well as those that refer to natural persons, we are reminded that the term "subject" is rarely used; it is neither used in c. 134, which defines the term ordinary, nor in c. 107, that establishes who is the proper parish priest and the proper ordinary. It is a term that the Code uses with less technical precision than the *CIC*/1917, taking into account the new conception of power as service rather than supremacy. Following the principle of *wide* interpretation of ordinary and delegated power in a general way (c. 138), we cannot restrict the norm only to the ordinaries.

7. S. ALONSO LOBO, in *Comentarios al Código de Derecho Canónico* (Madrid 1963), p. 503.

137 **§ 1. Potestas exsecutiva ordinaria delegari potest tum ad actum tum ad universitatem casuum, nisi aliud iure expresse caveatur.**

§ 2. Potestas exsecutiva ab Apostolica Sede delegata subdelegari potest sive ad actum sive ad universitatem casuum, nisi electa fuerit industria personae aut subdelegatio fuerit expresse prohibita.

§ 3. Potestas exsecutiva delegata ab alia auctoritate potestatem ordinariam habente, si ad universitatem casuum delegata sit, in singulis tantum casibus subdelegari potest; si vero ad actum aut ad actus determinatos delegata sit, subdelegari nequit, nisi de expressa delegantis concessione.

§ 4. Nulla potestas subdelegata iterum subdelegari potest, nisi id expresse a delegante concessum fuerit.

§ 1. Ordinary executive power can be delegated either for an individual case or for all cases, unless the law expressly provides otherwise.

§ 2. Executive power delegated by the Apostolic See can be subdelegated, either for an individual case or for all cases, unless the delegation was deliberately given to the individual alone, or unless subdelegation was expressly prohibited.

§ 3. Executive power delegated by another authority having ordinary power, if delegated for all cases, can be subdelegated only for individual cases; if delegated for a determinate act or acts, it cannot be subdelegated, except by the express grant of the person delegating.

§ 4. No subdelegated power can again be subdelegated, unless this was expressly granted by the person delegating.

SOURCES: § 1: c. 199 § 1; CodCom Resp. 3, 16 oct. 1919 (*AAS* 11 [1919] 477); CodCom Resp. VI, 26 mar. 1952 (*AAS* 44 [1952] 497)
§ 2: c. 199 § 2; CodCom Resp. VI, 26 mar. 1952 (*AAS* 44 [1952] 497)
§ 3: c. 199 §§ 3 et 4; CodCom Resp. V, 20 maii 1923 (*AAS* 16 [1924] 114–115); CodCom Resp. IV, 28 dec. 1927 (*AAS* 20 [1928] 61–62); CodCom Resp. VI, 26 mar. 1952 (*AAS* 44 [1952] 497)
§ 4: c. 199 § 5; CodCom Resp. VI, 26 mar. 1952 (*AAS* 44 [1952] 497)

CROSS REFERENCES: cc. 131–133, 135, 138, 361

COMMENTARY

Héctor Franceschi

1. Delegation, understood as an administrative technique, is a fiduciary assignment of specific functions to a subject. In the public law of the Church, the possibility of delegation has certain limits, as established in c. 135, where the possibility of delegation of power is practically restricted to executive power:[1] legislative power cannot be delegated by the legislator inferior to the supreme authority, unless the law provides otherwise (c. 135 § 2). Even in the case of a supreme legislator, there are norms that restrict to a great extent the legislative activity of the dicasteries of the Roman Curia. Along these lines, *Pastor bonus*, 18 establishes: "Dicasteries cannot issue laws or general decrees having the force of law or derogate from the prescriptions of current universal law, unless in individual cases, and with the specific approval of the Supreme Pontiff." Article 125 § 2 of the RGCR provides, on the other hand, that dicasteries cannot promulgate laws or general decrees, which are dealt with in c. 29, nor can they abolish the prescriptions of the law established by the Roman Pontiff, without his *specific approval*.[2] Judicial power can only be delegated for the realization of acts preparatory to a decree or sentence (c.135 § 3). On the other hand, c. 137, which corresponds to c. 199 *CIC*/1917,[3] enumerates the subjects in canon law that enjoy the capacity of delegating, restricting even more the use of this technique of sharing power. Its goal is the regulation of the delegation and subdelegation of executive power, being also applied to habitual faculties, as c. 132 provides.

This canon is an expression of the peculiar independence that delegated power presents relative to the delegating person. Delegated power can be subdelegated within the general limits established by the law and those limits that the delegating person may have pointed out at the beginning.[4]

2. The possibility of delegation of power is determined by different elements: the kind of power (ordinary or delegated), the authority from which it comes from (the Holy See or another authority with ordinary, executive power), and its extension (delegation obtained for the majority of the cases or for a specific act or acts). Taking into account these elements, the legislator determines the criteria of delegation and subdelegation.[5]

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1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd ed. (Pamplona 1992), p. 134.
2. *AAS* 84 (1992), pp. 201–267.
3. Cf. P. GEFAELL, *El régimen de la potestad delegada de jurisdicción en la Codificación de 1917* (Rome 1991), pp. 77–120.
4. Cf. J.I. ARRIETA, *Organizzazione Ecclesiastica* (testo provvisorio *ad usum scholarum*), Rome 1992, pp. 222–223.
5. Cf. M. CONTE A CORONATA, *Compendium Iuris Canonici*, I (Turin 1937), pp. 329–330.

a) The norm provides a general principle concerning ordinary power. Unless the law or the nature of the subject prevents it, all executive power can be delegated, either for all cases of the same kind (universal delegation), or for a specific case or cases (particular delegation). According to what c. 138 provides, with this delegation one can interpret that all functions necessary to facilitate the exercise of power that has been received and to carry out the mandate have been assigned to the delegate.[6]

Thus, a first principle is established in § 1 of the canon: "Ordinary executive power can be delegated either for an individual case or for all cases." It can be considered a general principle that ordinary executive power (proper or vicarious) can be delegated. The reason for this broad faculty of delegation can be found in the need to guarantee the efficient exercise of the power of governance within the Church. Delegation is an ordinary means of attributing competence in the Church, very appropriate and necessary in many cases for reasons of the common good, or due to the abundance of subjects for which the individuals that enjoy the power of governance are responsible.[7]

An exception is made regarding this general principle: "unless the law expressly provides otherwise." It is important to notice that the exact phrasing of the canon is "expressly." Accordingly the interpretation of prohibitions must be done strictly following the general rules of interpretation of the law. In the previous legislation, the prohibition to delegate the priest's faculty of confession or the canon penitentiary's faculty to absolve were mentioned as classical examples of this restriction. In *CIC*, these are considered to be habitual faculties, in accordance with c. 132, and not an exercise of executive power, although the norm of c. 137 § 1 is applied to them in accordance to the provisions of c. 132.

b) Paragraphs 2 and 3 of the canon establish the possibilities and the limits of subdelegation, or rather, of delegation of the delegated power. The criteria to determine it are the ones mentioned before: the authority that delegated and the extension of the delegation.

If power is delegated by the Holy See (§ 2), it can be subdelegated for the majority of the cases or for a specific act. Not only the Roman Pontiff but also the Secretary of State, the Council for Public Affairs of the Church and other institutions of the Roman Curia that, logically, enjoy executive power are considered to be the Apostolic See (c. 361). The canon provides two exceptions[8]: *a*) that the personal qualities have been taken into account; in other words, on granting the delegation, the Apostolic See must have clearly taken into account, explicitly or implicitly, not the mission or office performed by the individual, but his personal qualities: knowledge, expertise, prudence; or *b*) that subdelegation had been *expressly* forbidden.

6. Cf. J.I. ARRIETA, commentary on canon 137, in *Pamplona Com.*
7. Cf. G. MICHIELS, *De potestate ordinaria et delegata* (Tournai 1964), pp. 180–181.
8. Cf. ibid., pp. 190–192.

When a delegation was made by an authority with ordinary executive power other than that of the Apostolic See (§ 3) there are two possibilities: *a*) If the delegation was made for all matters, the power can be subdelegated for a specific act or acts. The reason for this possibility can be found in the similarity existing between ordinary power and the very broad delegated power that some authors call *quasi-ordinary* power. It seems logical that whoever enjoys such a broad power may be able to have the necessary means for its efficient exercise, such as the ability to delegate it; in this case, this controls only for some acts, since the availability of the power is less than that of the titleholder from which it was delegated. The legislator does not provide the exception of the previous paragraph: "unless the law expressly provides differently." There is not a general consensus on the interpretation of this omission.[9] Some argue it is due to an oversight, and others argue that it was an intentional omission by the legislator, since in each case, the limitations provided by the delegating individual are sufficient. *b*) If the delegation was made for a specific act or acts, the canon provides that power cannot be subdelegated without an explicit grant of the delegating person.

c) Paragraph 4 of the canon provides that: "No subdelegated power can again be subdelegated, unless this was expressly granted by the person delegating." A general principle is thus reinstated: the prohibition of the so-called subdelegation of the subdelegation. It is logical that the legislator may provide a limit to subdelegations to avoid an excessive dispersion of governance within the Church, which could also lead to juridical uncertainty as far as the acts of governance within the Church are concerned. The interpretation of the canon presents a difficulty that already existed in c. 199 *CIC*/1917, since it is not clear who is the delegating person who must authorize the subdelegation, whether it is the original delegating person, or the delegate that eventually subdelegated. In our opinion, it is necessary that it be the original delegating person, in other words, the titleholder of ordinary power, who authorizes the subdelegation of the subdelegation.[10]

3. Finally, we note that the canon corresponds to 988 *CCEO*, in which we find some modifications due to differences in the hierarchical organization of Eastern Catholic Churches. In paragraph 2, the delegation of power performed by the Apostolic See and that performed by the patriarchs are ranked at the same level. These can be subdelegated for the majority of cases or for an individual act taking into account the limitations that it was granted to a specific person or subdelegation was expressly prohibited.

9. Cf. ibid., pp. 194–195; L. BENDER, *Potestas ordinaria et delegata* (Rome 1957), pp. 40–43.
10. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., p. 134; L. BENDER, *Potestas ordinaria et delegata...*, cit., pp. 37–39.

138 **Potestas exsecutiva ordinaria necnon potestas ad universitatem casuum delegata, late interpretanda est, alia vero quaelibet stricte; cui tamen delegata potestas est, ea quoque intelleguntur concessa sine quibus eadem potestas exerceri nequit.**

Ordinary executive power, and power delegated for all cases, are to be interpreted widely; any other power is to be interpreted strictly. Delegation of power to a person is understood to include everything necessary for the exercise of that power.

SOURCES: c. 200 § 1

CROSS REFERENCES: c. 17, 36 § 1, 131 § 3, 133, 137

COMMENTARY

Hector Franceschi

1. This canon provides the criteria according to which both ordinary and delegated executive power should be interpreted, in the ambit of its exercise, taking into account its extension, (material ambit) and its intensity (degree of power that one has). The phrasing of this canon is almost verbatim from c. 200 § 1 *CIC*/1917, which considered in § 2 the proof of delegation, which is now provided for in c. 131 § 3 *CIC*.

Analogously, we can apply this norm to the prescription of cc. 17–18, in which two classical criteria of declarative interpretation are provided for: the *broad* and the *strict* interpretations, that aim to underline the precise meaning of the expressions presented in the norms, depending on whether we assign a limited or broad sense to those terms that can have different meanings. Declarative interpretation is different from restrictive or extensive interpretation that corrects the norm trying to understand its spirit, since it must confine itself to the terms used by the legal text, or, in the case of delegations, in the mandate by which it is granted.[1]

The canon differentiates between delegated power for the majority of the cases, which is ranked equal in its interpretation with ordinary power since it must be interpreted broadly, and delegated power for an act or specific acts, which must be strictly interpreted. In both cases, the same principle is provided by the legislator, namely: in the concession of

1. Cf. J.I. ARRIETA, commentary on c. 138, in *Pamplona Com.*

power, all that is necessary for this power to be exercised is included, even if it is not specified in the act of delegation.[2]

2. We can now analyze each one of the hypotheses contemplated in the norm.

a) In the first place, the ordinary executive power and the delegated power for the majority of cases receive a *broad* declarative interpretation. In other words, the interpretation of the ambit of power, when in doubt about the extension of the terms used by the legislator or by the mandate or act of delegation, must be made in a broad manner. Of all possible meanings or extension of the term, the broadest is the one that should be chosen. The reason for this is that, as Michiels argues in his commentary on c. 200 § 1 *CIC*/1917, the ordinary executive power and that delegated for the majority of cases, which is very similar to ordinary one in its exercise, are powers that seek, most of all, the common good of the community as a whole for which they were granted. It is accordingly logical that the authority that grants them may have decided to give its holders, by means of the office itself or through the reception of the delegation, all the necessary means for its efficient exercise, without limitations that would interfere with it.[3]

According to Bender's interpretation, we can argue that this norm would also be applied to those who enjoy a subdelegated power for all cases. This is the case of power delegated by the Apostolic See and then subdelegated for all the cases, a possibility considered in c. 137 § 2. The interpretation of the ambit of power would be made in a broad sense, and not in a strict one. The reason for this, according to this author, is that the principle is enunciated in this canon in an absolute way, not making any distinction between power delegated for the majority of the cases and subdelegated power which, being a subaltern type, can be said to be, in a broad sense, a delegated power.[4]

b) In all other cases, in which power for a specific act or acts is granted by delegation or subdelegation, declarative interpretation must be *strict*. One must read the terms in their least broad sense. The reason for this is that they are acts that somehow "run counter to a law in favor of private persons" (c. 36 § 1), which to a certain extent contravene the regular state of matters and consequently demand a strict interpretation.[5]

In his study of the corresponding c. 200 *CIC*/1917 Gefaell argues that: "Canonical tradition would normally allow that any other kind of power, i.e., *ad casum* delegated power, be interpreted in a strict manner, since it was considered to be odious, since the delegate would act in cases in

2. Cf. G. MICHIELS, *De potestate ordinaria et delegata* (Tournai 1964), p. 218.
3. Cf. ibid., pp. 216–217.
4. L. BENDER, *Potestas ordinaria et delegata* (Rome 1957), pp. 44–45.
5. Cf. G. MICHIELS, *De potestate...*, cit. p. 218.

which the holder of the office title should have acted. We can understand that the fact that someone interfered in someone else's competencies may be considered odious, particularly if one takes into account that power was granted as a personal privilege that one should make profitable."[6] Although it is true that the current conception of power is quite different, since it is conceived more as the ability to serve than as a form of power of benefit, the *odious* nature (in the sense of the maxim "favorabilia sunt amplianda, odiosa sunt restringenda") has remained the same: due to the exceptional nature of this power, one should avoid an excessive extension that could go against juridical security and order.

3. Finally, the canon provides that, in both cases, it must be understood that granting power entails granting everything that is necessary for the efficient exercise of power. Consequently, it must be argued that the performance of an act that is not considered in the mandate but believed to be necessary for its execution, would not make it null. For example, Wernz-Vidal argue, anyone who receives the power to absolve a heretic can receive the person's retraction, even though it is said that the retraction must be made before the delegate of the ordinary.[7] This is how the norms of interpretation of the delegation provided in cc. 133 and 138 complement each other.

6. P. GEFAELL, *El régimen de la potestad delegada de jurisdicción en la Codificación de 1917* (Rome 1991), p. 184.
7. Cf. F. WERNZ-P. VIDAL, *Ius Canonicum*, II (Rome 1943), p. 435.

139 **§ 1. Nisi aliud iure statuatur, eo quod quis aliquam auctoritatem, etiam superiorem, competentem adeat, non suspenditur alius auctoritatis competentis exsecutiva potestas, sive haec ordinaria est sive delegata.**

§ 2. Causae tamen ad superiorem auctoritatem delatae ne se immisceat inferior, nisi ex gravi urgetique causa; quo in casu statim superiorem de re moneat.

§ 1. Unless the law prescribes otherwise, the fact that a person approaches some competent authority, even a higher one, does not mean that the executive power of another competent authority is suspended, whether that be ordinary or delegated.

§ 2. A lower authority, however, is not to interfere in cases referred to higher authority, except for a grave and urgent reason; in which case the higher authority is to be notified immediately.

SOURCES: § 1: c. 204 § 1
§ 2: c. 204 § 2

CROSS REFERENCES: cc. 39, 65

COMMENTARY

Hector Franceschi

1. Due to the hierarchical organization of the Church, apart from the Roman Pontiff, no one has any power with exclusive character, but shares it with other people, who in the hierarchical order would be accordingly subordinates or superiors. This is true both for ordinary power and for delegated power.[1] In the same way, due to the diverse criteria of attribution of competencies, certain situations arise in which there are several competent bodies for one single matter. For instance, in some cases, it is the diocesan ordinary who has competence over one who has a domicile and a quasi-domicile, or, in the case of the military ordinariates, both the diocesan ordinary and the military one could be competent.

It could be argued that in those cases where a certain authority exercises competence, all the others would lose it, mainly in the case of authorities subordinated hierarchically; but this is not the case. Canon 139

1. Cf. L. BENDER, *Potestas ordinaria et delegata* (Rome 1957), pp. 72–73.

(the corresponding canon in the *CIC*/1917 would be c. 204) provides the criteria to settle possible conflicts of competence that can occur among different authorities competent in a given matter, taking or not taking into account hierarchical dependency, either through ordinary power or through delegated power.[2]

Among the many possible situations, it is worth mentioning the following ones. The acts are the competence of the vicar general or episcopal vicar of a diocese, and also are the competence of the diocesan bishop. The act for which the local ordinary has power also belongs to the competence of the Roman Pontiff. The acts that belong to the competence of the delegate can also be performed by the delegating person. On the other hand, the legislator does not provide the obligation of going to any given authority among those that are competent: one can go to one or the other, even disregarding the inferior authority. However, due to reasons of good governance and out of consideration for the principle of subsidiarity, whatever has been established as the specific competence of a given authority must be granted to it, unless there is reason to believe that it should be granted to the superior. What happens in these cases with all the other competent organs? This is what the present canon regulates.

2. Paragraph 1 of the canon provides a general principle resulting from the irrevocable nature of the norms of competence. This principle determines that, unless the law provides differently, executive power, both ordinary and delegated one, cannot be suspended only because one may have approached another authority also competent, even a higher one.

Paragraph 2 provides a limitation of this principle regarding the case of authorities hierarchically subordinated: when a superior authority is trying the issue because it is competent in this matter, the inferior authority should not become involved. This inferior authority is allowed to become involved only when there is an urgent and serious cause for it. In such a case, the canon provides, he should immediately inform the superior authority that he is participating in the case. Thus both respect owed to the superior and the public good that could be at risk are simultaneously protected.[3]

The act that contravenes this norm would be illicit, although valid, once the requirement provided by the legislator for the validity of the acts had been met. It could initially be argued whether these acts are invalid when there is no serious and urgent cause, in view of the terms provided in the norm: "*nisi* ex grave urgentique causa." Canon 39 argues that when particles such as *nisi* are used, it concerns validity. However § 2 is an exception to the general principle of the irrevocable nature of competence,

2. Cf. J.I. ARRIETA, commentary on c. 139, in *Pamplona Com.*
3. Cf. S. ALONSO LOBO, in *Comentarios al Código de Derecho Canónico* (Madrid 1963), p. 506.

provided for earlier in the norm. Consequently, the disposition has to be strictly interpreted: no one has any doubt about the validity of the act but about its legality, that would be determined by the serious and urgent cause.[4]

3. The term "superior authority" that is used in the canon must be interpreted in a precise manner. It does not refer to any authority that belongs to a superior rank, but to that one which in the hierarchical line would properly be the superior of that one that tries the matter that is already being tried by this superior authority. However, it is obvious that prudence and a sense of discipline suggest that an authority of inferior rank should not become involved unless there is a truly important reason for it, in matters that are already being tried by an authority of a superior.[5] The cases of organs with executive power not reciprocally dependent have their own legislation, at least as far as the concession of favors is concerned, provided for in c. 65.

"Superior," in the sense established by this canon, would be, for instance, the Roman Pontiff when compared with anyone else, the Holy See, when compared with all but the Roman Pontiff; the diocesan bishop when compared with his vicars; the local ordinary, when compared with the parish priests; the delegating person, when compared to the delegate.

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4. Cf. L. BENDER, *Potestas ordinaria et delegata...*, cit., p. 74; G. MICHIELS, *De potestate ordinaria et delegata* (Tournai 1964), pp. 240–241; M. CONTE A CORONATA, *Compendium Iuris Canonici*, I (Turin 1937), p. 327.

5. Cf. L. BENDER, *Potestas ordinaria et delegata...*, cit., pp. 74–75.

140 **§ 1. Pluribus in solidum ad idem negotium agendum delegatis, qui prius negotium tractare inchoaverit alios ab eodem agendo excludit, nisi postea impeditus fuerit aut in negotio peragendo ulterius procedere noluerit.**

§ 2. Pluribus collegialiter ad negotium agendum delegatis, omnes procedere debent ad normam can. 119, nisi in mandato aliud cautum sit.

§ 3. Potestas exsecutiva pluribus delegata, praesumitur iisdem delegata in solidum.

§ 1. When several people are together delegated to act in the same matter, the person who has begun to deal with it excludes the others from acting, unless that person is subsequently impeded, or does not wish to proceed further with the matter.

§ 2. When several people are delegated to act as a college in a certain matter, all must proceed in accordance with can. 119, unless the mandate provides otherwise.

§ 3. Executive power delegated to several people is presumed to be delegated to them together.

SOURCES: § 1: c. 205 § 2
§ 2: c. 205 § 3
§ 3: c. 205 § 1

141 **Pluribus successive delegatis, ille negotium expediat, cuius mandatum anterius est, nec postea revocatum fuit.**

If several people are successively delegated, that person is to deal with the matter whose mandate was the earlier and was not subsequently revoked.

SOURCES: c. 206; CodCom Resp. VI, 26 mar. 1952 (*AAS* 44 [1952] 497)

CROSS REFERENCES: cc. 10, 14, 67 § 2, 119, 139, 142 § 1

COMMENTARY

Hector Franceschi

Delegation of power is *singular*, when it was granted to a single person, or, *plural*, if it was made in favor of several people. These two can-

ons, similar to cc. 205–206 *CIC*/1917, that aim to settle possible competence conflicts in the exercise of power, regulate the manner of exercise, the prevalence, the competencies, etc., of the different kinds of delegated plural power which we shall analyze next.

The delegation granted to a single person does not present further problems as far as its exercise is concerned. By contrast, in the case of plural delegation several hypotheses may be considered since the legislator has provided for several possibilities. According to these canons, plural delegation can be *simultaneous*; that is, one by which in the same act of delegation or also in several acts with sequential unity, being dictated one after another by the same Superior, several people will be authorized to perform one of those activities that belong to the executive power. These are the cases regulated in c. 140. In this case, the delegation can be performed in a joint manner (*in solidum*) or in a collegial manner. In other cases, plural delegation is called *successive*, when it is performed at different times without a connection between them.[1] This second type is regulated in c. 141. In general, we may distinguish three types of plural delegation of power: joint, collegial, and successive.[2] The first two would be simultaneous delegations. We can now proceed to analyze each one of these cases.

a) *Joint* delegation (c. 140 § 1) is that one that is granted simultaneously to several individuals such that only one of them may make use of it. When one of the delegates begins to act, the phenomenon known as prevention takes place, excluding the rest of the delegates from exercising the power that is in suspense.

To avoid disturbing collisions or interferences in the exercise of the power, the legislator has provided this right of *prevention*, in accordance with which, once any of the delegates has begun to put the received power into practice, it cannot be disturbed in its exercise by any of those that received the same faculties, unless due to some impediment, such as sickness, violence, a canonical penalty, or if the delegate chose not to continue the work already started, in which case any other joint delegate could intervene so that the matter suffers no loss and can be seen through to the conclusion.

Although the remaining joint delegates cannot act when, following the prevention principle, the first one has taken upon himself the exercise of the power, this does not mean that they are deprived of the power received from the delegating person of which they continue to be titleholders and can validly exercise it. However, their interference would be illicit if, after one of them began to act, the rest tried to act when the circum-

1. Cf. S. Alonso Lobo, in *Comentarios al Código de Derecho Canónico* (Madrid 1963), pp. 506–507.
2. Cf. E. Labandeira, *Tratado de Derecho Administrativo Canónico*, 2nd expanded ed. (Pamplona 1992), pp. 135–136.

stances established in canon law do not occur. This does not mean that, were these circumstances to occur, the power would be retrieved, since they had never lost it. They are simply authorized to make a legitimate use of a power that had been until then suspended.

b) *Collegial* delegation is that performed on several individuals constituted as a group or college. In this case, the exercise of the power must be done jointly by all of them, because the jurisdiction resides as a whole on the college, and, the constitutive members lack any power when considered individually. The legislator did not want to follow the old criterion of c. 207 § 3 of the *CIC*/1917, according to which the absence of one of the delegates would stop the collegial delegation. Thus, the absence of one of them does not prevent the rest from acting in accordance with c. 119, which provides that not only the ballot criteria, but also the *quorum* demands be met so that a decision can be made. In order for a collegial decision to be valid, at least most of those that should be summoned must be present, and the matter must be approved by the absolute majority of those present. It then provides, as an exception, that what affects all and everyone must be approved by all. Canon 140 § 2 argues that it can be provided differently in the mandate. This could refer to the kind of ballot used, what is considered as majority, etc.

In order for the power granted to several individuals to be considered as collegially granted, it must be explicitly stated in the act of delegation. In case of doubt, the power delegated to several people is presumed to be joint (c. 140 § 3). This doubt could arise because, on examining the text, context, circumstances (of the concession) and nature of the power, it does not seem to be clearly stated whether the delegation is collegial or joint. In these cases, the legislator provides for a presumption *iuris et de iure*, that the power be really held, and, that makes the act performed by virtue of it valid, even if the delegating person's will is afterwards found to be contrary to this. This disposition is based on the fact that the exercise of executive power (which was formerly called voluntary) is freer and more expeditious than judicial and legislative power.[3]

c) *Successive* delegation (c. 141) is that which is granted to several individuals at different times, so that the power must be exercised by only one of the delegates, as it is the case with joint delegation, and not by all of them, as it is the case in collegial delegation. In this case, argues Labandeira, "the juridical rule '*qui prior est tempore, potior est iure*' has validity (In VI, *Regula iuris*, 54): this is to say, that person ought to act whose mandate has been granted first, if it has not been revoked after that."[4]

Consequently, if one of the later named delegates uses the power breaking this rule, the act performed would be valid although illicit. The

3. Cf. S. ALONSO LOBO, in *Comentarios al Código de Derecho Canónico*, cit., pp. 507–508.
4. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., p. 136.

reason for this is that the executor has the power necessary to act; and, according to what c. 10 provides, we have to argue that the prohibition provided for in c. 141 does not, expressly or equivalently, contain an invalidating clause. Besides, in case one considers this criterion to be dubious, it is established in c. 14 about doubt of law, even in those cases of invalidating or incapacitating laws, there would be the same consequences; namely the performed act would be valid.[5] It would be different if the first delegate, due to negligence or an impediment, did not use the power in due time, a situation in which the later delegate would be authorized to act. This interpretation is in total agreement with the regulation of the jointly delegated power which expressly refers to the case of impediment or negligence on the part of the individual who, in accordance to the norm of prevention, had taken upon himself the exercise of the power. In both cases the situation, once that action has been taken, is similar.

The phrasing of the canon could lead us to believe that the first delegate has a *duty* toward acting in the matter. The canon says: "that person is to deal with the matter whose mandate was the earlier..." But this is not the case; it is not an inescapable duty. The norm provides a faculty in favor of the first delegate who has the right to not have his power usurped by the other delegates.[6] Whoever has the oldest non-revoked power is free to choose whether to act or not. In case we do not want to act we could apply, as it was already stated, what the legislator provided for in c. 140 § 1 regarding the joint delegates: if the person that was acting is unable to do so any more, or, *does not want* to go ahead with the matter, any other of the delegates can continue to deal with the matter. In the case that concerns us, if the first delegate is unable to continue or does not want to exercise power, the second one can then do it, and so on.

There is another connection between this norm concerning the successive delegation (c. 141) and the one that presumes and regulates joint power (c.140 § 3) which must be taken into account for its correct interpretation: when the delegation is granted to several individuals and it is stated that the delegating person's will has been to have it be exercised jointly even though it is successive, the criterion of solidarity would prevail. When the delegation was granted at different times and nothing else about the case is stated, its exercise would have to follow the provided for successive delegations, that is, the seniority of the mandate. Doubt is necessary for the *presumption* of solidarity to be applied.[7]

Toward the end of c. 141, the legislator inserts a clause that conditions the norm, stating that the one who acts is whoever has the earlier mandate if it "was not subsequently revoked." As long as it is not stated differently, it is assumed that the later delegation was granted inadvert-

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5. Cf. S. ALONSO LOBO, in *Comentarios al Código de Derecho Canónico*, cit., p. 508.
6. Cf. L. BENDER, *Potestas ordinaria et delegata* (Rome 1957), pp. 80–81.
7. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, cit., p. 136.

ently by the delegating person, and, in this case, the prevalent right accompanies the first one. But if, in the second mandate, the first delegation is expressly rescinded, then the delegating person's will is clear and should be respected. Ordinary formulae, such as "anything contrary notwithstanding" or other similar ones that normally accompany official documents are not sufficient to consider the first mandate rescinded. It is necessary to make reference to the first delegation and to its transfer to a new person. As Conte a Coronata argues, "the delegating person is not presumed to have wanted to withdraw the power from the previous delegate unless he said so."[8]

The last matter that will concern us is the *means* of revocation of the previous mandate. The canon refers only to a *revocation* of the mandate without specifying what *means* is used. This phrasing, which differs from the phrasing of c. 206 of the *CIC*/1917, puts an end to the discussion around the interpretation of the norm, concerning the "subsequent abrogation by rescript." This presented a problem of interpretation, since not all the delegations were granted by means of a rescript, and not all those that had the ability to delegate could grant rescripts. In the current legislation, on the other hand, rescripts are circumscribed to the concession of favors (c. 59). The predominant interpretation among the authors was that the norm should not be restricted to the delegations granted by means of a rescript, that they should apply to any mandate of delegation. Thus, for instance, Alonso Lobo argues that the norm should be interpreted in the following manner: "the person whose delegation is previous and provided that it has not been expressly abrogated by a later *mandate*."[9] This is the interpretation that the legislator chose in the *CIc.* If it is in answer to a petition, the delegation of power can be granted by a rescript, by decree or orally. For what is not expressly established in c. 141 is in conformity with the norm established in c. 142 § 1 about the revocation of power—it is necessary that the revocation of the mandate be expressly stated.

8. M. CONTE A CORONATA, *Compendium Iuris Canonici*, I (Turin 1937), p. 330.
9. S. ALONSO LOBO, in *Comentarios al Código de Derecho Canónico*, cit., pp. 508–509; cf. L. BENDER, *Potestas ordinaria et delegata*, cit., pp. 79–80; G. MICHIELS, *De potestate ordinaria et delegata* (Tournai 1964), p. 246.

142 **§ 1. Potestas delegata extinguitur: expleto mandato; elapso tempore vel exhausto numero casuum pro quibus concessa fuit; cessante causa finali delegationis; revocatione delegantis delegato directe intimata necnon renuntiatione delegati deleganti significata et eo acceptata; non autem resoluto iure delegantis, nisi id ex appositis clausulis appareat.**

§ 2. Actus tamen ex potestate delegat, quae exercetur pro solo foro interno, per inadvertentiam positus, elapso concessionis tempore, validus est.

§ 1. Delegated power lapses: on the completion of the mandate; on the expiry of the time or the completion of the number of cases for which it was granted; on the cessation of the motivating reason for the delegation; on its revocation by the person delegating, when communicated directly to the person delegated; and on the renunciation by the person delegated, when communicated to and accepted by the person delegating. It does not lapse on the expiry of the authority of the person delegating, unless this appears from clauses attached to it.

§ 2. An act of delegated power exercised for the internal forum only, which is inadvertently performed after the time limit of the delegation, is valid.

SOURCES: § 1: c. 207 § 1; CodCom Resp. VI, 26 mar. 1952 (*AAS* 44 [1952] 497)
§ 2: c. 207 § 2; CodCom Resp. VI. 26 mar. 1952 (*AAS* 44 [1952] 497)

CROSS REFERENCES: cc. 47, 131, 189

COMMENTARY

Héctor Franceschi

Since the delegation of power is an administrative technique directly connected to the circumstances of the person and to the confidence of the delegating person, it is a power unstable and strongly precarious in nature.[1] However, for different reasons, among which we could mention the common good, the safeguarding of the acquired rights and juridical safety,

1. Cf. J.I. ARRIETA, *Organizzazione Ecclesiastica* (provisional text *ad usum scholarum*) (Rome 1992), p. 219.

it is convenient that delegated executive power have also certain stability and a clear regulation. This is why the legislator provides in the present norm the causes of extinction of delegated power. This disposition corresponds to c. 207 *CIC*/1917 and remains substantially the same; except for the elimination of § 3 which limited collegial power and required the presence of all collegiate delegates.

Delegated power can cease for several reasons that can be classified in the following groups: 1) causes related to the delegation itself; 2) causes that depend on the delegating person; and 3) causes that depend on the delegate.[2] We will analyze each one of these causes.

1. Causes that depend on the delegation itself. The very nature of the delegation indicates some limits which determine different cases in which the power is extinguished. These are reasons that are implied in the characteristics of the power itself that has been obtained by delegation. Among them we have fulfillment, expiration, and lack of usefulness.

a) Fulfillment: the delegate *has fulfilled* the mandate in exercising the power received and has completed the matter that was entrusted in performing the proper act of governance for which he or she had been granted the delegation.[3] This norm cannot be applied when we are dealing with *universal* delegations, in other words, granted for the majority of the cases, since in that case the mandate is not circumscribed by a specific matter that can be said to have been already taken care of.

b) Extinguished: the delegation *is extinguished* when the period of time for which it was granted is over. Had the delegating person stated a temporal limit for the power that he grants, once this period is over the power is understood to have ceased. Nonetheless, as § 2 of the canon provides, if the act of power is exercised only in the internal forum, it is valid when it had been performed inadvertently outside the time period of the concession. This would be the case, for instance, of the faculty to absolve undeclared censures granted for a specific period of time outside of which one may have, inadvertently, used the power in a specific case.

Likewise, the power ceases when a delegation has been granted for a specific number of cases and that conceded number has already been used up. In the past it was quite common to delegate power for a restricted number of cases: for instance, to absolve a reserved sin or censure ten times. Due to the dangers and inconveniences that this system involves, it is employed far less often today, although it is not always excluded. For instance, the faculty granted to a parish priest to dispense from the banns of marriage. It is understandable that the delegations made

2. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd expanded ed. (Pamplona 1992), pp. 136–137.

3. Cf. G. MICHIELS, *De potestate ordinaria et delegata* (Tournai 1964), pp. 249–253.

in this manner only have a scope as broad as that expressly provided for by the delegating person.[4]

c) Lack of usefulness: delegated power is *useless* when the final cause or purpose of the delegation has ceased to exist. The final cause is like the soul of the mandate, that loses its *raison d'être* when the former disappears. This can happen, for instance, when the purpose or the securing of the good which moved the delegating person to grant the delegation disappears; or when the situation *de facto* that justified the delegation has changed to such a point that it no longer has meaning. This is the case with the faculty granted to the parish priest to dispense from a marital impediment in a particular case when, before executing the dispensation, either the bride or the groom should die, or the impediment that had to be dispensed should cease to exist; or when one of the joint delegates has solved the problem, which would make the purpose of the other individual's delegation disappear; or if a law that one was authorized to dispense from is abrogated.

2. Causes that depend on the delegating person. We commented before about the causes of extinction that depend on the delegation itself. Now we will refer to the extinction of delegated power *due to* the delegating person. In this case we can include, as a general principle, the *revocation* of the power by the delegating person, and, as an exception, in some cases the cessation of the power of the delegating person.

a) The canon provides that the power ceases by *revocation* directly communicated to the delegate. It is said in c. 47 that "the revocation of an administrative act by another administrative act of the competent authority takes effect only from the moment at which the person to whom it was issued is lawfully notified." This norm is applied in the case of revocation of delegated power. The norm that we are analyzing adds that the notification must be done *directly* to the delegate by the delegating person: something he can do in person, by mail, or, through another as proxy.[5] Neither tacit revocation, nor a revocation that is communicated by any other individual that knows about the matter, but that is not commissioned for this, is accordingly sufficient: the *legitimate* notification in these cases is that made *directly* to the delegate.

Although the norm under discussion in its *literal sense* appears to be only granting to the delegating person the faculty of revoking the power and of communicating it to the delegate, we think that the hierarchical superior cannot be denied the same or even greater power of governance enjoyed by the delegating person. According to the most common doctrine,[6]

4. Cf. S. ALONSO LOBO, *Comentarios al Código de Derecho Canónico* (Madrid 1963), p. 510.

5. Cf. M. CONTE A CORONATA, *Compendium Iuris Canonici*, I (Turin 1937), p. 332.

6. Cf. E. LABANDEIRA, *Tratado de Derecho...*, cit., p; 137; G. MICHIELS, *De potestate ordinaria* ..., cit., pp. 261–266; L. BENDER, *Potestas ordinaria et delegata* (Rome 1957), p. 93.

it is not only the delegating person who can revoke the delegation, but the subdelegating person, as well as the superior of these two and that person who had received from them the faculty to revoke. The only requirement for the validity of the revocation is its direct notification, orally or in writing, made by the revoking person to the delegate.

Regarding the time when the delegate's power can be revoked, Wernz-Vidal distinguish three different cases, depending on who is the delegating person and who is the delegate. They specify that, if the power had already been initiated, a just cause is necessary so that the revocation can be legally and validly made before the mandate is over or the act that had already started to be exercised is completed. If there is no just cause, in some cases the revocation could even be invalid.[7]

b) The norm confirms the general principle that the cessation of the delegating person's power does not terminate the delegate's power. This is one of the characteristics of delegated power that make us interpret it as a power different from the original power, and with some amount of independence.[8] This is an often discussed doctrinal subject. Some authors consider delegated power as an exercise of *representation* of the delegating person, and others emphasize its independence from the delegating person's power.[9]

The legislator provides for an exception to the general principle mentioned before: if the mandate was included in a peremptory clause, the delegated power would cease when the power of the delegating person ceased. Such are, according to Michiels and Conte a Coronata,[10] the clauses *ad beneplacitum nostrum* or other equivalent ones, such as *durante meo munere, donec vixero, pro tempore nostrae voluntatis, donec voluero*, etc. The clauses *ad beneplacitum sedis, usque ad revocationem, donem revocavero*, etc., would not be peremptory.

3. Finally, we have "*renunciation* by the person delegated, when communicated to and accepted by the person delegating." Delegated power has its origin in the delegating person's power. Consequently, as long as the latter does not intend to revoke it, the delegate will necessarily continue to receive it. If the delegate does not want the power that was bestowed, for instance, because it causes awkward obligations or frequent scruples, it is not enough that the person renounces to it, he or she must inform the delegating person of the renunciation and it must be accepted by the same.

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7. Cf. F. WERNZ–P. VIDAL, *Ius Canonicum*, II (Rome 1943), p. 438.
8. Cf. J.I. ARRIETA, *Organizzazione Ecclesiastica*, cit., p. 222.
9. For this discussion one can consult P. GEFAELL, *El régimen de la potestad delegada de jurisdicción en la Codificación de 1917* (Rome 1991), pp. 134–137.
10. Cf. G. MICHIELS, *De potestate ordinaria...*, cit., p. 268; M. CONTE A CORONATA, *Compendium...*, cit., p. 332.

Thus, Labandeira argues,[11] for this cause of extinction to be effective, the delegate must unequivocally state his definitive renunciation of the power that had been granted. Second, this renunciation, orally or in writing, must be formally presented to the delegating person or to the competent superior. Finally, the renunciation must be accepted by the delegating person or the competent superior, even in the case that the delegate is not the superior's subject. This acceptance by the delegating person is an administrative act, the true formal cause of the cessation of the delegation: the moment the latter accepts the renunciation, the delegating mandate disappears and the delegated power ceases to be transmitted, without it being necessary to notify the renouncing person again.

11. Cf. E. LABANDEIRA, *Tratado de Derecho* ..., cit., p. 137.

143 **§ 1. Potestas ordinaria extinguitur amisso officio cui adnectitur.**

§ 2. Nisi aliud iure caveatur, suspenditur potestas ordinaria, si contra privationem vel amotionem ab officio legitime appellatur vel recursus interponitur.

§ 1. Ordinary power ceases on the loss of the office to which it is attached.

§ 2. Unless the law provides otherwise, ordinary power is suspended if an appeal or a recourse is lawfully made against a deprivation of, or removal from, office.

SOURCES: § 1: c. 208; CodCom Resp. VI, 26 mar. 1952 (*AAS* 44 [1952] 497)
§ 2: c. 208; CodCom Resp. VI, 26 mar. 1952 (*AAS* 44 [1952] 497)

CROSS REFERENCES: cc. 18, 131 § 1, 139, 145, 184–196, 481 § 1, 1331, 1333, 1638, 1732ff

COMMENTARY

Héctor Franceschi

Ordinary power is intimately bound to the concept of an ecclesiastical office; consequently, its origin, extension, ambit, and extinction depend on the title ownership of the office to which it is attached. Canon 184 provides several causes according to which ecclesiastical office can be lost: the expiration of the designated period of time, reaching the age determined by law, renunciation, transfer, removal, or privation. The loss of the office deprives the title owner of the executive power that, as c. 131 § 1 provides, "is that which by virtue of the law itself is attached to a given office."

Canon 143 considers in § 1 this case: "ordinary power ceases on the loss of the office to which it is attached." We can argue that, even though this statement is useful, it is also redundant, since it is clearly implied in the juridical regulation of power and of ecclesiastical offices that there is a close link between ordinary power and office. Ordinary power is obtained and is lost with the office to which it is attached.[1] This norm con-

1. Cf. S. ALONSO LOBO, *Comentarios al Código de Derecho Canónico* (Madrid 1963), p. 513; L. BENDER, *Potestas ordinaria et delegata* (Rome 1957), pp. 101–102.

tains the whole law about the extinction of ordinary executive power. Then § 2 mentions the cases of suspension and not loss of power which we shall now analyze.

a) The extinction of ordinary power, argues Bender, is determined by norms very different from those that regulate the extinction of delegated power. And it is logical that this should be the case. In the delegation of power, the power is communicated by means of a direct act between the delegating person and the delegate, by means of a simple donation, he argues; whereas in the concession of ordinary power rather than just granting power, what happens is that an office is granted, to which *ipso iure* a power is attached. Hence, the proper object of the juridical action, rather than the concession of power, would be the concession of the office to which the ordinary executive power is attached.[2]

The *principal* cause for the loss of ordinary power is the loss of office.[3] A consequence of the nature of this ordinary power is that power cannot be modified (increased, diminished, limited) independently of the office to which it is attached, as in the cases of delegated power. In other words, the ordinary power corresponding to an office will be the one that the law provides (universal or particular) for that office. A separate issue would be the habitual faculties granted to the title owners of specific offices in accordance with c. 132. Certainly, in each case, there can be specific variations that are due to the attributions of the power on behalf of the person that provides the office.

There are some cases in which it is more difficult to appreciate this tight link between ordinary power and ecclesiastical office. These are situations in which, at first glance, one would think that the power is lost but the office is retained. Among these cases, it is worth mentioning that of the resigning bishop who remains as diocesan administrator, with the powers of that position, until the arrival of a new diocesan bishop. In this case, rather than continuing in the office without the title ownership of the power, we would be dealing with a cessation in the office of diocesan bishop and a provision for a transitory office, that of diocesan administrator until the arrival of the new bishop. We also find other cases in which the extinction of the power is due not to the loss of the office, but to the extinction or abolition of the office itself, especially in the case of transitory offices, such as that of president of a particular council, secretary of a council commission, etc.

The norm under discussion is clear: ordinary power expires due to the loss of the office to which it is attached. This does not mean that in practice the doctrine about the extinction of ordinary power is easy to apply, since there are multiple possibilities in this matter. This matter,

2. Cf. L. BENDER, *Potestas* ..., cit., p. 101.
3. Cf. G. MICHIELS, *De potestate ordinaria et delegata* (Tournai 1964), p. 278.

however, belongs more to the commentary on those canons referring to the loss of ecclesiastical office (cc. 184ff; see respective commentaries). For purely informative purposes, we mention the different cases of loss of office, and, consequently, of the power attached to it, provided for by the legislator: the passing of the designated time or reaching the age determined by the law (c. 186), renunciation (cc. 187–189), transfer (cc. 190–191), removal (cc. 192–195), privation (c. 196).

In some of the cases provided by the law, on the expiration of the power of the authority that granted it, the title ownership of the office is lost. This is the case, for instance, for vicarious offices in which a general ordinary power is exercised, such as the vicar general and episcopal vicars of the diocese, positions that become vacant *ipso iure* when the authority that granted them expires (c. 481 § 1). This is also what is provided for the prefect of the dicasteries of the Roman Curia when, due to the death of the Roman Pontiff, the Apostolic See becomes vacant (cf. *UDG*, 14). Particular law could provide for analogous cases: for instance, this general principle is not the one that is followed in most of the personal circumscriptions (almost all the statutes of the military ordinariates reflect this) while the see is vacant, statutory law indicates that vicars general have only interim title to the power of governance. Wernz-Vidal mention another possibility: if in the concession of the office the clause *ad beneplacitum nostrum* or an equivalent one was included, the office would be lost when the power of the person that granted it expires.[4]

b) In paragraph § 2 of the canon, the case of the *suspension* of ordinary power is considered. Paragraph 1 of the canon provides a general principle: the loss of the office entails the loss of the power. An exception is now provided in two different cases: in cases of removal (cc. 192–195) and privation (c. 196), if one appeals the decision or lodges an administrative recourse against that decision, the power will be rescinded, but it is not lost until the recourse or the appeal has been definitively settled, unless the law provides differently. This is a case in which, in accordance with the legislator's decision, the appeal or the recourse not only have a *devolutive* effect, but also a *suspensive* one, at least as far as the loss of the title ownership of ordinary executive power.

In the cases mentioned we can interpret *suspension* in two different ways: suspension of the execution of a decision and suspension of the ordinary power attached to the office. In the first case, the execution of the decision by which someone is deprived or removed from an office is suspended, which, consequently, would effect the extinction of the power. This is exactly the *suspensive* effect of the appeal or of the administrative recourse, to which cc. 1638 and 1736 § 1 respectively refer. The norm under discussion is not superfluous since, at least in the case of the ad-

4. Cf. F. WERNZ-P. VIDAL, *Ius Canonicum*, II (Rome 1943), pp. 437–438.

ministrative recourse, the suspensive effect takes place automatically only when the law thus provides. At least this is what we can infer from the wording of c. 1736, where it is said that in the rest of the cases the authority that has been appealed to regarding whether the decree should or should not be suspended will decide. On the contrary, in case one goes to the judicial trial, c. 1638 provides that an appeal to a sentence always produces the *suspensive* effect.

The second effect of the appeal or the administrative recourse is the suspension of the exercise of the power itself. This would lead us to the problem of the validity of the acts performed while the power is suspended. The different specific cases would have to be analyzed. It is important to note that what is suspended is executive power, and not all the acts inherent to the office. The person whose power is suspended, while the appeal or the recourse against the removal or privation is being decided, can (we could even say must) perform those acts that are inherent to the office that do not imply the exercise of ordinary power, as in the case, for instance, of the pastoral care to the faithful that have been assigned to him.

Since this norm provides an exception to the general principle, this norm must be interpreted strictly (cf. c. 18). It cannot, consequently, be applied to the case of the transfer of an ecclesiastical office.[5] The norm is clearer than the corresponding c. 208 of the *CIC*/1917, in which the legitimate appeal was mentioned without determining which cases it refers to. In the *CIC* it is evident that the appeal or recourse refers to the act through which one is removed from or deprived of office. Though this act would in principle deprive a person of that power, it would only suspend it when recourse has been made. The definitive loss or recovery of the exercise of that power would depend on the decision of the authority invoked to settle the controversy, according to whether an administrative or judicial process has been used.

The power is, however, not suspended in those cases in which an authority hierarchically superior, that is competent in the matter, is already dealing with it. It should be noticed that c. 139 § 2 provides that the inferior, unless there is a serious and urgent reason for it, should not interfere. This, rather than a suspension of the power, is a limitation of its exercise.

There can be other situations in which ordinary power remains suspended, in which case it would be illicit, and, in some cases invalid, to use it. Among these categories, it is worth mentioning the following: when a censure of excommunication is incurred (c. 1331)—in this case the acts of the power of governance would be illicit, and if the penalty has been imposed or declared, they would also be invalid (c. 1331 § 2, 2°); to be subject to the penalty of suspension would make the acts of power affected

5. Cf. J.I. ARRIETA, commentary on c. 143, in *Pamplona Com.*

by suspension illicit, and in those cases in which it is thus provided, invalid, (c. 1333). Canon 208 *CIC*/1917 expressly mentioned these two cases, referring to cc. 2264 and 2284, dealing with excommunication and suspension respectively.[6] The present c. 143 omits the reference to these norms. This could be due to the legislator's belief that it is not necessary, which does not mean that we are not dealing with cases of suspension of the power, regulated by the corresponding norms.

6. Cf. L. BENDER, *Potestas...*, cit., p. 102; G. MICHIELS, *De potestate ordinaria...*, cit., pp. 279–280.

144 **§ 1. In errore communi de facto aut de iure, itemque in dubio positivo et probabili sive iuris sive facti, supplet Ecclesia, pro foro tam externo quam interno, potestatem regiminis exsecutivam.**

§ 2. Eadem norma applicatur facultatibus de quibus in cann. 882, 883, 966, et 1111 § 1.

§ 1. In common error, whether of fact or of law, and in positive and probable doubt, whether of law or of fact, the Church supplies executive power of governance for both the external and the internal forum.

§ 2. The same norm applies to the faculties mentioned in cann. 882, 883, 966, and 1111 § 1.

SOURCES: § 1: c. 209; CodCom Resp. VI, 26 mar. 1952 (*AAS* 44 [1952] 497)
§ 2: SCDS Instr. *Sacerdos,* 14 sep. 1946, 13 (*AAS* 38 [1946] 356); CodCom Resp. V et VI, 26 mar. 1952 (*AAS* 44 [1952] 497)

CROSS REFERENCES: cc . 14, 142 § 2

COMMENTARY

Antonio Viana

1. Canon 144 § 1 defines what is normally referred to as the supply of power. When the requirements provided by the canon are met, the Church supplies the power so that the administrative act is juridically effective even though it may be missing a formal necessity required for its validity.

The objective of this disposition, already provided for in c. 209 of the *CIC*/1917, is, on the one hand, to secure the normal exercise of executive power when some of the necessary elements that guarantee an absolute certainty about the validity of the act are missing (i.e., the unfeasibility of consultation in cases of positive and probable doubt on the part of the authority). On the other hand, c. 144 § 1 intends to guarantee the spiritual good and peace of conscience for the faithful who are the addressees of this power. All things considered, the idea is to avoid the impediments that would result in these cases from an excessively rigorous application of the general formal requirements. The canonical order offers here a solution that pays more attention to the substantial data, which can be applied in particular cases.

2. Regarding the juridical nature of this concept, the doctrine normally considers the supplying of jurisdiction as a provisional delegation *a iure*, or as a sanation *a iure* of invalid acts that the Church as an institution performs.[1]

3. The supplying of power cannot be applied to the exercise of legislative power nor, for that matter, to judicial power; it can only be applied in specific situations by virtue of executive power, by reason both of the office and of the delegation. Thus, there cannot be positive and probable doubt when exercising legislative or general administrative power (another case is the application of the norm), nor when we are dealing with the exercise of judicial power, which always requires the moral certainty of the judge when pronouncing a sentence (cf. cc. 1608 §§ 1 and 4, 1616 § 1). Obviously, the supplying of power is not applied when we are dealing with requirements demanded by divine law: thus, although c. 144 § 2 extends the supply to the faculties such as confession (cf. c. 966), in order to administer the sacrament one must have the power of orders, which cannot be supplied by the juridical system. In other words, the supply of executive power only operates in cases where the individuals are canonically capable of exercising the power that is supplied.[2]

4. The two requirements necessary for the supplying of power are: common error (of fact or of law), and a positive and probable doubt (of fact or of law). Normally, while common error refers to the addressee or addressees of the power, positive and probable doubt refers to the active subject of the power.[3] These are different requirements that tend to be concurrent, although not always, because we may find a situation of common error in which there is no positive and probable doubt in the subject that exercises the power (i.e., when due to grave reasons the latter provokes a situation of common error in the addressees, which would in itself be sufficient for the supplying of power).

a) *Common error* can be described as a mistaken judgment about the existence of the power that affects all or most of the faithful of a particular place, or of a particular community.[4] Common error of fact occurs when, in fact, the situation of error affects many faithful, and common error of law occurs in the event of a notorious cause that is in itself sufficient to lead the faithful into error, even though the individuals affected may in fact be few.

b) *Doubt* principally refers to situations in which the active subject of the administrative act does not have a solid opinion concerning the existence of power. The doubt has to be *positive*; in other words, it should

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1. Cf. E. LABANDEIRA, *Tratado de Derecho Administrativo Canónico*, 2nd expanded ed. (Pamplona 1993), p. 141.
2. Cf. H. SOCHA, commentary on c. 144, p. 2, in K. LÜDICKE (Ed.), *Münsterischer Kommentar zum Codex Iuris Canonici* (Essen 1985ff).
3. Cf. J.I. ARRIETA, commentary on c. 144, in *Pamplona Com.*
4. Cf. J. MANZANARES, commentary on c. 144, in *Salamanca Com.*

be based on reasons that do exist. Negative doubt, which can in actuality be equated to ignorance, is not sufficient. Furthermore, the doubt has to be *probable*, meaning that the foundation of the positive doubt must have sufficient entity. Positive and probable doubt is *of fact* when it refers to the realization in the specific case of the conditions required by the law; it is *of law* when it refers to the existence, validity, or way in which the norm is applied.

5. Canon 144 § 2 extends the supplying of power to the exercise of faculties such as confirming, hearing confessions, and assisting at marriages. This explicit determination was necessary because in the *CIC* such faculties do not, strictly speaking, entail an assumption of power of governance. Another example of the supplying of power, understood as an extension of the exercise of delegated power, can be found in c. 142 § 2.

TITULUS IX
De officiis ecclesiasticis

TITLE IX
Ecclesiastical Offices

INTRODUCTION

Juan Ignacio Arrieta

1. *Articulation of the public ecclesiastical function: ecclesiastical ministries and offices*

The public ecclesiastical function,[1] considered in global terms, is articulated and exercised through ministries and ecclesiastical offices. Although ecclesiastical offices are the focus of attention here, it will nevertheless prove useful to make a preliminary clarification regarding the public ecclesiastical function of ministries. The goal of this clarification is to better restrict both categories and avoid erroneous comparisons between the two.

In general terms, *ministries*,[2] from the juridical-canonical point of view, are public ecclesiastical functions conferred permanently on a person on account of that person's ability to carry out the acts proper to that function. The attribution of such functions and the subsequent capability to carry out the acts proper to the function are accomplished, according to the case, through a sacramental way or through the authority of the Church, under diverse categories and by distinct titles.

First consider the sacraments. Although all those conferring a sacramental grace do so on those who duly receive the grace, not all sacraments confer public functions properly speaking, in the sense of tasks or commissions of capital importance for the subsistence of the ecclesiastical society

1. Cf. J. HERVADA, *Elementos de Derecho constitucional canónico* (Pamplona 1987), pp. 163ff; especially, pp. 226ff; E. LABANDEIRA, *Tratado de Derecho administrativo canónico*, 2nd expanded ed. (Pamplona 1993), pp. 105ff; C. CARDIA, *Il governo della Chiesa* (Bologna 1984), pp. 263ff.

2. Cf. S. BERLINGÒ, "Dal 'mistero' al 'ministero': l'ufficio ecclesiastico," in *Ius Ecclesiae* 5 (1993), pp. 91–120.

as such.[3] In reality, only baptism and confirmation, on the one hand, and ordination, on the other, confer upon the subject specific commissions with regard to the development of the ecclesiastical society. For this reason, some areas of doctrine have used the terms "non—ordained ministries" and "ordained ministries" to distinguish the commissions that are conferred in baptism and confirmation from those conferred in the sacrament of ordination.

But this is still too broad a meaning for the concept of *ministry.* In reality only the sacrament of ordination confers on the subject the ability to exercise public ecclesiastical functions properly speaking, since the ordained are uniquely destined to "nourish the Church with the word and grace of God in the name of Christ" (*LG* 11).

From this sacramental point of view, it is possible to distinguish three ministries: the diaconal ministry, the sacerdotal ministry, and the episcopal ministry. Each degree of sacrament confers on the subject specific ecclesiastical functions, while ontologically qualifying the person to carry them out. Such ministries and functions are permanently held from the time the sacrament is received. They are conceptually autonomous from the functions that can arise from the assumption of the specific ecclesiastical office for which the degree of ordination qualifies the subject (cf. cc. 129, 150).

In addition to the sacramental way, ministries can be attributed through the authority of the Church.[4] This can be done in different ways and the need to do so may arise for different reasons. In the first place, due to the spiritual nature of the ecclesiastical society, the attribution of public functions—of an ecclesiastical ministry—can be a consequence of the recognition in the subject by the ecclesiastical authority of a charisma of divine inspiration. The history of the Church and of the apostles is a continuous testimony of this type of divine initiative and of the necessary judgment that the legitimate authority must receive, keeping in mind the societal dimension desired by God for the Church.

In the second place, the competent authority of the Church usually also attributes to some subjects determined public functions—ministries—through a liturgical rite, like the one used to confer the lay ministries (cf. c. 230 § 1). These functions may also be attributed through a juridical act—although it is devoid of any form—by one who has been invested with appropriate authority (cf., for example, c. 230 § 3).

3. Cf. F. MODUGNO, "Funzione," in *Enciclopedia del diritto* XVIII (Milan 1969), pp. 301–313.

4. Cf. S. BERLINGÒ, "Dal 'mistero' al 'ministero'…," cit., pp 110ff; P. LOMBARDÍA, "Rilevanza dei carismi personali nell'ordinamento canonico," in *Il diritto ecclesiastico* 80–1 (1969), pp. 3–21.

All of these ministries contain specific public ecclesiastical functions, which are restricted or which can be restricted by regulation of the Church.

Sometimes the Code or other ecclesiastical documents uses the term *officium* to designate the content of such ministries.[5] It appears clear, nonetheless, that in such cases this designation is used in a generic sense, analogous to the expression *munera*. It also seems that there is an attempt to somehow equate these ministries with the properly named ecclesiastical offices, such as those that are configured in cc. 145ff. As we will later have the opportunity to verify, such use of the expression *officium* in all cases would have to consider the notion of office in the wide sense that would reproduce c. 145 of the *CIC*/1917: "quodlibet munus quod in spiritualem finem legitime exercetur." The notion of office is also very binding in the subjective sense contained in the Decree *Presbyterorum ordinis* 20, which, as we will see, was corrected before the promulgation of the present *CIC*.

Moving forward we see, solely for the purpose of noting the differences between the ministry and the notion of office, that, as previously mentioned, they are the two ways by which the public ecclesiastical function is articulated. It may be noted that the canonical system understands the ecclesiastical office as something quite distinct from what we have seen so far: a juridical subjectivity erected in the abstract within the ecclesiastical organization to which canon law attributes stably determined ecclesiastical functions.

2. *New conceptual categories of the notion of office*

The *CIC* presents in title IX of book I the general technical elements for the treatment, in the canonical purview, of that which may be called the administrative organization of the Church. This is centered in the regulation of the general vicissitudes that modify the structural relation and the relation of service between the ecclesiastical administration and the subjects that are permanently in its service. The entire title denotes an effort—not always fully achieved—to technically define institutions, rules and principles arising from the canonical tradition, following the dictates of the most modern juridical administrative culture. The *CIC*/1917, regulated these in a fragmented manner, and, overall, from a distinctly different conceptual framework.

5. Cf. P. Erdö, "Ministerium, munus et officium in Codice Iuris canonici," in *Periodica* 78 (1989), pp. 411–436; M. Miele, "Dal vecchio al nuovo canone 145," in *Studi sul primo libro del Codex iuris canonici*, a cura de S. Gherro (Padova 1993), pp. 165ff; *Comm.* 21 (1989), p. 252.

In the *CIC*/1917, regulations for the subject matter of the present title can be found in two different places. For the *CIC* the central nucleus of the general treatment of ecclesiastical offices, including notion, provision, and loss, is contained in book II (*De personis*). But in the *CIC*/1917 this was found within section I of part I, relative to "the clergy in general." This figuration within the canonical system is already a clear indication of the specific use to which ecclesiastical offices later would be put. Another important aspect of the question, particularly at that time, became regulated in part V of book III, which deals with the ecclesiastical benefice and the right of patronage. In the present Code this problem was relegated to the juridical regimen of canonical presentation.

The fact that the material relative to ecclesiastical offices has remained grouped in title IX of book I, which deals with the general norms of the canonical system, should be considered a result of the process of abstraction and systemization carried out during the revision of the Code. This remains true although in the present discipline signs of elements bound to the categories that inspired the regulation of the ecclesiastical office in the *CIC*/1917, still remain.

In general terms, and apart from other important points that we will examine later, the primary novelty of the discipline is contained in cc. 145ff. Leaving aside the benefice system, which inspired the regulation of ecclesiastical offices in the *CIC*/1917, these canons constitute a general treatment of ecclesiastical offices. This revision carried with it the necessity of abandoning—or at least verifying the current relevance of—juridical techniques deriving from the network of benefices that had been consolidated over centuries as the structural elements of the ecclesiastical office as an institution. Consequently, this posed again many of the juridical problems inherent to ecclesiastical office that, for better or worse, had been resolved with expedients drawn from the benefice system.

On the other hand, in spite of the fact that the notion of ecclesiastical office supplied in c. 145 of the *CIC*/1917, was objective, and not subjective, the treatment of ecclesiastical offices in the purview *de clericis* presupposed a hierarchical and less technical perspective in its treatment of the office. In the code regulations of each of the ecclesiastical offices, a personalist emphasis was added— (the *CIC*/1917, for example, spoke of the pastor, the clergyman that was pastor, instead of speaking in the abstract form of the office of pastor). This focus was strengthened by binding each office to a benefice, each with its own juridical personality and its own administrator. Inexorably this conveyed a fragmentary presentation of ecclesiastical administration, atomized into a multitude of offices—or better stated, of benefices—that made the unitary juridical treatment of the entire ecclesiastical organization difficult. In this statement, as *Presbyterorum ordinis* 20 would indicate, the public ecclesiastical function corresponding to each office remained in some way relegated to the patrimonial dimension of the benefice.

Another aspect in the present discipline that requires a different juridical treatment is that of the type of subjectivity belonging to the ecclesiastical office. In the *CIC*/1917, upon recognition of the juridical personality of a benefice, the respective ecclesiastical office would receive subjective support in the canonical system,[6] which, as we said, raised the problem of the atomization of the ecclesiastical organization. By way of contrast, in the current juridical discipline the juridical personality is only recognized for the public ecclesiastical entity—the Holy See, a diocese, a bishops' conference, a parish, etc.—of which the office forms a part. In this framework each office holds a subjectivity, in the sense of a center of imputation of juridical situations, but one that is not recognized as an autonomous personality.

Notwithstanding, within this context a specific treatment of the constitutional offices is merited—inasmuch as they are elements essential to the entity for which juridical personality is recognized. Also, to a lesser degree, and for different reasons, those offices deserve mention whose officeholders receive the canonical status of ordinary (c. 134), inasmuch as they are in a proper sense the organs through which the will of the entity endowed with juridic personality is manifested.

3. *The office and ecclesiastical organization*

The overcoming of the system of benefices signaled by the Second Vatican Council now makes it possible for the legislator to realize an abstract and depersonalized treatment of the ecclesiastical office. This permits a unitary approach to the public ecclesiastical administration more in accord with the hierarchical dimension inherent in the sacramental structure of the Church.[7]

In the objective sense, the ecclesiastical organization—an all-encompassing notion and thereby more appropriate in this context than the notion of public administration—is the juridical structure resulting from the totality of existing ecclesiastical offices bound respectively to one another by way of diverse types of principles and canonical organizational techniques. At the heart of this ecclesiastical organization, special organizations exist (judicial, administrative) that group together ecclesiastical offices with similar natures, which are bound by principles, techniques, or

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6. Cf. F. Restivo, *Personalità dell'ufficio nell'ordinamento canonico* (Palermo 1942); P.G. Caron, "Persona giuridica, ufficio ed organo nel diritto canonico," in *Annali della Facoltà di giurisprudenza. Università degli studi di Camerino*, vol. XXVII (Milan 1961), pp. 220–407.

7. Cf. J.A. Souto, "Consideración unitaria de la organización eclesiástica," in *Ius Canonicum* 9 (1969), pp. 157ff; idem, "Presupuestos doctrinales de la noción de oficio en el Código de derecho canónico," in *Ius Canonicum* 9 (1969), pp. 331ff; J. Hervada, *Elementos de Derecho* ..., cit. pp. 230–235.

proper norms. Just as it is possible to speak of a general or universal ecclesiastical organization, which corresponds with a global consideration of the Catholic Church, so it is also possible to speak of organizations at distinct levels—the central level of the church, the diocesan level, the level of the bishops' conference, etc.—which group the ecclesiastical offices of the proper scope, in accordance with the principles, organizational techniques, and juridical norms specific to the respective organization.

The unity of the ecclesiastical organization as a whole is a consequence of the unity of the Church. From the technical-juridical point of view, this unity is understood fundamentally through the binding of the different ecclesiastical offices to those offices of constitutional character and divine institution (the Roman Pontiff and the episcopal college for the universal dimension of the Church, and the diocesan bishop for the local level), so the public ecclesiastical functions bestowed on each office have been entrusted at their respective levels.

As we said, the principles that stably govern the organizational relationships among the different offices are distinct, and depend on the nature of the offices themselves. Moreover, one finds the principles governing the relationships between constitutional offices distinct from those that govern relationships between constitutional offices and offices that are subordinated in their proper scope. Although these principles may share a great deal with the principles and rules common to any social organization, secular organizing principles (for example, the principles of decentralization, autonomy, diffusion, hierarchy, etc.) are not always directly applicable to the Church. Their current relevance in the ecclesiastical society depends on how closely they agree with the tenets of the sacramental structure of the Church (structural principles), and even with the dynamic principles that inspire the ecclesiastical activity of government (operative principles).

Only in a very summary manner can one explain here the relevance of the organizational principle of decentralization to the relationships existing among constitutional offices, primarily between the Roman Pontiff and the diocesan bishops. The mystery of the Church (as an official document reminded us recently[8]) presents the universal level and the particular level of the organization (the universal Church and the particular church) in a mutual and immanent relationship. In this relationship, absolutely speaking, it is abstract to talk of decentralized ecclesiastical functions over which the central authority has lost its competence. In this respect, and from the perspective of the authority to which this exercise from the public ecclesiastical functions (Roman Pontiff and episcopal college) had originally been entrusted, it is possible to resolve the problem that the imminence of the two levels of the church presents to the juridical system. This is done through recourse to the operative principle, and specifically to the

8. Cf. CDF, Letter *Communionis notio*, May 28, 1992, no. 9, in *AAS* 85 (1993), p. 843.

principle of *hierarchical communion* (which controls the relationship between the Roman Pontiff and the diocesan bishop). This relationship implies the existence in both instances of a *concurrent hierarchical competence,* and at the same time the existence of a *precedence of action in ordinary circumstances* in favor of the diocesan bishop.[9]

The connection between the constitutional offices of the Roman Pontiff or diocesan bishop and the offices that are juridically subordinate, within their respective universal or particular scope, raises a lesser problem. In their respective scopes, the relationships with subordinate offices—between the Roman Pontiff and the Congregation of the Curia, or between the bishop and his vicars—are controlled by the vicarious principle which pertains to the principle of decentralization. The subordinate offices then receive their competence—whether or not they exercise the authority of government—from the respective constitutional office of the proper entity.

Finally, it is possible to note that although the norms of this title have been written primarily with the hierarchical organization of the Church in mind, its prescriptions are also of general application in the scope of the law of religious to the measure in which, without dealing with the norms of *ius cogens*, the particular or proper norms do not establish anything different.

9. Cf. J.I. ARRIETA, *Organizzazione ecclesiastica, Lezioni di parte generale,* (provisional text *ad usum scholarum*) (Rome 1992), pp. 134–137.

145 **§ 1. Officium ecclesiasticum est quodlibet munus ordinatione sive divina sive ecclesiastica stabiliter constitutum in finem spiritualem exercendum.**

§ 2. Obligationes et iura singulis officiis ecclesiasticis propria definiuntur sive ipso iure quo officium constituitur, sive decreto auctoritatis competentis quo constituitur simul et confertur.

§ 1. An ecclesiastical office is any post which by divine or ecclesiastical disposition is established in a stable manner to further a spiritual purpose.

§ 2. The duties and rights proper to each ecclesiastical office are defined either by the law whereby the office is established, or by a decree of the competent authority whereby it is at one and at the same time established and conferred.

SOURCES: § 1: c. 145 § 1; *PO* 20

CROSS REFERENCES: cc. 129 § 1, 131 § 1, 134, 146, 148

COMMENTARY

Juan Ignacio Arrieta

Paragraph 1 of this canon corresponds to § 1 of c. 145 of the *CIC*/1917, and defines ecclesiastical office. Paragraph 2, on the other hand, is new. We will focus, first, on considering the notion of ecclesiastical office and the elements integrated within it.

1. Canon 145 of the *CIC*/1917 contained two notions of ecclesiastical office. In the *broad* sense, office was any duty that was legitimately exercised for a spiritual purpose (note in the commentary on the present title the relationship of this notion with the idea of the ministry). In the *strict* sense, or as the term was to be understood in law, except in the case where the context of the phrase presented another meaning, ecclesiastical office was a duty established permanently by divine or ecclesiastical order. It was to be conferred upon someone according to the norms of the sacred canons. It carried with it a participation in the ecclesiastical power of orders or of jurisdiction.[1]

1. Cf. A. Toso, *Ad Codicem juris Canonici, commentaria minora*, L. II, t. I (Rome 1922), pp. 112ff; B. Ojetti, *Commentarium in Codicem iuris canonici. De personis* (Rome 1930), pp. 3–4. Regarding the notion and discipline of the office in the *CIC*/1917: R. Naz, "Offices ecclésiastiques," in *Dictionnaire de droit canonique*, VI (Paris 1957), cols 1074–1105; P.G. Caron, "Ufficio ecclesiastico," in *Novissimo Digesto italiano* XIX (Turin 1973), pp. 1061–1066.

Doctrinal thought elaborated in subsequent years a third concept of office, in the *strictest* sense. This referred solely to those offices that carry an attached participation in the power of jurisdiction in the Church, such as the offices of diocesan bishop, vicar general, etc. These last offices in the strictest sense are those that, according to the structural theory of administrative law, have to be considered properly as juridical organs of the Church,[2] in notion close to the concept of ordinary established by canonical tradition (cf. c. 134).

Among other elements that we will analyze later are these notions which emphasize the objective stability of ecclesiastical office, endowed as an abstract subject permanently established in the canonical order, through which they remain ultimately defined and delimited in the concrete in the public functions in the Church.[3]

In this context, *Presbyterorum ordinis* 20 introduced an interesting problem, whose clarification in later years has contributed to streamlining the notion of office as it appears in the Code, and in distinguishing it from the ministries. Dealing with the remuneration of the presbyters, and with the proposed elimination of the system of benefices and allowing the dimension of service to the faithful inherent in each ecclesiastical office, the conciliar decree defined the office as "quodlibet munus stabiliter collatum in finem spiritualem exercendum." In this way, it gave the impression that it was the desire of the Council to confer on the new notion of ecclesiastical office (which had to result from the abandoning of the benefices) a subjective stability (*stabiliter collatum*) bound to the person on whom the office was conferred. This was opposed to the objective stability (*stabiliter constitutum*), independent of the subjective vicissitudes and changes of officeholder, that had remained in c. 145 of the *CIC*/1917.

The introduction of conciliar texts (united with other factors, principally the concept, not totally developed, regarding the implication of the uniqueness of the *potestas sacra* and the transmission of that power in the Church) led one area of doctrine to intensify the traditional personalist focus of ecclesiastical organization. This was in line with the hierarchical approach that was still presented in book II of the *CIC*/1917. From this perspective, that which here we call ecclesiastical organization would be constituted by a group of persons, and not of organs or offices. The ecclesiastical office would not be without a subjective juridical circumstance of the person upon whom it confers its duty, legitimized by the realization of

2. Cf. P. CIPROTTI, *Lezioni di diritto canonico* (Padova 1943), pp. 247ff; P.G. CARON, "Persona giuridica, ufficio ed organo nel diritto canonico," in *Annali della Facoltà di giurisprudenza. Università degli studi di Camerino*, vol. XXVII (Milan 1961), pp. 309ff; P.A. BONNET, "Ufficio, diritto canonico," in *Enciclopedia del Diritto* XLV (Milan 1992), pp. 690ff.

3. Cf. J.A. SOUTO, "Presupuestos doctrinales de la noción de oficio en el Código de derecho canónico," in *Ius Canonicum* 9 (1969), pp. 331ff.

specific acts in the Church.[4] In some ways this implied an affirmation that the public function was articulated in the Church only in the inorganic form, and only through ministries.

During the revision work on the *CIC*/1917, which began with the direct acceptance of the subjective notion of *Presbyterorum ordinis*,[5] this focus, which was of little benefit to administrative responsibility and its subsequent control, was definitively amended, thus returning to the traditional notion of office.[6] Once it had been clarified that the Council had not attempted to show a technical notion of office, the Commission arrived at the notion that is now stated in § 1 of c. 145.[7] This was done without resolving the substantial problems raised by the system of benefices, in the general context of the discipline of the priesthood. However, although the notion is broad, it takes on elements of the strict notion of office contained in c. 145 of the old Code, with the omission of all references to the ecclesiastical authority.

The objective notion of ecclesiastical office adopted by the Code, as the juridical norm established in the subsequent canons, comes to recognize the abstract subjectivity of office in the canonical order. That is to say, it recognizes the necessity of its juridical provision on the part of the legitimate authority (cf. c. 148), something that does not occur with the ministries. Its objective stability in periods of vacation of the office holder are derived—as was noted in the works of revision—from the capital offices that form part of the structure of the Church.[8]

Such a notion of office is applicable by necessity to those offices that according to § 2 are constituted at the same time that they are conferred on a subject. This does not appear to leave room for office to be understood as the fulfillment of any ministry, charism, or function benefiting the community.[9] This concurs with the broad notion of office in c. 145 of the *CIC*/1917, and with the subjective concept originating with number 20 of *Presbyterorum ordinis*. However, the notion may be referred uniquely to those subjectivities that become juridically configured and objectively established as ecclesiastical offices in Church order. Similarly, neither are ecclesiastical offices, in the sense given in cc. 145ff, those *munera* that are received in the reception of the sacraments (of baptism or of orders, for example). However, such *munera* constitute just such personal qualifications that make one able to assume those ecclesiastical offices that require the exercise of those *munera*.

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4. Cf. A. VITALE, *L'ufficio ecclesiastico* (Naples 1965), pp. 95ff; J.A. SOUTO, "Consideración unitaria de la organización eclesiástica," in *Ius Canonicum* 9 (1969), pp. 157ff.
5. Cf. Comm. 21 (1989) pp. 159ff.
6. In this sense, cf. the contribution of P. LOMBARDÍA in *Comm.* 21 (1989), p. 178.
7. Cf. *Comm.* 23 (1991), p. 247.
8. Cf. *Comm.* 22 (1990), p. 126.
9. In this sense, cf. S. BERLINGÒ, "Dal 'mistero' al 'ministero': l'ufficio ecclesiastico," in *Ius Ecclesiae* 5 (1993), pp. 91ff.

The technical notion of office in c. 145 does not include as an essential element participation in the ecclesiastical authority.[10] Nor does it include participation in the *potestas regiminis* or the authority of jurisdiction (cf. c. 129 § 1), nor in the sacred ministry or the *power of orders*. This last authority is that which only truly participates through the reception of the different levels of the sacrament of orders. That is to say, it is received through the reception of the ministries and not through the conferral of an office.

2. The ordinary power of governance (cf. c. 131 § 1) is obtained by the conferral of a duty and is exercised through ecclesiastical offices. However, the duties and rights proper to each office (to which § 2 of this canon refers) do not always form juridical circumstances of *power* in the strict sense. Paragraph 2 refers in general to the competence of the office, together with the public functions of the Church that the ecclesiastical authority unifies in the act of conferring them on an abstract public subject that is the office. These are competencies that can be established by the law, by an administrative act, by custom, etc.,[11] and their grouping determines the juridical position of the office. Nevertheless, their content can logically be quite varied, depending on the nature of each office. These rights and duties consist, frequently, of functions of administrative or technical character, or of pastoral assistance. They may also consist merely of matters that, although they occasionally have relevance in decisional proceedings of the exercise of power, are deprived of powers such as that of *imperium* and of the unilateral capacity to bind the faithful to that which is only proper to a juridical authority.

A number of *technical elements* of ecclesiastical office can be derived from the whole of the discipline of the Code. These include the following: *a*) they consist of a *munus* of spiritual dimension, in the sense of an institutionalized social ecclesiastical function; *b*) they are *erected* by a legitimate authority, that is, they are juridically created in the abstract (erected), by granting them subjectivity in the system of the Church which is the center of attribution of active and passive juridical situations; *c*) they are *restricted* and formed by canon law regarding their duties (cf. c. 145 § 2); and *d*) they must be *conferred* successively or simultaneously on a subject through a juridical act of canonical provision (c. 146).

In this sense the definitions of ecclesiastical office that are usually presented by doctrine are also defined by position. However, many of these definitions are only partially valid due to a normative change between the two Codes. Thus, Wernz (followed by diverse commentaries of

10. Cf. *Comm.* 21 (1989), p. 178.
11. Cf. *Comm.* 23 (1991), p. 247.

the *CIC*/1917) defined office as "certa et determinata mensura functionum ecclesiasticarum..."[12] Caron, as "cerchia di attribuzioni che rappresenta una forma di apparizione della personalità della Chiesa..."[13] Mörsdorf, as "determinatus complexus munerum, cui propter bonum commune semper provideri debet";[14] Labandeira, as "a stable social function constituted and determined by law so as to be attributed to a member of Christ's faithful";[15] and Souto, as an "abstract legitimization for the exercise of public ecclesiastical functions, stably constituted by law and restricted in accordance with different technical criteria, the subjective titularity of which corresponds to the Church as an institution."[16]

3. The final clause of § 2 presents the possibility of simultaneously establishing the office and conferring it on an office holder (*simul et confertur*). This simultaneity, which does not modify the objective dimension of ecclesiastical office, is frequent in the case of the first officeholder of a recently created office, but is used also in other cases. For example, it applies in the naming of a stable delegate before an organism or for a function, and in cases of temporal offices, such as president of a plenary council or secretary of the assembly of the Synod of Bishops.

4. Canonical doctrine has offered a rich classification of ecclesiastical offices dealing with different points of view. By way of synthesis, and in order to refer us to some of the more useful classifications, it is fitting to note the following typology of offices:[17]

a) by *origin*, there may be constitutional offices—of divine or ecclesiastical origin—and non-constitutional offices;

b) by the *nature of the function*, there may be offices with proper or vicarious authority (c. 131), and offices without authority; and also active offices, consultative offices, or offices of control; curate offices for the care of souls—of complete or partial *cura animarum*—and not for the care of souls (c. 150);

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12. Cf. F.X. WERNZ–P. VIDAL, *Ius canonicum*, II, *De personis*, 3rd ed. (Rome 1943), p. 193.
13. Cf. P.G. CARON, "Persona giuridica...," cit., p. 305; F. RESTIVO, *Personalità dell'ufficio nell'ordinamento canonico* (Palermo 1942), p. 59.
14. Cf. K. MÖRSDORF, "De conceptu officii ecclesiastici," in *Apollinaris* 33 (1960), p. 75; A. CATTANEO, *Questioni fondamentali della canonistica nel pensiero di Klaus Mörsdorf* (Pamplona 1986), pp. 267ff.
15. Cf. E. LABANDEIRA, *Tratado de Derecho administrativo canónico*, 2nd expanded ed. (Pamplona 1993), p. 114.
16. Cf. J.A. SOUTO, *Derecho Canónico*, I (Madrid 1983), p. 138.
17. Cf. F. RESTIVO, *Personalità dell'ufficio...*, cit., pp. 61ff; J.I. ARRIETA, *Organizzazione ecclesiastica. Lezioni di parte generale*, (provisional text *ad usum scholarum*) (Rome 1992), pp. 246–249.

c) by *scope of competence*, there can be universal offices (central: the offices of the Roman Curia, or peripheral: the nuncios); diocesan offices (corresponding to any ecclesiastical circumscription): offices that can be general or local (that of the parish); and superdiocesan offices;

d) by *stability*, there can be permanent or temporary offices (the offices of a synod, for example);

e) by *manner of designating* the office holder: by free conferral, by presentation, or by election.

CAPUT I
De provisione officii ecclesiastici

CHAPTER I
The Provision of Ecclesiastical Office

146 **Officium ecclesiasticum sine provisione canonica valide obtineri nequit.**

An ecclesiastical office cannot be validly obtained without canonical provision.

SOURCES: c. 147 § 1; SCCouncil Decr. Catholica Ecclesia, 29 iun. 1950 (*AAS* 42 [1950] 601–602); *SCCong* Decl., 17 mar. 1951 (*AAS* 43 [1951] 174)

CROSS REFERENCES: cc. 10, 145–148, 153 § 1, 154, 157, 178, 199, 6°, 332 § 1, 382, 404, 427 § 2, 527, 542

COMMENTARY

Juan Ignacio Arrieta

As an ecclesiastical office is (see commentary on c. 145) an abstract center of imputation of juridical situations in the canonical order, the operation of the public functions assigned to the office absolutely require that the respective juridical situations be assumed by a psycho-physical subject who personally exercises them.[1] The task of entrusting to a physical per-

1. Cf. P.G. Caron, "Persona giuridica, ufficio ed organo nel diritto canonico," in *Annali della Facoltà di giurisprudenza. Università degli studi di Camerino*, vol. XXVII (Milan 1961), pp. 309ff; L. Sandri, "Organo, rappresentanza e 'potestas sacra' nella Chiesa," in *Apollinaris* 63 (1990), pp. 172ff; E. Labandeira, *Tratado de Derecho administrativo canónico*, 2nd expanded ed. (Pamplona 1993), pp. 56–65; J.I. Arrieta, *Organizzazione ecclesiastica. Lezioni di parte generale*, (provisional text *ad usum scholarum*) (Rome 1992), pp. 147–193.

son the responsibility of the abstract duties of office is carried out through canonical provision.

The present canon practically reproduces § 1 of c. 147 of the *CIC*/1917, pointing out restrictively, as it is an incapacitating law,[2] that the legitimate canonical provision is the only title to validly obtain an ecclesiastical office.[3] It is not possible, then, to obtain the responsibility of the office by another route. In addition, the acquisition of the office by prescription, alluded to in c. 199, 6°, presumes the existence of a canonical provision, juridically refutable perhaps, that becomes valid by prescription.

1. For good reason the Code does not define what should be understood as canonical provision, leaving the doctrine to establish the concept. On the other hand § 2 of c. 147 of the *CIC*/1917, sets forth something different, indicating that "the term canonical provision designates the conferral of an ecclesiastical office made by the competent ecclesiastical authority according to the norms of the sacred canons." In reality the legal notion of canonical provision in the *CIC*/1917, centered on the act of ecclesiastical authority (one of three elements that, as we will see, it is possible to specify in the procedure of canonical provision) and should not be applied generally to all canonical systems of provision noted in the current c. 147. Specifically, in those cases of collective or constitutive election of c. 178, the intervention of the ecclesiastical authority is not required. This occurs very frequently, for example, in the designation of the major superior of religious institutes, but also in cases of a vacant see (cf. cc. 332 § 1, 427 § 2). This deprives the definition of provision contained in § 2 of c. 147 of the *CIC*/1917, of the necessary generality.

In the current juridical governance, keeping in mind the categories used by the Code, it is pertinent to note the existence of a double use of the term *canonical provision*. In the first sense, perhaps more technical and rigorous, provision is understood as the system or proceeding, integrated by a plurality of heterogeneous acts, juridically linked, with the purpose of conferring an ecclesiastical office on a subject. From this point of view there are four proceedings of provision that the canonical order recognizes: *a*) free conferral (c. 157); *b*) canonical presentation (cc. 148–163); *c*) canonical election (cc. 164–179); and *d*) canonical postulation (cc. 180–183). Besides this meaning, the Code nevertheless continues to use the category of *canonical provision*, in a sense close to that of c. 147 § 2 of the *CIC*/1917, to specifically indicate the juridical act that in itself is effective in order to confer the office, and that normally is completed by an ecclesiastical authority, as is alluded to in c. 148.

2. Cf. A. Toso, *Ad Codicem juris Canonici, commentaria minora*, L. II, t. I (Rome 1922), pp. 114ff.

3. Cf. P. Ciprotti, *Lezioni di diritto canonico* (Padova 1943), pp. 255ff; R. Naz, "Offices ecclésiastiques," in *Dictionnaire de droit canonique* VI (Paris 1957), cols 1077ff.

2. Considering the canonical provision as a proceeding in order to confer the responsibility of an ecclesiastical office, the canonical doctrine has specified three distinct integrated elements of the provision that, in their time, can explain various separable juridical acts. These are: *a*) designation of the person; *b*) concession of the title; and *c*) taking possession of the office. Dealing with episcopal offices, it is common to add as a requirement the episcopal ordination of the subject.[4] In addition, for specific offices, the canonical order imposes the obligation to issue the profession of the faith (cf. c. 833) or the oath of fidelity to the Apostolic See (cf. c. 380; RGCR, 18 § 2, *Appendix* I–II).

a) From the juridical point of view, the distinction between the first two elements applies only in those cases in which, apart from the competent ecclesiastical authority, there exist other subjects with the right to intervene in the provision of the office. This occurs in cases of presentation or canonical elections.

Nonetheless, in provision by free conferral (c. 157), which is the most common system of canonical provision, the distinction between "designation of the person" and "concession of the title" is not juridically relevant. In this assumption, although one act or another is materially realized by different subjects, the ecclesiastical authority that concedes the title does not remain legally bound by the designation that another subject may have carried out. (Consider, for example, episcopal appointments, or the normal procedure of requesting counsel regarding the suitability of the candidate, whether or not the canonical procedure requires it). Thus, this intervention only follows the natural moral obligation, founded in reasons of good government, of valuing the prudent counsel of those that are deemed able to give it.

Something slightly different occurs, on the other hand, in cases of the selection of candidates for the attainment of office through competition or tests of suitability. This is because, although in this case the competent authority continues to be free to choose from different candidates, it is also necessary to make known a legitimate expectation of those that have adequately passed the proof of suitability and remain free of other impediments.[5]

b) The second of the elements that the doctrine has distinguished in the canonical provision is, as has been indicated, the concession of the title to a subject previously designated for the office. This is a juridical act that, in accordance with c. 148, corresponds in each case to the competent ecclesiastical authority, successive to the identification of the subject. The concession of the title carries with it (see commentary on c. 149), the previous completion of a judgment on the part of the ecclesiastical authority.

4. Cf. F. MAROTO, *Instituciones de derecho canónico*, II (Madrid 1919), p. 290.
5. Cf. idem, p. 291.

This occurs with regard to the legality of the proceeding of designation, over the suitability of the candidate, etc., which cannot be completed on equal juridical terms of discretion in all cases.

According to the specific procedures for canonical provision, the juridical act of the competent authority that grants the investiture of office in favor of a specific person receives the name of *free conferral* (c. 157); *institution* is the act of the authority in the system of canonical presentation; *confirmation* is the act of the authority in the proceeding non-collective election; and *admission* is used in cases of canonical postulation (see commentary on c. 147). With regard to collective election, the act of the authority would not exist in itself, since the acceptance of the candidate perfects the collegial act of provision carried out by the electoral body.

c) The third element that the doctrine has noted in canonical provision—and that the Code mentions explicitly when speaking about those general elements of the canonical provision—is that of taking possession of ecclesiastical office. In this respect, it appears necessary to begin by distinguishing between *taking possession* as a formal act by virtue of which the officeholder subject begins officially to fill the functions of the office, and the *possession of the office* upon mere factual data. This possession, in itself, is indispensable for the exercise of the duties and rights inherent in any office (cf. c. 145 § 2). The formal act of taking possession, if no legal manner has been established, is done based on the custom of each location, and often has different functional names for the significance of the acts that are recorded: *installatio*, *investitura*, *intronizatio*, *introductio in possessionem*, *institutio*, *captio vel apprehensio possessionis*, etc.[6] On the other hand, the lack of possession of the office gives place to the mere title of right, but not of action, formed in cc. 153 § 1 and 154.

3. The problem of the juridical relevance of the formal act of taking possession offers greater complexity. In this respect, and in general terms, it is possible to note that, without any legal norm prescribing it, the formal act of taking possession does not constitute an integral element of the canonical provision required by c. 146 for the valid attainment of ecclesiastical offices. In this sense, the current juridical norm agrees with what is deduced by the more immediate canonical tradition, both legal and doctrinal. This considers the taking of possession as a completion of the provision, but not a requirement *ad validitatem*,[7] although particular or statutory law can impose it with respect to specific offices.

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6. Cf. S. GOYENECHE, *Iuris Canonici Summa Principia*, vol. I (Rome s.f.), p. 188.

7. Cf. R. NAZ, "Offices ecclésiastiques," in *Dictionnaire* ..., VI (Paris 1957), cols 1090; S. GOYENECHE, *Iuris Canonici Summa Principia*, cit., p. 188.

In some specific cases, nonetheless, the present Code prescribes the completion of a formal act of taking possession, establishing even the manner in which it should be realized. This is the case, for example, of the diocesan bishop (and of those that are before ecclesiastical circumscriptions (c. 382), of coadjutor and auxiliary bishops (c. 404), of pastors (c. 527) or of members of the parochial group (c. 542). In all of these cases the juridical relevance of the non-observance of the legal precept of taking of possession is established. This is done keeping in mind, in each case, according to c. 10, that the only laws which are invalidating are those that contain the word expressly.

Of all those cases already indicated, the furthest reaching are the ones which deal with the diocesan bishop, both due to the attributions of authority derived from the valid attainment of office, and for the act that in § 1 of c. 382 establishes the prohibition against involvement in the exercise of an office before taking possession of that office. When it is understood that this canon contains an incapacitating norm, the invalidity of acts undertaken prior to the taking of possession comes as a natural consequence.

This case has raised doubt regarding the doctrine, which in our judgment can be resolved by taking the meaning of the norm of c. 382 into account. Starting from the point that this canon does not establish in clear terms the invalidating nature of what it prescribes (cf. c. 10) and that its goal does not appear to be purely formal but that it attempts to guarantee proper governance in the case of a vacant see, one can affirm that, in this case, the formal act of taking of possession should not be considered an integral element of the canonical provision. Moreover it appears to be a prohibition that could eventually serve to support the challenge to specific juridical acts carried out in violation of c. 382 § 1, but that do not cause the nullification *ipso iure* of said acts.

In the case of parish priests, § 3 of c. 527 indirectly echoes the case of a tacit renunciation of the office on the part of the person who has not taken possession of the parish. The same is done, with respect to the Roman Curia, in *Regolamento generale della Curia Romana*, 69, 1, in relation to the person who has presented himself for the job on the date indicated in the letter of contract. Regarding the tacit renunciation, keep in mind also c. 1444 § 2 of the *CIC*/1917, which established that in the case of negligence in the taking of possession of a benefice, the local ordinary should declare the benefice vacant in accordance with c. 188, 2° (cf. also c. 2398 of the *CIC*/1917).

Finally, following the manner of verifying the provision, the traditional doctrine employs some categories that even today continue to be used by the authors. In this sense, the doctrine distinguishes between *ordinary* or *extraordinary* provision, according to whether or not the provision follows the normal rule established by the provision of the office with which it deals. It also distinguishes between *full* or *less full* provision,

according to the two primary elements of which the provision is composed—designation of the person and concession of the title—fulfilled by the same subject or different persons. *Necessary* or *free* provision are distinguished, according to whether the concession of the title is or is not bound to the exercise of some other right, as in the provision by presentation, or by election.[8]

8. Cf. M. CONTE A CORONATA, *Institutiones Iuris Canonici*, vol. I (Taurine 1928), pp. 228–229; F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, *De personis*, 3rd ed (Rome 1943), pp. 244–245.

147 **Provisio officii ecclesiastici fit: per liberam collationem ab auctoritate ecclesiastica competenti; per institutionem ab eadem datam, si praecesserit praesentatio; per confirmationem vel admissionem ab eadem factam, si praecesserit electio vel postulatio; tandem per simplicem electionem et electi acceptationem, si electio non egeat confirmatione.**

The provision of an ecclesiastical office is effected: by its being freely conferred by the competent ecclesiastical authority; by appointment made by the same authority, where there has been a prior presentation; by confirmation or admission by the same authority, where there has been a prior election or postulation; finally, by a simple election and acceptance of the election, if the election does not require confirmation.

SOURCES: c. 148 § 1; SCCouncil Decr. *Cum ob belli*, 26 feb. 1919 (*AAS* 11 [1919] 77)

CROSS REFERENCES: cc. 146, 157, 164, 178, 180, 199, 6°

COMMENTARY

Juan Ignacio Arrieta

Canon 147 mentions the distinct methods of canonical provision which the Code regulates beginning with c. 157. The list considers the forms of canonical provision from the point of view of the authority that should carry out the conferral upon the officeholder. It uses the term *provision* to refer, not to the group of acts that integrate the proceeding of provision as a whole, but specifically to the juridical act of the ecclesiastical authority which acts as the effective cause for the investiture of the officeholder in the office, and puts an end to the proceeding (see commentary on c. 146). According to this canon, the provision can be made by one of the following methods: by a *free conferral* of the authority, by an *appointment* that has been legitimately presented, by *confirmation* or *admission* of the one legitimately elected or postulated, and, finally, by simple *election-acceptance*, or by collective or constitutive election.[1]

1. Cf. P. CIPROTTI, *Lezioni di diritto canonico* (Padova 1943), pp. 255ff; R. NAZ, "Offices ecclésiastiques," in *Dictionnaire de droit canonique* VI (Paris 1957), col 1090ff; J.I. ARRIETA, "El Pueblo de Dios," in *Manual de Derecho Canónico*, 2nd ed. (Pamplona 1991), pp. 142ff; C. CARDIA, *Il governo della Chiesa* (Bologna 1984), pp. 268ff.

The distinct forms of canonical provision emerge in the function of the distinct subjective juridical situations that contribute to the proceeding of provision of an office. Each of these forms implies, also, a distinct level of juridical liberty on the part of the ecclesiastical authority that carries out the conferral. This corresponds with an unequal title and right of the remaining subjects who participate in the provision.

It should be noted that the content of c. 147 does not coincide with the plan that for practical reasons will later follow in the Code to specifically regulate each of the diverse forms of provision. Thus, in cc. 180–183 of article 4 of this chapter, the canonical postulation is regulated in isolation, as if it dealt with a specific manner of provision, when in reality it is only a specific point that, in principle, can adopt any type of election. On the other hand, cc. 164 and those that follow in article 3 of this chapter contain two systems of provision that are clearly different, confirmation and collective (or constitutive) election (cf. c. 178), that, nonetheless, are treated together for reasons of mere legislative convenience.[2]

One can also wonder whether the list of the methods of canonical provision made by the Code in this canon are taxative or open. There is the impression that the canon, and later the regulation contained in cc. 157ff, have intended to part from the entire canonical tradition relative to the methods of provision. This standardizes the essential elements to those that can direct each of the elements, which would correspond to the four forms of the provision contemplated in this canon. In any case, the Code, and in general the canonical order, obviously remains open to the multiplicity of variants and hybrid systems that can result from these forms in the juridical experience of the Church. The juridical qualification of such specific cases has not yet conflicted with the legislator, nor with the doctrine, the governor or the judge, on their respective levels, beginning with the juridical elements which support this hypothesis.

A distinct problem is whether, in addition to the four methods of provision mentioned in this canon, the canonical order allows some other system to legitimately obtain ecclesiastical office. In this regard it has been rightly emphasized[3] that the current Code continues to allow prescription as a form of obtaining the status of titleholder with a right to non-curatorial offices (cf. c. 199, 6°). However, one should note that this possibility assumes the existence of a canonical provision, because that same phrase of c. 199 states this and because, when the invalidating character of the precept of c. 146 has been taken into account, there is no alternative.

2. Cf. *Comm.* 22 (1990), p. 80.

3. Cf. P. ERDŐ, "Quaestiones quaedam de provisione officiorum in Ecclesia," in *Periodica* 77 (1988), p. 373.

148 Auctoritati, cuius est officia erigere, innovare et supprimere, eorundem provisio quoque competit, nisi aliud iure statuatur.

Unless the law provides otherwise, the provision of an office is the prerogative of the authority which is competent to establish, change, or suppress the office.

SOURCES: —

CROSS REFERENCES: c. 147, 155, 157, 332 § 1, 421 § 1, 373, 377 § 5, 421 § 2, 425 § 3, 475 § 1, 508 § 2, 515 § 2, 525, 625 §§ 1 et 3

COMMENTARY

Juan Ignacio Arrieta

This canon determines the active subject of the canonical provision to that which properly corresponds with the realization of the effective juridical act of investiture of office. Canon 147 points out that a competent ecclesiastical authority should carry out the act of provision. To this end, c. 148 indicates who is a competent authority, as long as the law does not establish something different from this determination, for example, some type of substitute intervention in the style pointed out in c. 155 (cf. cc. 421 § 2, 425 § 3, 525). Therefore, c. 148 should not be understood as a duplication of c. 157, as this last precept establishes that the free conferral is the general system and is primary to the canonical provision.

Canons 147 and 148 affirm, with a general character, the principle of autonomy and liberty of the Church in the conferral of any type of ecclesiastical office. The construction of the "capital offices" of the diocesan bishop and the like, corresponds to the Supreme Authority of the Church in order to constitute the corresponding ecclesiastical circumscription (cf. c. 373). In this respect § 5 of c. 377, according to the prescriptions of *Christus Dominus* 20,[1] affirms the purpose of not conceding any right to the civil authorities to intervene in the appointment of bishops. Presently, the concordat law recognizes in some cases a certain type of right, apart from the concessions, that—not by law but by diplomatic imperative—the

1. Cf. CPAC, *Normae de promovendis ad Episcopatum in Ecclesia latina*, March 25, 1972, *AAS* 64 (1972), pp. 387–391, art. XV.

Holy See is obligated to carry out in specific cases.[2] In reference to the diocesan scope, and overall to the appointment of parish priests (cf. c. 515 § 2), the *Motu proprio Ecclesiae Sanctae* I, 18, to execute number 28 of *Christus Dominus*, suppressed *any privilege not burdensome* to intervene in the provision of offices that limited the freedom of the bishop. This occurred at the time that the agreement of the suppression of similar situations supported in concordats with the states or in contracts with physical or juridical persons was requested.

In abstract terms, the principle taken up in c. 148 protects the relationship with the *organizing power* that, in the proper scope, corresponds with the "capital office." This authority consists of the capacity to form the ecclesiastical structure that is the origin of the manner understood pastorally. More appropriately, establishing, innovating or eliminating the ecclesiastical offices that make up the respective entity (and are therefore structurally bound to said "capital office") are clearly within the limits established by the law.[3]

In the context of the system of benefices, the canonical doctrine noted diverse conditions of lawfulness for the establishment of ecclesiastical offices: just cause, suitable location, sufficient talents, and observance of the obligatory solemnities.[4] In the current discipline, the law establishes two types of general limitations. However, a certain margin of discretion on the part of the respective ecclesiastical authority is recognized in order to assess the opportunity to erect ecclesiastical offices and to give form to and appropriate mode for the circumstances of each place. On one hand, the norm sometimes grants, in limited form, the establishment of specific offices (for example, that of the vicar general: c. 475 § 1; or the office of penitentiary: c. 508 § 2). On the other hand, the discretion of the competent authority to give form to the offices—the organizational authority—is also limited by the nature and by what attributions the universal legislator has desired to establish for each office.

Neither do the requirements and typologies established by the preceding canonical doctrine have practical utilitarian relevance (in the context of the system of benefices) to deal with the innovation and suppression of ecclesiastical offices. Here we deal with categories configured primarily in the function of the juridical personality recognized as the benefice (cf. c. 1409 of the *CIC*/1917). Subsequently, today these categories would refer in all cases not to offices that do not have juridical

2. Cf. M. COSTALUNGA, "La congregazione per i vescovi," in *La Curia Romana nella Cost. Ap. 'Pastor Bonus'*, a cura di P.A. BONNET e C. GULLO (Vatican City 1990), pp. 293ff; R. METZ, "Innovation et anachronismes au sujet de la nomination des évêques dans de récentes conventions passées entre le Saint-Siège et divers États," in *Studia Canonica* 20 (1986), pp. 197–219.

3. Cf. *Comm.* 22 (1990), p. 123.

4. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, *De personis*, 3rd ed. (Rome 1943), pp. 211ff; F. MAROTO, *Instituciones de derecho canónico*, II (Madrid 1919), pp. 281ff.

personalities, but to the ecclesiastical entities erected with canonical personality (for example, ecclesiastical circumscriptions, bishops' conferences, etc.). These entities would be *derivative* of "capital offices" in that they constitute an essential part of the ecclesiastical circumscriptions,[5] which do enjoy a juridical personality.

In this respect it is fitting to remember for the purpose of illustration that the traditional doctrine often spoke of diverse modes of *innovation* of ecclesiastical office. These included the following: *a*) by transfer from the office to a new see; *b*) by transformation or conversion of the office; *c*) by division of the office into various offices, that could be done in two ways: division *aeque principalis*, or division *minus principalis*; *d*) by the union of various offices that could be: a union *aeque principalis*, a union *extinctiva* or *per confusionem*, and a union *minus principalis* or *per accessorium*.[6]

In a subjective aspect, the provision of office ordinarily establishes a juridical relationship of subordination, and, more specifically, of hierarchy between the ecclesiastical authority that confers the office and the subject over which the provision falls. This hierarchy has, nonetheless, diverse connotations, according to the type of existent objective subordination between the respective offices. This is not the same, for example, as the type of hierarchical subordination that is given between the Roman Pontiff and the diocesan bishop. Neither is it the same for the subordination that exists between the Pope and the prefect of a division of the Roman Curia, or between the diocesan bishop and his vicar general or a pastor in the diocese. In these last cases the provision had established a hierarchy between the officeholders of the respective offices. It also established, in the strict organizational sense, as these are all vicarious offices, in a more or less proper form, the relationship of the Pope with the diocesan bishop. This relationship of hierarchical subordination is resolved in some way through a focus on the communal dimension that corresponds with the exercise of both offices. Consequently, it is not possible to say the diocesan bishop is a representative or a vicar of the Pope, as neither is the Pope a vicar of the episcopal college. However, the officeholders of the other offices mentioned previously as an example do vicariously represent the officeholder of the respective capital office.

There are other cases, nonetheless, in which the canonical provision does not establish hierarchical relationships of any type between the person that carries it out and the passive subject. This is so, for example, in the cases of provision by substitution noted in c. 155. In cases of constitutive election (cf. cc. 332 § 1, 421 § 1, 625 §§ 1, 3) it is the electoral body that, through the acceptance of the person elected, confers the provision of the office. Such provision, nonetheless, does not establish a relation-

5. Cf. *Comm.* 22 (1990), pp. 118ff.
6. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, *De personis*..., cit., pp. 214ff.

ship of subjective hierarchical subordination with the officeholder of the office.

On occasion, the ecclesiastical authority referred to in c. 148 may not be personal. There are situations, in effect, in which the creation of offices and their provision correspond to collective organs: to the same organ or to distinct organs for each of the two functions. We encounter abundant examples of this possibility in the scope of the bishops' conferences, as regards the ecclesiastical offices of the conference proper, as regards others that pertain to canonical entities of national scope that depend on the conference. An example of this would be a university. The procedure of some conferences indicates that the ecclesiastical authority assigned to the provision would be by delegation of the plenary assembly, or according to the proper statutes, the permanent commission of the conference. This would correspond to the president of the conference who signs the respective decrees of appointment.[7] An exception would be the office of major emphasis, in whose provision the plenary assembly intervenes directly.

7. Cf. R. ASTORRI, *Gli statuti delle Conferenze episcopali*, I, *Europa* (Padova 1987), pp. 28ff; I.C. IBÁN, *Gli statuti delle Conferenze episcopali*, II, *America* (Padova 1989), pp. 19–20.

149 **§ 1. Ut ad officum ecclesiasticum quis promoveatur, debet esse in Ecclesiae communione necnon idoneus, scilicet iis qualitatibus praeditus, quae iure universali vel particulari aut lege fundationis ad idem officium requiritur.**

§ 2. Provisio officii ecclesiastici facta illi qui caret qualitatibus requisitis, irrita tantum est, si qualitates iure universali vel particulari aut lege fundationis ad validitatem provisionis expresse exigantur; secus valida est, sed rescindi potest per decretum auctoritatis competentis aut per sententiam tribunalis administrativi.

§ 3. Provisio officii simoniace facta ipso iure irrita est.

§ 1. In order to be promoted to an ecclesiastical office, one must be in communion with the Church, and be suitable, that is, possessed of those qualities which are required for that office by universal or particular Law or by the law of the foundation.

§ 2. The provision of an ecclesiastical office to a person who lacks the requisite qualities is invalid only if the qualities are expressly required for validity by universal or particular Law or by the law of the foundation; otherwise it is valid, but it can be rescinded by a decree of the competent authority or by a judgment of an administrative tribunal.

§ 3. The provision of an office made as a result of simony, is invalid by virtue of the law itself.

SOURCES: § 1: cc. 149, 153 § 1
§ 2: c. 153 § 3
§ 3: c. 729

CROSS REFERENCES: cc. 148, 150, 153 § 1, 163, 228, 378, 377 § 3, 478, 494 § 1, 524, 623, 1739

COMMENTARY

Juan Ignacio Arrieta

The present canon (which corresponds to c. 153 § 1 of the *CIC*/1917) considers the subjective requirements that a candidate should possess for an ecclesiastical office. These requirements can be of two types: *general* or *absolute*, if they are required for the conferral of any office in the Church; and *particular* or *relative*, which are the specific requirements demanded by the nature of each office.

According to c. 153 § 1 of the *CIC*/1917, the canonical doctrine often identifies the following general requirements of the candidate to qualify for ecclesiastical office: clerical state (or religious profession, when dealing with laypersons), proper age, honesty of life, and lack of impediments.[1]

1. In the discipline of the present Code, the clerical state is no longer, as we have seen, a general requirement for the valid attainment of ecclesiastical offices. Given the explicit recognition of the possibility that the lay faithful have of admission to a specific type of office (cf. c. 228), it becomes clear that it will be the nature of the functions proper to each office (see commentary on c. 150) that will determine whether or not it can be conferred on a layperson. This is not yet an absolute requirement, but is relative to the office in question (cf. cc. 129 and 274). The true impediment to ability of the lay faithful to validly obtain a specific office will be the specific necessity of exercising the sacred orders, or specific functions of government bound to the plenitude of the orders. This is dependent, definitively, on the sacrament of the orders, and not on the clerical state. Further, c. 623 restates that proper law or the constitution of each institution applies in the case of the religious superior.

2. Generally, on the other hand, § 1 of c. 149 demands that the candidate for the office must be in ecclesiastical communion. Here arises the problem of the scope of this requirement, and what should be understood in the present context as "to be in communion with the Church."[2]

In this respect, it is essential to distinguish the negative aspect and the positive dimension that come together in the condition of *ecclesiastical communion*. The negative aspect of the requirement is strictly accomplished with the sole absence of ecclesiastical censure that carries with it a subjective condition of excommunication. However, the positive dimension of the precept, certainly included in the requirement of the canon, postulates, in addition, a personal *active situation* of ecclesiastical communion. This is confirmed through the genuine union of the candidate with legitimate pastors, through effective assent to the magisterium of the Church, and by the participation in the means by which the community of the people of God is given life and congregates. It is obvious, on the other hand, that the negative aspect of the requirement should be applied with the same measure as the provision to qualify for ecclesiastical offices. The positive dimension, however, should be required in relation to the proportionality with respect to the nature and the proper ecclesiastical functions of each specific office.

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1. Cf. F. MAROTO, *Instituciones de derecho canónico*, II (Madrid 1919), pp. 297ff; M. CONTE A CORONATA, *Institutiones Iuris Canonici*, vol. I (Taurine 1928), pp. 232–236; B. OJETTI, *Commentarium in Codicem Iuris Canonici, De personis* (Rome 1930), pp. 24ff; F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, *De personis*, 3rd ed. (Rome 1943), pp. 253ff.

2. Cf. *Comm.* 23 (1991), p. 250.

3. Apart from the prescriptions that singularly denote the canons of the Code for each specific ecclesiastical office, particular or statutory law should establish the requirements of each specific duty. Thus, diverse precepts of the Code determine the personal requirements of age, title, etc. for the provision of specific offices (cf. for example cc. 478, 494 § 1, etc.). These requirements can be established indirectly, as occurs with the norms that establish the conditions for candidates to the episcopate (c. 378) or to the presbyterate (cc. 1026ff), in relation with the requirements for the attainment of the corresponding ecclesiastical offices of diocesan bishop, of pastor, etc. In many cases, nonetheless, more than the requirements in the strict sense, the norm better denotes directives that remain to the prudent, but free evaluation of the one who should confer the office. This is the case, for example, in norms like that of c. 478 § 1, which seeks to denote that the vicar general or episcopal vicars should have "a doctorate or licentiate in canon law or theology," adding that they be "at least well versed in these disciplines" (cf. also c. 378 § 1, 5°). (For other requirements of suitability, see commentary on c. 152).

4. The prescription of c. 149 implies the realization of a judgment regarding the suitability of the candidate to an office.[3] This evaluation, in all cases, corresponds to the ecclesiastical authority that should carry out the conferral of the office in accordance with c. 148. Nonetheless, it does not deal with a judgment to which the aforementioned authority should arrive alone. The rules of law and the dictates of the general criteria of prudence should also be observed here. On occasion, the corresponding ecclesiastical authority has the juridical obligation to hear the opinions of determined subjects (cf. cc. 377 § 3, 494 § 1, 524, etc.). In all other cases, although there is no juridical obligation strictly speaking, the appropriate consultation with suitable persons—particularly with those who, by the office they occupy, collaborate with the competent authority to make the provision—is an element that integrates the good work in governance.

Paragraph 2 of c. 153 of the *CIC*/1917 established that, considering all circumstances, the "most suitable" candidate should be chosen, assuming the concurrence of a number of candidates for the same office. In the present Code this prescription, which in some way put conditions on the freedom of election among diverse candidates, has been eliminated. Thus, the freedom has been conceded to the ecclesiastical authority to choose whichever of the candidates meets the required conditions.[4]

It is obvious, in the cases of presentation or election, that the judgment of suitability by the ecclesiastical authority should again fall—with the exclusion of any other possible suitable subject—upon those candidates that have been presented or have been elected. The judgment should

3. Cf. R. NAZ, "Offices ecclésiastiques," in *Dictionnaire de droit canonique* VI (Paris 1957), cols 1084–1085.
4. Cf. *Comm.* 22 (1990), p. 126.

confirm whether these persons meet the established requirements for attainment of the office. The authority has the obligation to institute—or confirm, when dealing with election—the candidate positively (c. 163).

5. Paragraph 2 of the canon considers cases of invalidation *ipso iure*, or of rescinding the canonical provision due to a lack of the necessary requirements. The invalidation of the provision is produced only by the lack of a requirement demanded *ad validitatem* for the provision of the office with which it deals. In this sense, and apart from that established in § 3 with respect to the provisions of simony, perhaps the most relevant of all the invalidating conditions that the present Code denotes is the condition, in general form, indicated in c. 150. This canon requires the order of the priesthood in order to obtain the offices that clearly involve *cura animarum*.

When not dealing with a requirement demanded by an invalidating norm, the provision for ecclesiastical office made in favor of a person who does not meet all stated requirements is valid. However, the provision may be rescinded at a later time through decree or by sentence of an administrative tribunal.[5] Thus the route of administrative recourse is opened in order to refute an irregular provision, permitting a superior instance to revoke the act of the provision. In any case, the administrative recourse that this canon permits does not mention any type of restorable effect over the provision itself (see commentary on c. 155), as would have been obligatory if it had been desirable to transfer the right to realize the provision to the superior (cf. cc. 148 and 1739).

6. The *Regolamento generale della Curia Romana*, 14,[6] notes in general the requirements for the hiring of personnel of the Roman Curia. This norm, current only in this specific scope, can nevertheless illustrate the general application of c. 149 of the Code. Apart from the conditions of virtue, prudence, knowledge, and appropriate experience, the *Regolamento* requires the following conditions for the hiring of officials of the Curia: *a*) the required age, between twenty-five and forty-five years for priests and between twenty-one and thirty-five for laypersons; *b*) priests must possess a *nihil obstat* from the proper ordinary, of the dicasteries competent for the subject in each case, of the material, etc., and of the vicariate of Rome if the priest resides in this city; *c*) license of military service, in the case of laypersons; *d*) good health, duly verified; *e*) suitability for the work to which the person is assigned; *f*) lack of penal precedents; *g*) good religious conduct, moral and civil, certified by the proper parish priest and

5. Cf.. *Comm.* 22 (1990), pp. 59–60.

6. Cf. J.I. ARRIETA, "Funzione pubblica e attività di governo nell'organizzazione centrale della Chiesa: il Regolamento generale della Curia romana," in *Ius Ecclesiae* 4 (1992), pp. 586–613, about art. 13 of the previous version of the RGCR of 1992.

by the respective superior; and *h*) appropriate professional qualification at the functional level for each official. Appendix III of the *Regolamento* contains, in addition, the *Mansionario generale della Curia Romana*, in which, for each of the ten levels in which all the officials of the Curia are grouped, there corresponds a specific type of activity to carry out, the required title, and the professional profile of each job.

150 **Officium secumferens plenam animarum curam, ad quam adimplendam ordinis sacerdotalis exercitium requiritur, ei qui sacerdotio nondum auctus est valide conferri nequit.**

An office which carries with it the full care of souls, for which the exercise of the order of priesthood is required, cannot validly be conferred upon a person who is not yet a priest.

SOURCES: c. 154

CROSS REFERENCES: c. 145, 228 § 1, 230, 517 § 2

COMMENTARY

Juan Ignacio Arrieta

This canon, which has no equivalent in the *Codex canonum Ecclesiarum orientalium*, 1990, establishes, among others, two important issues. The first is the scope of the expression "plena *cura animarum*." The second is the distinction between the ecclesiastical functions assigned to the ecclesiastical office under § 2 of c. 145 and the ontological-sacramental ability of the officeholder of the office (see commentary on the present title).

1. An ecclesiastical office necessarily has an ecclesiastical dimension and is exercised, therefore, for a spiritual purpose (cf. c. 145 § 1) in the function of the pastoral duties charged to the office. However, the norm and the canonical doctrine have traditionally distinguished between offices with full care of souls and offices without full care of souls (cf. c. 1411, 5° of the *CIC*/1917). The first are those offices that are entrusted with the direct pastoral attention of the faithful (offices of bishop, of pastor, of chaplain, etc.). On the other hand, those offices without full care of souls are charged with functions that are administrative, technical, etc., that do not include charges of pastoral assistance, as is the case of chancellor, financial administrator, etc.

Although dealing with a scheme that is, in itself, clear and also, in principle, valid in the actual canonical system, a need was seen through the course of the works of revision to clarify this norm. Therefore, by diverse routes, the Church has proceeded to extend the participation of different categories of faithful in some functions proper to ecclesiastical ministry. Thus, the establishment of the permanent diaconate and the creation of the lay ministries (cf. c. 230) opened the door to the creation of

ecclesiastical offices strictly (for the distinction between ministry and office, see commentary on the title) that had assigned functions of pastoral assistance. Consequently, these offices supposed some participation in the *cura animarum*. For this reason, the first schemata for this canon, while they did not recall the expression "plena *cura animarum*," spoke of offices "ad quam plene adimplendam ordinis sacerdotalis exercitium requiritur," thereby expressly protecting the salvation of the functions that the law permits the deacons to carry out.

The distinction between the various types of offices with full care of souls that the Code now accepts was arrived at later. Thus the legal body distinguishes offices with *full care of souls* and offices with *partial care of souls*, which on occasion can be entrusted to the lay faithful (cf. c. 230 and 517 § 2), and, over all, to deacons, according to *Lumen gentium*, 29, and *Christus Dominus*, 15.

2. Attending to the formation of the text, it should be stated that the canon recalls a material distinction in the function of the pastoral duties that are assigned to the distinct ecclesiastical offices.

From the jurisdictional perspective, there should also be a distinction between "ordinaria *cura animarum*" and "extraordinaria *cura animarum*." The first would be that which the Church offers to all the baptized through the corresponding ordinary or the proper pastor according to the norm of domicile or quasi-domicile (cf. c. 107 § 1). The extraordinary *cura animarum*, on the other hand, would be that which the same hierarchical organization of the Church offers in addition to some of those faithful dealing with specific pastoral situations. This can be given in different ways, as for example, through determined types of offices (the office of rector of a church, chaplain of a college or educational center, chaplain of emigrants, etc.). It may also be given through specific personal ecclesiastical circumscriptions (military ordinariates, personal prelatures) that are compatible with the "ordinaria *cura animarum*" that normally coincides with territorial circumscription of a domicile.

3. In addition the canon establishes a second matter of interest that can generally be applied to all ecclesiastical offices: the distinction—and adaptation—between the subjective ability of the officeholder and the functions objectively assigned to each office.

In effect, as has been previously noted, the Code has surmounted the old conception that reserved ecclesiastical offices only to the clergy. That focus gave acceptance to a hierarchical vision of ecclesiastical organization. Thus, as noted, in the discipline of the *CIC*/1917, the clerical state was acquired with tonsure alone.

The establishment that the Code now follows is more suited to the sacramental structure of the Church, to the postulate in candidacy for any office who has received by sacramental route the ontological qualification, definitively, the *munera Christi*. This qualifies the person to carry

out the functions attached to each ecclesiastical office. Thus, the functions of diocesan bishop require, in principle, episcopal ordination. The functions of pastor require priesthood, those of notary or chancellor, at least, require the qualification proper to baptism (cf. c. 228 § 1), etc. Consequently, and prescinding from the other requirements that are proper for each office, there will be the respective functions of the office that will indicate in each case the type of sacramental requirement: that is, the type of ontological qualification, required as a requisite for the office-holder of an office, and, dealing with the sacrament of ordination, the level at which it should have been received. This is the criterion that followed the legislator when, in dealing with each specific office, the requirements that should be held by each candidate are noted.

The fact that the lay faithful do not habitually fill ecclesiastical offices without care of souls, or with partial *cura animarum*, does not respond, consequently, to an inability in principle to develop such functions, nor only to motives of prudence and opportunity. Rather, it responds fundamentally to the fact that the lay faithful have as an ecclesiastical condition proper the dedication to secular tasks. Vice versa, when the lay faithful fill this class of offices, they do so in the context of supplementing with respect to the clergy (suppletion of the actual priesthood in a ministerial respect). An exception is made of those offices that are merely technical, administrative, material, etc., that are exercised with a professional focus similar to those secular jobs (without forgetting the scope that the notion of office actually possesses).

151 **Provisio officii animarum curam secumferentis, sine gravi causa ne differatur.**

The provision of an office which carries with it the care of souls is not to be deferred without grave reason.

SOURCES: cc. 155, 458

CROSS REFERENCES: cc. 57, 148, 150, 155, 157, 158 § 1, 163, 165, 178, 179 § 2, 199, 379, 382 § 2

COMMENTARY

Juan Ignacio Arrieta

Speaking of not delaying provision, the present canon deals precisely with the act of concession of the office by the legitimate authority called to intervene (cf. c. 148), since in other precepts specific legal terms are denoted for the exercise of the right of presentation (c. 158 § 1) or of election (c. 165). In addition, with respect to some specific office, the present Code establishes temporal terms—not peremptory, and, therefore, dispensable—in order to carry out acts that should be considered integral to the proceeding of canonical provision of ecclesiastical office. For example, in the case of episcopal offices, the deadline for receiving consecration is noted (c. 379; cf. c. 2398 of the *CIC*/1917), as is the deadline established for taking possession of the see (c. 382 § 2).

Canon 155 of the *CIC*/1917, contained a general prescription that established a maximum deadline of six months for the provision of any vacant offices that did not establish a distinct time limit for provision.[1] Upon the passing of this legal time limit, in some cases the right to carry out the provision automatically *returned* to the hierarchically superior authority (cf. cc. 274, 1°; 1432 § 3 of the *CIC*/1917; see commentary on c. 155). This was also the criterion that was adopted in the first drafts of the present canon. However, this line was later abandoned, noting that the new legal notion of office had a much broader scope than the *strict* notion of c. 145 of the *CIC*/1917[2]—with which the temporal prescription was applied to many more cases than those understood in the strict notion of office of the *CIC*/1917. In this context, it could be inconvenient to impose a general precept of this type for all kinds of offices. It was decided to allow for the legitimate authority (cf. c. 148) to prudently appraise in each case the tem-

1. Cf. F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), p. 312–314; F.X. WERNZ-P. VIDAL, *Ius Canonicum*, II, *De personis*, pp. 284–285.
2. Cf. *Comm.* 23 (1991), p. 251.

poral conditions of the provision of vacant offices. As is logical, particular or statutory law can establish legal time limits for the provision of specific offices.

The only exception made to this general criterion refers to curate offices, both with those of *full* and those of *partial cura animarum* (cf. c. 150) since on this point the canon does not distinguish between the two categories.[3] With respect to these types of offices, the legislator has limited himself to declaring his will regarding which duties will not remain without a title-holder,[4] generically prescribing the obligation to proceed diligently in their provision, as long as no grave cause becomes an obstacle: that is to say, as long as there is no motive that is positive and proportionately valid for the authority that should carry out the provision. The right of the legitimate authority to carry out the provision of these types of offices that carry with them the care of souls is also protected by c. 199, 6°. This avoids through prescription the consolidation of actual situations with respect to offices that carry the care of souls.

A generic precept is dealt with for each case lacking a legal sanction, as corresponds to the case of the same authority of c. 148 who should validate the circumstances of the provision. Two issues, the lack of a time limit and the corresponding authority to validate the gravity of the case, make it difficult to objectively determine eventual cases of the failure to carry out the provision seen in c. 151. The norm that generally establishes the devolution of the right of provision to the superior hierarchical authority (cf. c. 155) does not apply here, and thereby differs from the *CIC*/1917. Two exceptions are the cases where a continuance is given, and when other norms can be prescribed.

In any case, it should also be clarified that the present canon has a clear power with respect to the provisions that deal with free conferral (c. 157),[5] and that in most cases the canonical system contains technical elements that supersede in themselves temporal limits for carrying out the provision. Thus, in cases of collective or constitutive election (c. 178), the fixed time limit to carry out the right of election (cf. c. 165) carries with it a temporal term for the provision. In addition, the existence of a right of presentation or of election-confirmation, with an understood term of three months noted by c. 57, for which the negative administrative silence with the possibility to settle by administrative recourse (cf. cc. 163 and 179 § 2) is produced. This would have to be validated in each circumstance. In this way some of the effects that in these same cases would follow the route of hierarchical recourse are covered automatically in the other discipline mediating the devolution of the right to the superior (see commentary on c. 155).

3. Cf. F.J. URRUTIA, *De normis generalibus* (Rome 1983), p. 102.
4. Cf. *Comm.* 23 (1991), p. 253.
5. Cf. F. MAROTO, *Instituciones de Derecho...*, cit., p. 313; F.J. URRUTIA, *De normis...*, cit., p. 103.

152 Nemini conferantur duo vel plura officia incompatibilia, videlicet quae una simul ab eodem adimpleri nequeunt.

Two or more offices that are incompatible, that is, which cannot be exercised at the same time by the same person, are not to be conferred upon anyone.

SOURCES: c. 156 §§ 1 et 2

CROSS REFERENCES: cc. 148, 149 § 2, 163, 179 § 2, 423 § 2, 425 § 1, 478 § 2, 492 § 3, 515 § 2, 533 § 1, 550 § 1, 1436 § 1

COMMENTARY

Juan Ignacio Arrieta

This canon refers to the concession in full right of the title of office. Nevertheless, except in the cases of legal incompatibility that we will examine, it does not apply to provisional cases of the temporary assumption of functions attached to an ecclesiastical office on the part of one who is already the officeholder of another office.

In law two types of incompatibility of offices can be distinguished: *a*) purely material or physical incompatibility, and *b*) legal incompatibility.

a) Materially or physically incompatible offices are those which carry attached ecclesiastical functions that, according to common opinion, cannot be carried out simultaneously in a satisfactory manner.[1] In the discipline of the *CIC*/1917, c. 188, 3° established *ipso iure* the tacit renunciation of the first office when a second incompatible office was accepted and uncontested possession was taken. The present Code has not legislated any similar precept except that through the present canon, which does not contain any legal sanction; instead one is limited to directing an order to the authority (cf. c. 148) that must proceed to the provision of an office so that no incompatible provisions are carried out.[2]

Consequently, in general terms, it is that same ecclesiastical authority who will have to consider the incompatibility of the functions attached to distinct offices, keeping in mind all the circumstances of the community in

1. Cf. B. OJETTI, *Commentarium in Codicem Iuris Canonici, De personis* (Rome 1930), pp. 34ff; M. CONTE A CORONATA, *Institutiones Iuris Canonici*, vol. I (Taurine 1928), pp. 241–242; F.X. WERNZ-P. VIDAL, *Ius Canonicum*, II, *De personis*, pp. 274–278; F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), p. 314–316.
2. Cf. *Comm.* 22 (1990), p. 82.

his charge. This is not to say, nonetheless, that in this evaluation there do not exist objective elements, since—apart from the reasons implied in the appropriate *cura animarum* to which one must attend[3]—in the case of specific offices it is sometimes the same law that points them out. For example, one of the objective elements appears to be the obligation of residence which cc. 533 § 1 and 550 § 1 establish for parochial offices;[4] another objective element of incompatibility could stem, at least in theory, from the possibility that upon accumulating various offices as pastor, the integrity of one of the essential elements of the parish—the office of pastor itself—is itself modified. For such a case, moreover, the bishop would have to consult the presbyteral council (c. 515 § 2).

In any case, and however difficult the most appropriate remedy may be, in theory the possibility also remains of juridically validating the incompatibility of two offices through an administrative recourse intended to rescind the decree of provision (c. 149 § 2).

In cases of canonical presentation or of election-confirmation, the precept c. 152 determines that the authority should nullify the institution (cf. c. 163) or the confirmation (cf. c. 179 § 2), respectively.

b) Legally incompatible offices are those which the canonical system—the Code, the particular or statuary law, etc.—designates as such. In this sense, according to what was established in the *CIC*/1917,[5] the Code Commission establishes that the offices of diocesan administrator and finance officer cannot be assumed simultaneously (c. 423 § 2). Neither can the offices of vicar general, episcopal vicar, or penitentiary vicar (c. 478 § 2); or promoter of justice and defender of the bond in the same case (c. 1436 § 1). In addition, and although it is not expressly stated in the law, those offices that, by the very nature of the legal institution with which they deal, should be understood as legally incompatible, should not be assigned to the same person. This is the case, for example, of the offices of prefect and of secretary of a Congregation of the Roman Curia; of judge of the same case in two distinct levels of procedure, etc.

In addition to cases of incompatibility in the strict sense, there also exist *legal prohibitions* established by the canonical system, that should be strictly considered as requisites for the suitability of a candidate for an office. Such is the case, for example, of the prohibition against designating the priest as diocesan administrator who has been chosen, named, or presented for the same vacant see (c. 425 § 1); the prohibition against relatives of the bishop up to the fourth level of consanguinity or affinity being

3. Cf. F.X. WERNZ–P. VIDAL, *Ius Canonicum...*, cit., p. 276.

4. Cf. P. ERDÖ, "De incompatibilitate officiorum specialiter paroeciarum. Adnotationes ad cann. 152 et 526," in *Periodica* 80 (1991), pp. 499–522.

5. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum...*, cit., pp. 276–278; F. MAROTO, *Instituciones...*, cit., p. 314–316; P. CIPROTTI, *Lezioni di Diritto Canonico* (Padova 1943), p. 259.

members of the diocesan financial council (c. 492 § 3); the prohibition against designating such an individual to an office in the dicastery where a blood relative or related person, up to the fourth and the second levels, respectively, already work (cf. *RGCR*, 17); or the prohibition against exercising professions or jobs incompatible with the function that one has in the dicastery (cf. *RGCR*, 40), etc.

153 **§ 1. Provisio officii de iure non vacantis est ipso facto irrita, nec subsequenti vacatione convalescit.**

§ 2. Si tamen agatur de officio quod de iure ad tempus determinatum confertur, provisio intra sex menses ante expletum hoc tempus fieri potest, et effectum habet a die officii vacationis.

§ 3. Promissio alicuius officii, a quocumque est facta, nullum parit iuridicum effectum.

§ 1. The provision of an office which in law is not vacant is by that very fact invalid, nor does it become valid by subsequent vacancy.

§ 2. If, however, there is question of an office which by law is conferred for a determinate time, provision can be made within six months before the expiry of this time, and it takes effect from the day the office falls vacant.

§ 3. The promise of any office, by whomsoever it is made, has no juridical effect.

SOURCES: § 1: c. 150 § 1
§ 3: c. 150 § 2

CROSS REFERENCES: cc. 146, 148, 154, 157, 158, 165, 184, 403 § 3, 405, 406 § 1, 407 § 1, 454 § 2

COMMENTARY

Juan Ignacio Arrieta

The vacancy of an office is one of the conditions required from antiquity by the canonical system for the valid provision of ecclesiastical offices.[1] The norm acquired its full sense in the previous juridical character of the system of benefices and of those offices of immovable character. This would avoid the situation whereby under any foreign titles there might be created any kind of expectation of a right, whether it be founded in the provision of an office that is not vacant, or only on the promise of a future provision lacking any legal basis. For all this, in addition to the *ipso facto* nullity of the provision (cf. c. 150 § 1 of the *CIC*/1917), the *CIC*/1917

1. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, *De personis*, 3rd ed (Rome 1943), pp. 266–273; F. MAROTO, *Instituciones de derecho canónico*, II (Madrid 1919), p. 309–312; P. CIPROTTI, *Lezioni di diritto canonico, parte generale* (Padova 1943), p. 257.

contemplated among other necessary penal sanctions the disqualification of the person who consciously accepts the conferral of an office that is not vacant (cf. c. 2395 of the *CIC*/1917).

Although in the current juridical order the present norm—which has remained in the Code without penal sanction—has lost an important part of its original meaning, it in fact constitutes a limit to the discretion for free provision of offices that cc. 148 and 157 grant to ecclesiastical authority. The limitation not only has the intention of protecting the subjective juridical situations of the holders of ecclesiastical offices, but also of permitting good order in governance—always making the provision dependent upon a previous juridical matter or act (cf. c. 184) that resolves the title ownership—and of guaranteeing certainty in the identification of the organ and, more generally, of every holder of ecclesiastical office.

For its part, the doctrine has emphasized that this prohibition equally affects the three acts that can be distinguished in any canonical provision—designation of the person, concession of the title, and taking possession (see commentary on c. 146)—so that, while it does not produce vacancy, neither is it possible to validly exercise the rights of presentation (cf. c. 158 § 1) or of canonical election (cf. c. 165).[2]

The Code deals with its own traditional categories of vacancy of office. The vacancy of the office may be *de iure*—if the office lacks a legitimately provided officeholder—or *de facto*. The latter category refers to pure factual data where no person is fulfilling the function corresponding to the office in question. Consequently, it is possible that an office may be vacant by law but not by fact if someone has been carrying out the corresponding ecclesiastical functions, whether by some pretense of legitimacy or in some illegitimate form (cf. c. 154).

The prohibition against conferring offices that are not vacant refers in this canon to vacancy *by law*. That is, vacancy by the absence of a legitimate officeholder, independent of whether anyone is *de facto* filling the office with certain legitimacy or by some form of *ius ad rem*.

The only exception to this made by § 2 of the canon refers to temporary offices, which can be conferred six months before the termination of the mandate, taking effect from the moment of the legal effects of the provision. The exception deals with the temporal nature of the office, and not with the system of provision that should be followed. Thus, in principle, the exception appears applicable not only to cases of free conferral, but also—in accordance with what is stated above—to the exercise of the right of presentation or of election. This is true in spite of the fact that the respective norms (cf. cc. 158 § 1 and 165) establish that the vacancy of office is terminated with the exercise of such rights.

2. F. MAROTO, *Instituciones...*, cit., p. 311.

Aside from this case of temporal offices, the canonical system offers another exception to the general norm of § 1 in the juridical figure of the coadjutor bishop found in c. 403 § 3. In this case, the authority of cooperation in fulfilling the functions of office together with its legitimate office holder is conferred upon the coadjutor of the episcopal office. In addition, it grants the right to succeed automatically once a vacancy occurs. In this case, the *ius ad rem* that the bishop has with respect to the see remains protected by the canonical system—as in the scope of the bishops' conference (cf. c. 454 § 2)—which, in addition, necessarily establishes the criteria to harmonize its participation in the management of the office without requiring a vacancy (cf. cc. 405, 406 § 1, 407 § 1). In principle, the figure of the coadjutor with the right of succession in the office can be established also by law in other cases.[3]

3. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II..., cit., p. 271.

154 **Officium de iure vacans, quod forte adhuc ab aliquo illegitime possidetur, conferri potest, dummodo rite declaratum fuerit eam possessionem non esse legitimam, et de hac declaratione mentio fiat in litteris collationis.**

An office which in law is vacant, but which someone unlawfully still holds, may be conferred, provided that it has been properly declared that such possession is not lawful, and that mention is made of this declaration in the letter of conferral.

SOURCES: c. 151

CROSS REFERENCES: cc. 10, 149, 153, 194, 199.

COMMENTARY

Juan Ignacio Arrieta

As opposed to the preceding canon, which deals, above all, with the *de iure vacancy* of an ecclesiastical office—the absence of a legitimate officeholder—the present canon considers in a special way the legal relevance that the *de facto possession* of an office that lacks a legitimate officeholder can possess. More specifically, the canon refers to the "illegitimate possession," which applies to a person lacking any title to the possession of an office. It is also fitting to speak of a "legitimate possession," proper to the person who, although not specifically the legitimate officeholder, does have some title, of substitution, for example, to exercise the institutional functions inherent in said office. In this case, save when there are risks of resistance on the part of the one in possession of the office, a declaration of vacancy appears unnecessary.

The norm, similar to the content in c. 151 of the *CIC*/1917, has a designated *ius-privatist* that encountered a clear meaning in the norm on benefices in the previous discipline. In that context, for example, the mere lapse of the legally established time (three years according to c. 1447 of the *CIC*/1917) consolidated the position of the person who, in good faith, but based on an invalid title, possessed a determined type of ecclesiastical offices, allowing him to obtain the office *pleno iure.*

In the present discipline the norm is still lacking in this sense. It appears to have as an object, on one hand, a guarantee of juridical security, and, on the other, the opportune protection of subjective juridical positions born of the scope of situations of fact. The following statement also relates to the possibility of acquisitive prescription opened by c. 199, 6°

with respect to the person who possesses an office on the basis of a provision susceptible to refutation (see commentary on c. 149): the declaration of illegitimacy would have, in this case, the technical effect of interrupting the acquisitive prescription of the office.

Different from the canon immediately prior, the present norm does not possess an invalidating character (cf. c. 10), for which, in principle, the canonical provision that did not take this precept into consideration would not be nullified. The canon is limited to the establishment of the necessity of a declarative act, whether administrative or judicial, dealing with the illegitimacy of the actual situation. This act is a preceding step to the juridical act of canonical provision, in whose documentation mention should be made of the preceding declarative act. Both juridical acts are, nonetheless, autonomous, for which may follow, independent of each other, the normal vicissitudes of any juridical act: nullification, recourses, etc.

In cases of evident illegitimacy in the possession of ecclesiastical office, the doctrine[1] considers unnecessary the declarative act preceding the provision, understanding that the juridical security would not be put in danger, nor would there be risk of harming any type of rights at all. In any case, one should not forget that the norm specifically finds its sense in cases of opposition or resistance. In such cases, in order to prevent ulterior refutations by formal cause, and to destroy the appearance of legitimacy that the possession could bring on, it becomes particularly necessary and useful to follow the procedural norms.

One particular case of the application of this precept is that of removal *ipso iure* prescribed in c. 194. In this situation, the declaration required by § 2 of c. 194 in order to be able to press for the removal of the office, should be understood as serving as a declaration of illegitimacy to the effects required by c. 154.

Keep in mind, in any case, that the declaration of illegitimacy is an objective and purely technical act that, in principle, does not prejudge any type of culpability or of harmful conduct on the part of the subject. There may be situations that are legitimate, in principle, that make specific recourse to this form of declaration. It is sufficient to consider, for example, in the situations apparently consolidated by the prolongation of juridical situations that have arisen with provisional character; or when the office-holder has asked to fulfill temporarily the functions of another superior office that has been left vacant (cf., for example, *RGCR*, 30 § 5).

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1. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, *De personis*, 3rd ed. (Rome 1943), pp. 268ff; F. MAROTO, *Instituciones de derecho canónico*, II (Madrid 1919), p. 311.

155 Qui, vicem alterius neglegentis vel impediti supplens, officium confert, nullam inde potestatem acquirit in personam cui collatum est, sed huius condicio iuridica perinde constituitur, ac si provisio ad ordinariam iuris normam peracta fuisset.

One who confers an office in the place of another who is negligent or impeded, does not thereby acquire any power over the person on whom the office is conferred; the juridical condition of the latter is the same as if the provision of the office has been carried out in accordance with the ordinary norm of law.

SOURCES: c. 158

CROSS REFERENCES: cc. 151, 162, 165, 412, 421, 425

COMMENTARY

Juan Ignacio Arrieta

The canon considers one of the characteristics of the so-called "restorative effect" in the provision of ecclesiastical offices: the non-restoration of the hierarchical relationship between the ecclesiastical authority that confers a title in substitution of another and the holder of the office that has been conferred. Subsequently, the hierarchical relationship that will eventually exist between both subjects—and also between one office and another—will not be other than what would exist if the aforementioned substitution in the provision had not taken place.

In the canonical tradition, the restorative effect was one of the consequences that, in specific cases, carried with it the lack of the obligatory canonical provision of an office. Such juridical effect was defined by the doctrine as the "traslatio iuris conferendi officium in immediatum superiorem ecclesiasticum ipso iure facta ob culpam vel negligentiam in provisione."[1] It dealt, therefore, with an *ipso iure* effect provoked by an objective act or by an illegitimate juridical act relevant to the provision of some ecclesiastical offices. The doctrine had identified three general cases that, in specific types of offices, provoked the restitution to the superior of the right to confer. These included: *a*) the ineffective passing of time indicated in order to carry out the provision; *b*) the nullity of the proceeding

1. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, II, *De personis*, 3rd ed. (Rome 1943), p. 285.

following the conferral; and *c*) the provision made in favor of a person lacking the required conditions.[2]

In the current law, the *restorative effect* in the provision of ecclesiastical offices has very limited power. Generally, c. 155 does not establish any type of restitution to the ecclesiastical superior of the right to carry out the canonical provision of office. It is limited to designating an organizational premise excluding any juridical relationship of hierarchical subordination derived from the sole substitution in the conferral.

Literally, the text refers only to substitution due to negligence (leaving the time limit established for the provision to pass) or to impediment (as much in the common sense of the term, as in the technical sense of cc. 412ff). In reality, however, the organizational principle that the canon denotes should be considered for general application to any case of substitution, with the exception of an eventual direct intervention of the Supreme Authority.

In the first schemata for revision of the Code, in addition to the organizational principle mentioned, the respective canons established in a general sense the substitution of the metropolitan in the provision of offices by "necessary conferral": that is, those that were conferred by exercise of the right of presentation or by canonical election. The later suppression of this reference to the metropolitan had assumed, in fact, a technical option of substituting the technique of *restorative effect* in these cases. This substitution was automatic and transmitted the right to carry out the provision, by the normal system of administrative recourse, to the ecclesiastical authority. This authority would be a superior who, in the case of the diocesan bishop, would generally not be the metropolitan, but the Holy See (see commentary on c. 151). In these cases of recourse, it is not common to make the right to carry out the provision known to the superior, but only the authority to revoke the rejecting act (positive or presumed, by negative administrative silence) of the institution or the confirmation in favor of a certain candidate.

The law must establish the cases in which substitution exists, properly speaking, in the provision of some office, indicating the superior authority named to confer the office. This is what, for example, the Code does on the subject of the election of the diocesan administrator on the part of the college of consultors, in the case of a vacant see. This deals with a case of restorative effect in the strict sense, in which the substitution of the metropolitan—or of the oldest suffragan, when dealing with the metropolitan see (c. 425 § 3)—is produced *ipso iure* by any of the three general cases denoted earlier: that is: *a*) the ineffective passage of the term of eight days established to conclude the election (c. 421); *b*) the ex-

2. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, II, cit., pp. 285ff; R. NAZ, "Offices ecclésiastiques," in *Dictionnaire de droit canonique* VI (Paris 1957), cols 1080–1081.

istence of eventual irregularities in the electoral proceeding (c. 421); and *c)* the designation of a person lacking in the conditions established by law (c. 425 § 3).

It should be noted, finally, that it is also common to speak of the *restorative effect* alluding to cases in which the right to intervene *ceases*—through presentation or election—in a proceeding of canonical provision. Subsequently, the ecclesiastical authority that in any case would have had to grant the conferral of the office remains free to designate the subject who is found suitable for it. The Code establishes in a general sense this restorative effect in the three cases indicated (cf. cc. 162 and 165): *a)* the passage of the time established for presentation or election; *b)* the repeated presentation or election of candidates who are not suitable; *c)* the breaking of the rules of proceeding established for the exercise of such rights.

156 **Cuiuslibet officii provisio scripto consignetur.**

The provision of any office is to be made in writing.

SOURCES: c. 159

CROSS REFERENCES: cc. 145, 154, 474

COMMENTARY

Juan Ignacio Arrieta

The present canon establishes the principle of writing in the provision of ecclesiastical offices. This criterion is intimately related to the requisite of publication and traditional publicity required for the conferral of offices. It deals with a principle that is found fundamentally evident in postulates of good order of government. This refers as much to juridical security in general, as to the necessary objective establishment of the juridical situations that specifically desire to be conferred on the officeholder of the office (cf. c. 145 § 2 *in fine*).

In order to understand the sense of the norm it is necessary to bear in mind the distinction between the juridical act itself—in the case of canonical provision—and the form or manner of publication of the act. This can be carried out in different ways: oral, written, tacit, etc.[1] Thus, when c. 474 denotes that "that acts of the curia which of their nature are designed to have a juridical effect must, as a requirement for validity, be signed by the Ordinary from whom they emanate," is alluding to two distinct things. On one hand, the intervention *ad validitatem* of the ordinary in the formation of the juridical act, and on the other the need to formalize in writing such type of acts.

The precept of c. 156 contains a mandate to the ecclesiastical authority to substantiate in writing the act of provision through an official document. This is different from the mere registry of the act of provision in acts of the corporation with which it deals. Nonetheless, considered in itself, the precept is deprived of sanction, in that it is not a requirement *ad validitatem* of the provision itself—as, however, it had always been considered

1. Cf. J.M. GONZÁLEZ DEL VALLE, "Los actos pontificios como fuente de derecho canónico," in *Ius Canonicum* 16 (1976), pp. 246ff; R. ENTRENA CUESTA, *Curso de derecho administrativo*, I, 1, 7th ed. (Madrid 1982), pp. 208–209.

in canon law[2]—although the absence of said formality of exteriorization of the act does not always remain exempt from juridical consequences.

The type of written document in which the act of provision is substantiated is very varied in canon law, and depends as much on the authority who carries out the provision as on the nature of the office conferred. Thus, pontifical provisions are made through *Apostolic Letters*, which take the form of a *solemn pontifical bull* in cases of the appointment of cardinals and bishops; through an *Apostolic Brief*, for the appointment of nuncios, apostolic delegates, etc.; through a *note* of the secretary of state, when dealing with superior offices, of the members and of the consultants of the dicasteries of the Roman Curia. In all other instances (bishops' conferences, diocese, and all other ecclesiastical circumscriptions, etc.) the document in which the act of provision is recorded would generally be a decree from the corresponding authority.

There are, nonetheless, special cases that impede the establishment of strict rules to this respect. Thus, for example, sometimes the constitutive apostolic constitution of an ecclesiastical circumscription itself contains the act of canonical provision of the respective capital office.[3] In other cases, and keeping in mind the broad notion of ecclesiastical office given in c. 145, the same contract that formalizes the working relationship may constitute the written document that substantiates the canonical provision. Thus, the *Regolamento generale della Curia Romana* distinguishes two means of entering the service of the Roman Curia: the appointment, reserved for superior offices and for officials with the authority of *department head* (*capo ufficio*), and the contract, which is applied to all other officials.[4]

In general terms, for the ideal content of the document that substantiates the canonical provision, it appears that several following elements should be assembled. These are as follows: *a*) the heading, naming the entity dealt with (diocese, bishops' conference, etc.) and the ecclesiastical authority carrying out the provision; *b*) the *narratio* or motivation that succinctly explains the logical procedure followed, the norms that have been followed, the juridical acts previously realized (as, for example, established in c. 154), and the instances that, in a non-obligatory manner and because a right has been exercised, have intervened in the determination of the subject; *c*) the *dispositio*, necessarily integrated by two elements: the certain identification of the subject to whom the conferral is directed

2. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, *De personis*, 3rd ed. (Rome 1943), p. 282.
3. Cf. Ap. Const. *Ut Sit*, November 28, 1982, *AAS* 75 (1983), pars I, 423–425.
4. Cf. J.I. ARRIETA, "Funzione pubblica e attività di governo nell'organizzazione centrale della Chiesa: il Regolamento generale della Curia romana," in *Ius Ecclesiae* 4 (1992), pp. 585–613, especially, p. 591. Cf. arts. 12, 13 and 16 of the RGCR of 1999.

and the ecclesiastical office being conferred. In addition, the expositive part of the document should contain the eventual authorities that, in addition to those functions permanently assigned to the office at the moment of its construction, are specially conceded to the specific officeholder; *d*) the final clauses of place, date and signature of the conferring.[5]

5. Cf. L. GALATERIA-M. STIPO, *Manuale di diritto amministrativo, parte generale* (Turin 1989), pp. 272–273; J.M. GONZÁLEZ DEL VALLE, "Los actos pontificios…," cit., pp. 263ff; R.R. CALVO-N.J. KLINGER, *Clergy procedural handbook* (Washington 1992), pp. 129ff.

ART. 1
De libera collatione

ART. 1
Free Conferral

157 **Nisi aliud explicite iure statuatur. Episcopi dioecesani est libera collatione providere officiis ecclesiasticis in propria Ecclesia particulari.**

Unless the law expressly states otherwise, it is the prerogative of the diocesan bishop to make appointments to ecclesiastical offices in his own particular Church by free conferral.

SOURCES: c. 152; *CD* 28; *ES* I, 18 § 1

CROSS REFERENCES: cc. 127, 134 § 2, 147, 148, 162, 165–179, 182 § 2, 317, 368, 494 § 1, 509 § 1, 523, 547, 553 § 2, 565, 625 § 3, 626

COMMENTARY

Jesús Miñambres

1. This canon, which follows the precepts dedicated to the provision of ecclesiastical offices in general, initiates the series that establishes the specific rules of each of the systems of provision named in c. 147. The first deals with the system called *free conferral.*

The *CIC*/1917, dedicated eight canons to free conferral.[1] During the work of the revision and writing of the *CIC* it was clearly shown that the majority of these referred to the provision of offices in general, and not solely to free conferral.[2] Thus, the article dedicated to free conferral in the *CIC* contained only the canon that we discuss.

1. Cf. cc. 152–159 *CIC*/1917.
2. Cf. *Comm.* 21 (1989), p. 213–216 and 23 (1991), p. 281. Cf. also, M. CABREROS DE ANTA, commentary on c. 152, in *Código de Derecho canónico y legislación complementaria* (Madrid 1954).

2. The authors have distinguished three successive acts in the provision of office: the designation of the person, the concession of the title or juridical conferral of the office, and the taking of possession or investiture of the duty.[3] Free conferral would be the system of provision whereby the first two acts of the procedure are carried out by the same authority.[4] That is, this form of provision consists in the free and direct designation of the holder of the office on the part of the authority to which the office that is being conferred is bound hierarchically.[5]

Free conferral is the general system of provision of offices (cf. c. 148).[6] Canon 157 itself reiterates that if the law does not expressly indicate another system of provision, free conferral of office on the part of the competent authority is the general rule.

In spite of this character of generality, the *CIC* expressly prescribes provision by free conferral in some cases. Canon 317 denotes it for the office of chaplain or ecclesiastical assistant of a public association of the faithful. Canon 523 signals free conferral for the provision of office of pastor by the bishop; c. 547 for the provision of parochial vicar; and c. 553 § 2 for the vicar forane. Canon 565 indicates free conferral of the office of chaplain by the local ordinary; c. 626 for offices conferred to religious by their superiors, etc. But these express prescriptions of the system of free conferral do not impede its character as a general norm of provision. Thus, the indication of another system of provision in a specific case should be expressly recorded in the regulation applicable to the case. This is true as much in the *CIC* itself (cf. cc. 377 § 4; 557 § 2; 625 § 2; etc.) or in another universal norm, as in particular law[7] or in a regulatory or statutory norm (consider the constitutions of religious institutes, statutes of associations of faithful, whether public or private, etc.), or even by custom.

3. On the other hand, in addition to constituting the general system of provision, free conferral is also a suppletory norm when, for any reason, other systems are declined. Canon 162 expressly indicates this in the case of declining (by the passing of deadlines or through repeated presentation of unsuitable candidates) of the right of presentation. In such a case the provision of office should be made by free conferral of the authority that should have appointed the candidate. Canon 165 is similar for the

3. Cf. A. ALONSO LOBO, in *Comentarios al Código de derecho canónico*, I (Madrid 1963), p. 455, no. 444; J.A. SOUTO, *La noción canónica de oficio* (Pamplona 1971), p. 304.

4. Cf. A. ALONSO LOBO, in *Comentarios...*, cit., p. 458, no. 448.

5. Cf. J.I. ARRIETA, *Organizzazione ecclesiastica (Lezioni di Parte Generale)* (Rome 1992), p. 260.

6. Cf. F.X.WERNZ-P.VIDAL, *Ius canonicum*, II (Rome 1943), p. 304; J.I. ARRIETA, commentary on c. 157, in *Pamplona Com*, p. 145.

7. Cf. the norms complementary to the *CIC* issued by some bishops' conferences as given in J.T. MARTÍN DE AGAR, *Legislazione delle Conferenze episcopali complementare al CIC* (Milan 1990). For Complementary Norms promulgated by English language conferences of bishops, see Volume V, Appendix III.

case in which election is not completed within three months from the time of notice of the vacancy. The provision of office will then be made by free conferral by the authority that should have confirmed the election, or, if the election was collective, the authority to whom the subsidiary provision corresponds.

4. The nature of free conferral, which makes the provision dependent exclusively on the authority that carries it out, does not change the fact that in specific circumstances, the testimony of some person or persons should be heard, with legal obligation. In dealing with a complete act, the intervention of a third party in some phases is possible, principally in the designation of the candidate.[8] Thus, for example, at the time of appointment of a diocesan financial administrator, the bishop should hear the college of consultors and the finance council (cf. c. 494 § 1); for the conferral of canonries, the diocesan bishop should hear the chapter council (cf. c. 509 § 1), etc. Such obligatory consultation does not change the nature of the collective act, nor remove the freedom of the competent authority (cf. c. 127). However, if the competent authority pertaining to the free conferral of an office does not hear the obligatory counsel required in these cases, the act of provision would be invalid (cf. c. 127 § 2, 2°).

5. The same matter of the dependence of the provision solely on the competent authority further would not impede, for example, the possibility of the convening of a competition of merit in order to examine the suitability of possible candidates.[9] In this sense, the *Regolamento generale della Curia Romana* 13 § 4 presents the verification of the competence of the employees that are assumed through presentation of titles or completion of tests of suitability, before proceeding to the appointment on the part of the competent authority. It is obvious that such a test would not affect the nature of the free conferral of the office nor the freedom of the authority that should confer it.

6. When the advisory opinion[10] should be given by a collective body (college of consultors, finance council, general chapter of a religious institute, etc.), what is indicated by c. 127, in general, should be followed for carrying out collective acts. Specifically, for example, the convocation of the college will be in accord with that prescribed in c. 166, noted in article 3 of this same chapter of the Code and referring to election. This states that in order to give an advisory vote requested by the authority an election should be held. Anything relating to this matter, to the suffrage, to the scrutiny, etc., should also consider the article regarding election (cc. 164–179). Nevertheless, the provision of office will correspond solely to the authority requesting the opinion and will follow the system of free conferral. Although the proceeding may have the external appearance of an election,

8. Cf. J.A. SOUTO, *La noción...*, cit., p. 304.
9. Cf. M. CABREROS DE ANTA, commentary on c. 153, in *Código...*, cit.
10. Cf. J. ARIAS, "La función consultiva," in *Ius Canonicum* 22 (1971), p. 217–243.

it is not. The difference is that in the opinion granted by the collegial body no right is conferred, nor is it expected, in the appointment. However, when the system of election is followed for the provision of offices, the elected, from the moment at which the majority of necessary votes is completed, acquires a right to the office (see commentaries on cc. 164–179 regarding election).

7. Distinct from the necessity to request this advisory opinion, which the law sometimes requires for the obtaining of a provision of office, is the obligation of prudence in opportunely receiving advice in the appointments with which useful elements of judgment can be furnished. Here we deal with an obligation of good government, also postulated by the ideas of communion and co-responsibility in exercising the ministerial function (cf. cc. 384, 407 § 2, etc.).[11] In some cases this petition of counsel is expressly suggested by the legislator, for example, in the appointment of superiors of religious institutes by the major superior prescribing a previous "suitable consultation" (cf. c. 625 § 3).

8. One of the differences evident in this canon with respect to the norms of the *CIC*/1917, is the substitution of the mention of the local ordinary by the diocesan bishop. This change was carried out in the last preparatory works, when there was a desire to unify the use of both terms throughout the legislative text.[12] The difficult wording of c. 152 of the *CIC*/1917, is thus improved in that, after establishing that free conferral would correspond to the local ordinary, the vicar general would be expressly excluded. Clarifying the terminology (cf. c. 134 § 2 current), the legislator, also recalling conciliatory prescriptions,[13] has chosen the term of diocesan bishop.[14] In any case, it is useful to bear in mind that we are dealing simply with a terminological choice based on the Code's necessity to utilize synthetic expressions. This does not imply the exclusion of other subjects that hold capital offices in diverse structures that are not properly diocesan (cf. c. 368 in relation to c. 134). It should also be understood that when the legislator refers to the local ordinary as an authority competent to make a free conferral of office (cf. c. 565), he is also naming the vicars general and episcopal vicars, and not only the diocesan bishop (cf. c. 134).

The terminology employed does not express more than a choice of synthesis. Thus, to present just one of the most evident examples, the free conferral of many offices corresponds to the Roman Pontiff, not only in his position of bishop of the Latin Church, but also as pastor of the universal Church (cf. c. 331). For example, the Roman Pontiff is called upon for the provision of capital offices of ecclesiastical circumscriptions, which

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11. Cf. J.I. ARRIETA, *Organizzazione*..., cit., p. 261.
12. Cf. *Comm.* 23 (1991), p. 277.
13. Cf. *CD*, 28; *ES* I, 18 § 1.
14. Cf. F.J. URRUTIA, *De normis generalibus, adnotationes in Codicem: Liber I* (Rome 1983), p. 105.

are made by free conferral or by confirmation (cf. c. 337 § 1), also by institution, through the Congregation for bishops,[15] the Congregation for the Evangelization of Peoples,[16] or the Congregation for the Eastern Churches.[17] This differs from the extraordinary cases (cf. c. 333 § 1) of intervention by the Roman Pontiff in the conferral of offices through prevention, concurrence, restitution or reserve.[18]

15. Cf. *PB* 77. Cf. also M. COSTALUNGA, "La Congregazione per i Vescovi," in *La Curia romana nella Cost. Ap. "Pastor Bonus"* (Vatican City 1990), p. 281–307; V. GÓMEZ-IGLESIAS, "La Congregación para los Obispos," in *Ius Canonicum* 31 (1991), p. 333–373.
16. Cf. *PB* 89. Cf. also V. DE PAOLIS, "La Congregazione per l'evangelizzazione dei popoli," in *La Curia...*, cit., p. 359–378.
17. Cf. *PB* 58-60. Cf. M. BROGI, "La Congregazione per le chiese orientali," in *La Curia...*, cit., p. 239–267. Cf. also J.I. ARRIETA, "Vescovi," in *Enciclopedia Giuridica* (Rome 1993).
18. Cf. F.X.WERNZ-P.VIDAL, *Ius canonicum...*, cit., p. 296–299.

ART. 2
De praesentatione

ART. 2
Presentation

158 **§ 1. Praesentatio ad officium ecclesiasticum ab eo, cui ius praesentandi competit, fieri debet auctoritati cuius est ad officium de quo agitur institutionem dare, et quidem, nisi aliud legitime cautum sit, intra tres menses ab habita vacationis officii notitia.**

§ 2. Si ius praesentationis cuidam collegio aut coetui personarum competat, praesentandus designetur servatis cann. 165–179 praescriptis.

§ 1. Presentation to an ecclesiastical office by a person having the right of presentation must be made to the authority who is competent to make an appointment to the office in question; unless it is otherwise lawfully provided, presentation is to be made within three months of receiving notification of the vacancy of the office.

§ 2. If the right of presentation belongs to a college or group of persons, the person to be presented is to be designated according to the provisions of cann. 165–179.

SOURCES: § 1: c. 1457
§ 2: c. 1460 § 1

CROSS REFERENCES: cc. 147, 148, 165–179, 184 § 3, 200–203, 377 §§ 4–5, 557 § 2, 682 § 1, 1272

COMMENTARY

Jesús Miñambres

I. This canon initiates the norms of the Code dealing with the systems of provision of offices in which the authority should respect the rights of third parties. These include provision by presentation and by election, fundamentally, together with a broad possibility of more or less

hybrid systems. Specifically, the current article deals with the second system of provision denoted by c. 147. This is called presentation or institution, based on either the point of view of the person who is going to receive the appointment (the person to be presented) or of the person responsible for making the appointment.

Facing the study of the norms of the *CIC* regarding presentation for ecclesiastical offices (although this provision also serves for the norms regarding election) it should be kept in mind that the concept of presentation does not have a univocal juridical understanding in the canonical system, since under such denomination very distinct matters are considered. For example, consider the difference that exists between the presentation made for a benefice (where such exists today[1]) and that prescribed in c. 377 § 4 for the appointment of auxiliary bishops. For reasons of legislative economy, the *CIC* accepts in this article the general norm for any type of presentation for ecclesiastical offices. From here the special relevance that is acquired in this matter by the consideration of any legitimate prescription (of particular legislation, statutory legislation, etc.) is applicable to each specific case.

II. The *CIC*/1917, regulated presentation for ecclesiastical offices to the treatment of benefices in a legal tribunal (cc. 1448–1471). In that legal body, in effect, presentation was considered as one of the *privilegia patronorum* (cf. c. 1455 of the *CIC*/1917), the first constitutive relevant to the right of patronage itself. This right of patronage was generally defined in the function of the presentation; thus, Wernz described it as a right conceded by the Church to *present* a suitable cleric to the competent ecclesiastical superior for institution in a vacant office.[2]

Patronage had arisen for two principal historical reasons: the gratitude of the Church toward the founders, constructors or caretakers of a place of worship or other pious works; and the assimilation of two feudal Germanic institutions. The first was the *vestitura*, consisting of the free disposition of owned land and all goods, movable and immovable, existing on it. The second was the *mundium*, by virtue of which the persons residing on said lands remained subject to the owner of the same.[3]

In order to avoid abuses that a total assimilation of such institutions could provoke, the Church conceded some rights of presentation to the proprietors of lands on which there were places of worship. In this way, upon conceding a certain right over the appointment of the persons that

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1. Cf., by way of example, J.M. VÁZQUEZ G.-PEÑUELA, *Las capellanías colativo familiares (régimen legal vigente)*, (Pamplona 1992).
2. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 341. Cf. also P.G. CARON, "Patronato ecclesiastico," in *Novissimo Digesto Italiano* XII (Turin 1982), pp. 698–706; P. COLLELA, "Patronato (diritto di)," in *Enciclopedia giuridica* XXII (Rome 1990); A. SINI, "Giuspatronato," in *Enciclopedia del diritto*, XIX (Milan 1970), pp. 524–537.
3. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., pp. 346–347.

should exercise the functions of the office, the consideration of the office itself as part of the patronage of the owner of the lands was prevented. In any case, at least since the twelfth century, the Church has constantly rejected the consideration of patronage as *plenum dominium ecclesiarum.*[4]

The *CIC*/1917, under different historical circumstances, came to establish the abolition of the right of patronage. It prohibited its future constitution (cf. c. 1450 § 1 of the *CIC*/1917) and offered the permutation of those then existing in spiritual suffrage (cf. c. 1451 § 1 of the *CIC*/1917). Nonetheless, the legislator decided to present rules for the rights of patronage that, notwithstanding, would continue to exist (cf. c. 1451 § 2 of the *CIC*/1917). Perhaps this was because in the epoch of the codification it was thought that there should be a characteristic of totality to the modern Code, which demanded the regulation of all cases. The establishment of such regulation, as we have already pointed out, dealt with the presentation for ecclesiastical office. This was a mode of provision that, although mentioned in the chapter regarding the provision for offices (cf. c. 148 of the *CIC*/1917), was not received in this specific norm, other than remitting to the see the right of patronage.

The definitive abolition of the right of patronage, which alluded to the civil authorities that from that time enjoyed the appointment of bishops, was produced by *Motu proprio Ecclesiae sanctae* I, 18, and was recalled in the *CIC* in c. 377 § 5. Nonetheless, while presentation is no longer bound to the system of benefices or that of patronage, some rights of presentation on the part of ecclesiastical authorities still subsist, over all in the matter of the appointment of bishops,[5] and in some offices that pertain to religious.[6] Thus the presence of this article in the *CIC* regarding presentation for ecclesiastical offices is justified.

In any case, the legislator of 1983, in contrast with what had been done in 1917, undertook the matter of presentation for the provision of offices, fixing the legal bases for an autonomous consideration of the office itself.[7] The individualization of the characteristics proper to the office, separated from that which is proper to the benefice, was made difficult during the time of the previous legislation.[8] In fact, the confusion was manifested even during the works of elaboration of the canons of the *CIC.*[9]

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4. Cf. ibid., pp. 347–348.
5. Cf. M. COSTALUNGA, "La Congregazione per i Vescovi," in *La Curia Romana nella Cost. Ap. "Pastor Bonus"* (Vatican City 1991), pp. 281–307, especially the *Apéndice*, pp. 293–307; J.I. ARRIETA, "Vescovi," in *Enciclopedia giuridica* (Rome 1993); R. METZ, "Innovation et anachronismes au sujet de la nomination des évêques dans de récente conventions passées entre le Saint-Siège et divers États (1973–1984)," in *Studia canonica* 20 (1986), pp. 197–219.
6. Cf. *Comm.* 22 (1990), p. 141.
7. Cf. *Comm.* 22 (1990), pp. 141–142.
8. Cf. J.A. SOUTO, *La noción canónica de oficio* (Pamplona 1971), p. 222ff.
9. Cf. *Comm.* 22 (1990), pp. 118–128.

Apart from the considerations that can be made in theory regarding the advantage of distinguishing the organizational element (office) from the patrimonial element (benefice), the autonomous consideration of the office permits us to reach a practical result. This result is that the freedom of the person responsible for conferring the office is not restricted by financial reasons.

III. From this perspective, the presentation or institution could be defined as a method of provision of office for which the authority responsible should proceed to the appointment of the person—or of one of the persons, based on diverse modalities of the particular law—that comes to be indicated as the person who enjoys such right, if the steps and conditions of the following canons are carried out.

1. The Code of 1983 conveys the presentation as a normal system of provision in some specific cases. Thus, c. 377 § 4 establishes that the diocesan bishop who decides that an auxiliary bishop is needed in his diocese, if such appointment is not made in any other legal form, should present to the Apostolic See a list of three priests that he considers suitable for the office. Canon 557 § 2 determines that it is for the diocesan bishop to institute the person presented for rector, even if the church pertains to a clerical religious institute. Canon 682 § 1 establishes that the normal system of conferral of a diocesan ecclesiastical office to a religious is presentation on the part of the competent superior.

Apart from the mention of c. 377, the universal law puts forth the presentation of candidates for episcopal office as one of the rights of bishops[10] and of superiors of missionary institutions that are charged with ecclesiastical circumscriptions in accordance with the practice of the Congregation for the Evangelization of Peoples.[11]

The particular, statutory or regulatory law can foresee the provision by presentation in many other cases, at least in the Latin Church. For Eastern Catholic Churches, the universal law (the *Codex canonum Ecclesiarum orientalium*) totally disavows presentation as a method of provision of offices.

2. The procedure for the provision of an office by presentation is complex. It is composed of at least two phases: the presentation proper, that is, the designation of a suitable candidate to be put forth to the authority,[12] on the part of an individual or a group, and the institution of the presented person by the competent authority.

a) In reference to the first phase of the proceeding, the canon establishes that the person or college to whom the presentation corresponds

10. Cf. *Normae de promovendis ad episcopale ministerium in Ecclesia latina*, art. 1,1, in *AAS* 64 (1972), p. 387.
11. Cf. ibid., art. 1,3.
12. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*..., cit., p. 360.

should make the presentation before the person competent to institute the candidate (cf. c. 148) within three months of receiving notice of the vacancy of office. It appears that the subject who should know of the vacancy in order for the term to commence is the person who enjoys the right of presentation. The authority that arrives at the knowledge of such a vacancy should communicate it to the person responsible for presenting the new candidate (cf. c. 184 § 3), especially if the office carries with it the care of souls (cf. c. 151).

The term of three months that the canon denotes for the completion of the presentation may be modified by legitimate prescription of particular or statutory law applicable to the specific provision. Further, except for a contrary determination, this term should be extended an additional month if the person presented is judged to be unsuitable for the office, or if he is deceased or renounces the office before the institution (cf. c. 161).

If the party responsible for carrying out the right of presentation is a college, the canon (greatly simplifying the previous norm: cf. c. 1460 of the *CIC*/1917) indicates that the norm established for election, primarily in reference to the convocation of the college, the vote, the scrutiny, etc. (cc. 165–179) should be respected. In reality, the college that enjoys the right of presentation proceeds exactly as if it were dealing with a canonical election. However, the scope of this right is limited to the presentation of the candidate, or various candidates, based on the regulations applicable to the case. As in the case of free conferral, in which a college submitting an advisory vote may also intervene, the simple matter of recourse to the system of suffrage in order to determine the identity of the candidate conferred the right to some office does not apply here.[13] It would only apply to a legitimate expectation of being presented. This would distinguish presentation carried out by a college or electoral group itself as a mode of provision of offices.[14] Nonetheless, legally determining the content of such an expectation becomes complex (see commentary on c. 159).

In any case, the distinction between both systems of provision allows the legal qualification of some difficult cases. For example, c. 344, 2° denotes that it is the responsibility of the Roman Pontiff *to ratify the election* of the elected members of the synod. At first view it would seem that this deals with a non-collective election. However, elections of this type, although they do not directly confer an office, confer to the candidate *ius ad rem* that, in this case, appears to contradict the freedom of the Roman Pontiff to elect his own counselors. It should be concluded that the norms applicable to the designation of members of the synod utilize the term *election* in a broad sense, descriptive of the method of suffrage for which

13. Cf. ibid., p. 364; in contra, M. CONTE A CORONATA, *Institutiones iuris canonici*, I (Taurine 1928), pp. 230–231.
14. Cf. J.I. ARRIETA, *Organizzazione ecclesiastica (Lezioni di Parte Generale)* (Rome 1992), p. 262.

the proposal of the candidate is arrived. In the technical legal sense, it would have to be affirmed that the system of provision utilized for the designation of members of the synod that applies to the bishops' conferences is *presentation*,[15] or perhaps even free conferral.

b) The second phase of this mode of provision consists of the institution of the person presented on the part of the authority competent to confer the office. This moment of the proceeding is regulated by c. 163 (see commentary).

15. Cf. J.I. ARRIETA, "Lo sviluppo istituzionale del Sinodo dei vescovi," in *Ius Ecclesiae* 4 (1992), pp. 201–202.

159 Nemo invitus praesentetur; quare qui praesentandus proponitur, mentem suam rogatus, nisi intra octiduum utile recuset, praesentari potest.

No one is to be presented who is unwilling. Accordingly, one who is proposed for presentation must be consulted, and may be presented if within eight canonical days a refusal is not entered.

SOURCES: c. 1436

CROSS REFERENCES: c. 178

COMMENTARY

Jesús Miñambres

This canon recalls a concrete expression of the principle of freedom of acceptance of an appointment for office by the candidate, applied to the case of presentation. Although the relevance of the free acceptance is especially manifested in collective election, in which the acceptance bestows the office (cf. c. 178), here it is demonstrated in a legislative provision for each particular case. This occurs since the freedom of the candidate is guaranteed from the moment of the designation prior to the appointment.

This norm refers to the first of the two phases in which the provision by presentation is developed (see commentary on c. 158): the presentation itself. It seeks to guarantee the knowledge and the will, at least where it is not negative, of the candidate establishing a requisite of proceeding. In order to continue with the following acts that will carry out the provision it is necessary that the presentation be communicated to the person to be presented for the office, and that it not be refused before the limit of eight days.

This norm is introduced precisely to offer to the person to be presented the opportunity to refuse the presentation.[1] For this reason, if in fact the candidate refuses, he or she cannot be presented. This protection of the will of the candidate before the presentation itself presents some technical problems, since the acceptance of the office itself cannot be produced before the authority has examined the suitability of the candidate (cf. c. 163).

1. Cf. *Comm.* 22 (1990), p. 235.

It is fitting, therefore, to separate the phases of presentation and institution. The will protected by this norm would refer to the first. The sanction of non-completion of the requisite of investigating the will of the candidate prior to his or her presentation, which, on the other hand, deals with the *ius cogens* and cannot be neglected due to statutory, particular, or regulatory law, would appear to be a nullifying factor of the presentation itself. Nonetheless, the person presented for the office without his or her knowledge, or having refused the presentation, does not need to present recourse for the rescission of the presentation: it is sufficient not to accept the office before the institution (cf. c. 163). On the other hand, the ulterior acceptance in the phase of institution would remedy the omission of the requisite indicated in this canon. Thus, it appears that this norm should be considered as merely procedural since it is not clear in what manner it could, in fact, provoke the rescission of a presentation in which it has not been followed. In addition, let us keep in mind that in some cases noncompliance of the requisite indicated in this canon is expressly put forth. This occurs, for example, in presentation for the appointment of bishops. In this case, the prior consent of the candidate is not required for inclusion in the ternus, but only after the suitability of the candidate has been studied, in the phase of institution.

From the positive point of view, the person who has accepted presentation, or has not refused it within the established time limit, would acquire a legitimate expectation of being effectively presented, although not a true right to the office or *ius ad rem* (cf. c. 178).[2] Some part of the doctrine prior to the *CIC*, nonetheless, attributed a true *ius as rem* to the person presented, as to the person chosen in a non-collective election.[3]

In c. 159, therefore, the consultation of the candidate is established as a mere requisite for the ability to proceed, allowing the proceeding of the successive steps without any positive act on the part of the candidate. In c. 163, on the other hand, in the phase of institution, the acceptance is considered as a requisite *sine qua non* for the validity of the provision of office, and requires a positive act of the person presented.

Perhaps the norm that was inferred from the first proposal of the drafting of c. 159 (of 1973)[4] would have been more suitable: "Nemo invitus praesentetur; quare qui praesentandus proponitur, de mente sua rogatus, intra octiduum utile eandem manifestet." Here, in effect, a positive act of the manifestation of will on the part of the candidate is required. This is similar to the acceptance required later for institution (cf. c. 163). In this way, the norm of the presentation would have remained configured in this aspect of the acceptance of the office by the candidate in a form similar to

2. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 364.
3. Cf. M. CONTE A CORONATA, *Institutiones iuris canonici*, I (Taurine 1928), p. 230–231, bibiography found in notes.
4. Cf. *Comm.* 22 (1990), p. 236.

the postulation in the law prior to the codification of 1917. It would require a prior notification of the presentation itself that would require consent in a conditioned form, in order that after the intervention of the authority, the absolute consent would be required.[5]

In the current wording of the canon, after the changes that took place in 1980,[6] the *CIC* assured the ability to proceed through a silence that presumed a positive act, but later requires the express acceptance in order to effectively institute the person presented (see commentary on c. 163).[7]

5. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum...*, cit., p. 339; B. OJETTI, *Commentarium in Codicem iuris canonici*, II (Rome 1931), p. 125.
6. Cf. *Comm.* 23 (1991), p. 254.
7. Cf. J.I. ARRIETA, commentary on c. 159, in *Pamplona Com.* Cf. also ibid., commentary on c. 163.

160 **§ 1. Qui iure praesentationis gaudet, unum aut etiam plures, et quidem tum una simul tum successive, praesentare potest.**

§ 2. Nemo potest seipsum praesentare; potest autem collegium aut coetus personarum aliquem suum sodalem praesentare.

§ 1. One who has the right of presentation may present one or more persons, either simultaneously or successively.

§ 2. No person may present himself or herself. However, a college or a group of persons may present one of its members.

SOURCES: § 1: c. 1460 § 4
§ 2: c. 1461

CROSS REFERENCES: cc. 119, 127, 165–179, 377 § 4, 1445 § 2

COMMENTARY

Jesús Miñambres

The scope of the right of presentation becomes confined in this canon between two extremes. The first is positive, allowing the presentation of various persons. The other is negative, forbidding the presentation of oneself.

a) In the first case, the "multiple" presentation may be simultaneous or successive. The statutes or regulations may determine a norm prohibiting any of the possibilities outlined in § 1, obliging that the presentation of various candidates always be made simultaneously, etc.

With respect to the person enjoying the right of presentation, the juridical configuration of the simultaneous presentation of various candidates does not offer special problems. In addition, it is expressly foreseen in the Code in some cases (for example, c. 377 § 4 orders the presentation of a list of three presbyters to the Apostolic See for the appointment of an auxiliary bishop). The legal problem that can arise from this type of presentation (see commentary on c. 163) refers overall to the content of the expectations of those presented and to the obligation of institution on the part of the authority.

On the other hand, successive presentation can cause legal problems relative to the exercise of the right of presentation itself since it supposes the necessity to revoke a previous presentation. In some way, the right of

the person making the presentation is thus broadened with the possibility to retract a presentation already put through, and that only requires the institution of the candidate on the part of the authority who should make the conferral.

The question of the possibility of successive presentation of diverse candidates was studied at length during the works of elaboration of the *CIC*.[1] The greatest consideration was given to the significance of whether a retraction should be granted to a presentation already carried out before the instituting authority. In effect, it is not difficult to see the possibility of damaging acquired rights, above all if the requirement of informing the candidate before carrying out the presentation is considered (cf. c. 159). As some doctrinal commentaries to the *CIC*/1917,[2] have already implied, the successive acceptance of the presentation by the candidate, although not conferring a right in the strict sense to the office or the institution, can still bring about a legitimate expectation relative to the effective presentation.

From c. 159 we infer, for the candidate, the possible existence of a legitimate expectation of the right to be presented once the requisite of consulting the candidate regarding his will is completed. Thus, the failure to present the candidate who has accepted the presentation would defraud the expectation and justify the substantiation of a cause of compensation for the damages that the omission has produced against the person possessed of the right of presentation.

The work group that dealt with the elaboration of the canons regarding ecclesiastical offices did not settle the question of the right that the person had who had consented to be presented. The group preferred to maintain the unclear legislation considered on this point. That is, when problems arise from the retraction of a presentation already before the instituting authority, they can be resolved, case by case, by the administrative tribunals.[3] (In 1973 when this decision was made it appeared clear that tribunals of this type would be instituted on a level inferior to the Apostolic Signatura.)

It is prudent, then, that the statutes and regulations, or the legislation promulgated by a concordat that regulates the right of presentation in each case, establish all the requirements to the retraction of a presentation already submitted to the authority. In addition, the possible recourses the different interested parties can initiate against it should be established. In any case, the recourse could always fall before the Apostolic Signatura (cf. c. 1445 § 2 and *PB* 123).

When the party having the right of presentation is a college or group, the regulatory or statutory law will determine, in addition, the necessary quorum to proceed with the retraction of an already submitted presenta-

1. Cf. *Comm.* 22 (1990), p. 236–237.
2. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum,* II, 3rd ed. (Rome 1943), p. 364.
3. Cf. *Comm.* 22 (1990), p. 237.

tion, and the requirements of an eventual responsibility for damages. In the case of silence on this point by the applicable norm, it appears that a unanimous agreement regarding the retraction by all those that have the right to participate in the group making the presentation would be required, according to the norm of c. 119, 3°. In effect, the responsibility of the group, except for an expressly contrary indication, would be jointly liable in this case and, therefore, would affect any and all of its components.

b) Paragraph 2 of the canon sets a negative limit to the right of presentation. The legislator—recalling that established by c. 1461 of the *CIC*/1917—has set forth, with the purpose of avoiding "suspicions of ambition,"[4] that no physical person can present himself. But if the party having the right of presentation is a college or group, nothing impedes its presentation of one of its members.

4. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*..., cit., p. 362.

161 **§ 1. Nisi aliud iure statuatur, potest qui aliquem praesentaverit non idoneum repertum, altera tantum vice, intra mensem, alium candidatum praesentare.**

§ 2. Si praesentatus ante institutionem factam renuntiaverit aut de vita decesserit, potest qui iure praesentandi pollet, intra mensem ab habita renuntiationis aut mortis notitia, ius suum rursus exercere.

§ 1 Unless the law prescribes otherwise, one who has presented a person who is judged unsuitable, may within one month present another candidate, but once only.

§ 2 If before the appointment is made the person presented has withdrawn or has died, the one with the right of presentation may exercise this right again within one month of receiving notice of the withdrawal or of the death.

SOURCES: § 1: c. 1465 § 1
§ 2: c. 1468

CROSS REFERENCES: cc. 37, 51, 55, 148–150, 157, 177 § 2, 200–203, 1737

COMMENTARY

Jesús Miñambres

This norm regulates two possible specific applications of the successive presentation of candidates (cf. c. 160 § 1), which had made up two distinct canons at the beginning of the drafting process for the *CIC*. Nonetheless, later it was decided to group them into one canon in order to deal with the same material and propose the same solution.[1]

1. The first case refers to the possibility of presenting a new candidate when the first has been considered unsuitable (cf. c. 149) by the instituting authority (cf. c. 148). With the goal of not indefinitely prolonging the vacancy, two limitations are established. The first is quantitative (it is only possible to present one other candidate) and the other temporal (the new presentation must be carried out within one month) except for a diverse determination on the part of the applicable statutory or regulatory law.

1. Cf. *Comm.* 22 (1990), p. 238.

The legislator has not established that juridical consequences would be derived by the presentation of unsuitable candidates in cases where various names are proposed in order for the authority to institute one of the persons presented in this way (cf. c. 163). This is true, for example, in the case of c. 377 § 4. Except where the law establishes something else, it appears that a new ternus should be presented—or the number of candidates prescribed by the applicable legislation—before the authority responsible for the institution is able to fill the office by free conferral (cf. c. 162).

The judgment of unsuitability of the person presented should be given through a decree from the instituting authority, and should be done in writing (cf. cc. 37, 51, 55). Such a decree may be appealed either by the party that made the presentation or by the person presented, or even by a third party affected by it (cf. c. 1737 § 1) within a period of fifteen days (cf. c. 1737 § 2).[2] To our understanding, the intervention of recourse would interrupt the deadline of one month during which it is possible to make a new presentation in dealing with operative time (cf. c. 201 § 2).

The aforementioned judgment of suitability that the authority should carry out in order to make an institution is already in place in the second phase of the proceeding of provision by presentation (see commentary on c. 158): that of institution. At this time the general prescriptions of cc. 149 and 150, together with the specifications of the office to be conferred, would apply. The doctrine signals the possibility that a contest of merit can precede the presentation. Nonetheless, this would not exempt the authority from the obligation of verifying the effective suitability of the candidate.[3]

2. The second case of possible successive presentation considered by this canon arises from the withdrawal or death of the person who has been presented but not yet instituted. It is a given that if the person presented had already been instituted, a new vacancy of the office would be produced (cf. cc. 184ff) and, therefore, the situation would not deal with the successive presentation of candidates but with successive vacancies of the office itself. Also in this case, in order to avoid an indefinite or overly prolonged vacancy of the office, it is stated that the new presentation must be carried out within the limit of one month.

In the two suppositions actually established by this canon (if a new candidate is not presented within the established deadline, or if the candidate comes to be considered unsuitable) the appointment proceeds by the system of free conferral (cf. c. 157). Such free conferral will correspond to

2. Cf. F.J. URRUTIA, *De normis generalibus, adnotationes in Codicem: Liber I* (Rome 1983), p. 106.
3. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 363.

the authority that was competent to carry out the institution of the candidate presented (cf. c. 162).

The regulation of this canon is also applied to the presentation carried out by a college or group. The concession of an additional month in order to proceed to the second presentation agrees with what is established in c. 177 § 2. This applies to the case of presentation by virtue of the remission of c. 158 § 2 (relative to the manner of proceeding in order to specify the candidate in cases where the party responsible for the presentation is a group). In any case, it appears that for the case considered in § 1 of the canon (unsuitability of the candidate presented) the regulatory or statutory norm would be able to establish other terms. This is not true for the case of withdrawal or death after the presentation and before the institution (§ 2).

162 **Qui intra tempus utile, ad normam can. 158 § 1 et can. 161 praesentationem non fecerit, itemque qui bis praesentaverit non idoneum repertum, pro eo casu ius praesentationis amittit, atque auctoritati, cuius est institutionem dare, competit libere providere officio vacanti, assentiente tamen proprio provisi Ordinario.**

A person who has not presented anyone within the canonical time prescribed by can. 158 § 1 and can. 161, or who has twice presented a candidate judged to be unsuitable, loses the right of presentation for that case. The authority who is competent to appoint may then freely provide for the vacant office, but with the consent of the proper Ordinary of the person appointed.

SOURCES: c. 1465 § 1

CROSS REFERENCES: cc. 148, 155, 157, 682 § 1

COMMENTARY

Jesús Miñambres

This canon establishes another test of the generality of the norm of free conferral of offices and of its place as subsidiary in the event that other systems of provision are not possible in some case (see commentary on c. 157). In the two hypotheses of dysfunction of the system of presentation, that is, either the presentation is not made within the prescribed time limits, or the candidates are not considered suitable by the instituting authority, the office will be provided by free conferral by the authority corresponding to the institution of the candidate presented under normal conditions (cf. c. 148).

The legislator establishes the substitution of the system of presentation by free conferral in reference to the exercise, in a determined case, of the right of provision of the office. The entitlement of the right itself does not change by this fact. For this reason, that which in one case has created circumstances that impede the effectiveness of the presentation and require the provision by the method of free conferral, does not imply that such a change in the system becomes a norm. Neither does it imply the loss of the right of presentation by the person who possesses it, but only the impossibility of exercising that right in a specific case.[1] Let us also

1. Cf. J.I. ARRIETA, commentary on cc. 161–162, in *Pamplona Com.*

keep in mind that the authority that proceeds to free conferral in these cases does not acquire, by this fact, any authority over the person to whom the office is conferred. The juridical position of the person on whom the office is conferred will be the same as if the office had been provided by presentation (cf. c. 155).

The final clause of the canon—"assentiente tamen proprio provisi Ordinario"—is not completely clear and appears to break the actual composition of the norm. Effectively, these final words were added at a moment of discussion of the text in the *coetus* "De personis physicis et iuridicis," above all in consideration of the religious.[2] Keeping this in mind, it is evident that the clause we are discussing seeks to expressly state the establishment of the norm that in order to confer an office in favor of a religious, the candidate's superior should be informed or even asked for consent (cf. c. 682 § 1). In any case, the consent of the ordinary is required for the provision by free conferral that substitutes, in this case, for the presentation itself and, therefore, does not make reference to the system of provision that occupies us now.

2. Cf. *Comm.* 22 (1990), p. 238 and 23 (1991), p. 59.

163 **Auctoritas, cui ad normam iuris competit praesentatum instituere, instituat legitime praesentatum quem idoneum reppererit et qui acceptaverit; quod si plures legitime praesentati idonei reperti sint, eorundem unum instituere debet.**

The authority to whom, in accordance with the law, it belongs to appoint one who is presented, is to appoint the person lawfully presented whom he has judged suitable, and who has accepted. If a number lawfully presented are judged suitable, he is to appoint one of them.

SOURCES: c. 1466 § 1 et 3

CROSS REFERENCES: cc. 57, 148, 149, 150, 156, 177, 377 § 4, 1737

COMMENTARY

Jesús Miñambres

Here we deal with the second phase of the provision of an office through presentation: the institution of the candidate by the competent authority (see commentary on c. 158). The norm points out, on one hand, the obligation of the authority to validate the suitability of the candidate or candidates presented (cf. cc. 149–161). On the other hand, the authority is obligated to carry out the institution. The imperative *instituat* is not used in vain. Therefore, in the phase that we examine now, the phase of institution, the act of validation of the suitability of the candidates by the authority (see commentary on c. 161) can be distinguished from the act of institution itself.

1. The authority to whom the legislator refers here is the same as that indicated in c. 148. In some cases, the *CIC* expressly notes the authority that should institute some presented candidates. For example, in order to institute the president of a public association of faithful, c. 317 § 1 indicates the competence of the Holy See, the bishops' conference, or the diocesan bishop, depending on the scope of the association itself. Canon 525, 1° determines what corresponds to the diocesan administrator in the institution of pastors during the period of vacant or impeded see. Canon 565 establishes that the candidate presented for the office of chaplain should be instituted by the local ordinary.

2. In addition to the suitability of the candidate presented for office, the candidate's acceptance is also required in order to proceed to institution. As we have already indicated, this deals with a requisite distinct from that expressed in c. 159 (there we dealt with the mere procedural act, for which presumptions could be made). Here, on the other hand, the

acceptance must be expressly shown in order to institute the office. In addition, the will of the candidate falls upon distinct objects: in the phase of presentation (c. 159), the act of will is directed toward the presentation itself. In the institution, which occupies our attention, the acceptance has as an object: the office itself. Nevertheless, as the presentation is simply a means of provision for ecclesiastical offices, the acceptance of the presentation required by c. 159 that is positively recorded could signify an acceptance of the office itself, conditioned upon a positive judgment of suitability by the authority.[1] The acceptance of the office in the phase of institution would also correct the failure to complete the requirement of c. 159 in the phase of presentation.

As regards the temporal and logical conferral in the act of acceptance by the candidate, the norm appears to require that this be carried out before the institution. This could present some problems in the case of presentation of various candidates (cf., for example, c. 377 § 4) since one may think the acceptance must be asked of all the candidates. Nonetheless, it should be kept in mind that the act of the instituting authority is produced in two successive moments: the validation of suitability and the institution itself. The acceptance by the candidate is made between both. That is, the acceptance is requested only after the authority has chosen the subject upon whom the institution will fall.

3. When a presentation refers to various candidates (cf. c. 377 § 4) and all of the candidates possess the conditions of suitability required for the office in question, the authority must choose from them and institute one. This possibility of choice by the authority between suitable candidates cannot damage the rights of any of the candidates since a right of institution does not exist. In any case, the obligation of the authority to institute one from among all the suitable candidates presented remains. The canon does not concede to the candidates presented a right to be instituted in the office, but does establish an obligation for the authority to carry out the institution.

4. The *CIC*/1917 expressly determined (cf. c. 1464 § 3) that the ordinary was not obligated to disclose to the patron the motives for which the person presented could not be admitted to the office. In accord with the new *CIC*—given the general norm relative to decrees that present a disclosure of motives, at least in summary—the effective suitability of the chosen candidate should be expressly indicated. This is done as a motivation to the act of institution, although it does not appear that the reasons why the authority made such a determination must be expressed.

Canon 1466 § 3 of the *CIC*/1917 established that "Ordinarius eligit quem magis idoneum in Domino iudicaverit." The current norm, avoiding comparisons, simplifies the action of the authority. In any case, it does not

1. See commentary on c. 159, along with the cited bibliography on postulation in canonical governance prior to codification.

appear that the election that has already been made can be appealed since, at the point when the law indicates that various persons should be presented, the right to choose from the presented candidates is granted to the authority. This right can justify the rejection of the institution by the authority, given the possibility of legal proceedings of fraud by the presenter that would indicate only one suitable candidate among all the candidates presented, together with other clearly unsuitable candidates. Such a proceeding would violate the right of selection among the candidates that should be presented that the *CIC* concedes to the authority.

Regarding the *CIC*/1917, Wernz explained that "cum enim plures praesentantur sive simul sive successive, nullus determinate habet ius, sed omnes habent ius indeterminatum ut unus ex ipsis assumatur";[2] rightly, the motive for the current norm is valid.

5. The obligation to institute the presented candidate, although evident by the use of the imperative, has remained slightly mitigated with respect to the first proposed drafts of the canon. In effect § 2 has proven the establishment of the return of the "right" of institution to the authority immediately superior in the case where no presented candidate has been instituted: "Auctoritas ad institutionem conferendam competens, si institutionem deneget legitime praesentato qui idoneus repertus sit, pro eo casu amittit ius instituendi, quod quidem devolvitur ad auctoritatem immediate superiorem."[3] In the acts of the previous works the reason for the suppression of this paragraph is not explained.[4] In any case it remains clear that the obligation to institute is not ordered by the nature of the presentation itself, and, therefore, is derived solely by this canon.[5] Thus, it could be affirmed that the expectations of the presented candidate, or candidates, are exhausted by the presentation itself.

6. Although the canon does not establish a term in which the authority must proceed with the institution of the presented candidate, the decree should be given within a period of three months (cf. c. 57 § 1). After this time it is understood that the institution is refused, by negative administrative silence (cf. c. 57 § 2), for the purpose of the possible presentation of recourse (cf. c. 1737). The particular, statutory or regulatory law can indicate a shorter time limit and better determine the obligations of the authority and the proceedings of his act with the general scope of the *CIC*.

7. The effective institution of the candidate confers the office. Nonetheless, the exercise of the functions, rights, and obligations of the office itself can also depend on subsequent acts, such as taking possession of the office (cf. cc. 382, 404, 527 and 542, 3°).

2. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 364.
3. *Comm.* 22 (1990), p. 239.
4. Cf. ibid. 23 (1991), p. 255.
5. Cf. J.I. ARRIETA, commentary on c. 158, in *Pamplona Com.*

ART. 3
De electione

ART. 3
Election

164 Nisi aliud iure provisum fuerit, in electionibus canonicis serventur praescripta canonum qui sequuntur.

Unless it has been otherwise provided in the law, the provisions of the following canons are to be observed in canonical elections.

SOURCES: c. 160

CROSS REFERENCES: cc. 119, 127 § 1, 158 § 2, 332 § 1, 352 § 2

COMMENTARY
Jesús Miñambres

1. In cc. 164 to 179 the legislator establishes the norm of the Code regarding another of the systems of provision of offices that implies the participation of third persons: the election.[1] In reality, distinct methods of provision can be specified in these canons. These have in common the act of proceeding through suffrage to the determination of the candidate. These methods of provision include provision by collective election, provision by confirmation of an election, provision through a compromise of the electoral body, and even some more or less hybrid systems of election and presentation, election and postulation, etc. (Consider, for example,

1. Cf., in addition to the classic manuals, G. OLIVERO, "Lineamenti del diritto elettorale nell'ordinamento canonico," in *Studi in onore di Vicento Del Giudice*, II (Milan 1953), pp. 207–270; F. D'OSTILIO, "La provvista degli uffici ecclesiastici," in *Monitor Ecclesiasticus* 107 (1982), pp. 51–78; P. ERDÖ, "Quaestiones quaedam de provisione officiorum in Ecclesia," in *Periodica* 77 (1988), pp. 363–379; J. GAUDEMET, "La participation de la communauté au choix de ses pasteurs dans l'Église latine. Esquisse historique," in *Ius Canonicum* 14 (1974), pp. 308–326.

the *approbation* of the election of the dean and vice-dean of the college of cardinals.)[2]

2. Canon 164, the first of article 3, *De electione*, establishes that the norms contained in it should be applied to all canonical elections, whether or not they deal with what is carried out for the provision of an office. Thus a special generality, such as what occurred with the canons of the *CIC*/1917 in reference to the legal body, is conferred upon these canons (cf. c. 160 of the *CIC*/1917).

The norms recalled here, therefore, take in a much greater scope of application than the elections for provision of office. They indicate, among other things, how the convocation of collegial entities must proceed (cf. c. 127 § 1), how votes must be cast, how to proceed to the scrutiny of the votes, the requisites for the validity of the votes, etc. In summary, the norms that we examine here confer a general scope that contains all the collegial acts which should be followed for voting (cf. c. 119; this can be deducted also from other canons of the Code, for example in cc. 158 § 2, 424; etc.).

The lengths to which collegiality has been tested in modern times, as a general organizational principle that implies a determined manner of proceeding in decision making, is evident in all types of societies.[3] In the Church this principle has had power since antiquity (consider, for example, the apostolic college). However, new studies of episcopal collegiality have been done, influenced by Vatican Council II and the major presence of collegial entities in the ecclesiastical organization indicated in the *CIC*. These studies undoubtedly make of these canons (164–179), in relation to those dedicated to collegial acts (cf. c. 119), a field of special relevance at the time of the studies of the activity of the ecclesiastical administration.[4]

We have spoken purposely of the principle of collegiality (a principle of the actions of collective structures) and not of the traditional figure of the college since, to apply the elements of the organizational figure of collegiality to the Church, we cannot forget the peculiarities of the canonical system. Thus Vatican Council II expressly took notice of the episcopal college. Specifically it indicated that the term *college*, referring to the College of Bishops, could not be understood in the strict juridical sense, as a group of equals, but more as a permanent group whose structure and authority should be inferred from the revelation (cf. *pen*, 1).

This broad use of the concept of college, proper to the canonical system, has determined that the legislator, in order to avoid uncertainties, utilizes several times throughout the article regarding election the term

2. Cf. *Supplemento* to *L'Osservatore Romano*, June 10, 1993, p. 2.
3. Cf. S. VALENTINI, *La collegialità nella teoria dell'organizzazione* (Milan 1980).
4. Cf. D. GARCÍA HERVÁS, *Régimen jurídico de la colegialidad en el Código de Derecho canónico* (Santiago de Compostela 1990).

"group" immediately after mentioning a *college* (*collegium vel coetus*: cf. cc. 165, 166, 169, 173, etc.). He does not use the term separately in any case. Again, we connect the applicability of this legislation to all collegial actions in the broad sense, and not only to that of a college in the strict juridical sense.

Therefore, the norm of the Code relative to collegial action should be confronted keeping in mind the advice of the Code Commission: as in c. 119, which refers expressly to collegial acts, and many others throughout the *CIC*. Among these we find c. 127 § 1, or those of the article regarding election, that we discuss now. That is, the fact that a determined entity is called a "college" does not necessarily signify that in its action it is governed by the principle of collegiality in the strict sense.[5]

Having said this, it can be noted how collegiality, among many other aspects, can much more easily make up for the lacunae of knowledge that can be found in individual persons. It also offers a greater guarantee of impartiality in action and assembles the distinct interests of those united to make the decision, thus facilitating the unity of action.[6] Certainly, this also presents disadvantages with respect to individual or personal action. The proceeding is slower and runs the risk of diluting in some form the responsibility among the members of the college. Nonetheless, it is a much used technique, above all when making very important decisions, which in addition are applied to many branches of the law: constitutional, procedural, administrative, etc.[7] Thus, one should keep in mind that collegiality is only a form of action. It deals with the manner of arriving at decisions of government, but not with the type of decision being made: regulatory, consultative, jurisdictional, administrative, etc.[8]

3. A specific case which fits within the normative framework described up to this point, although at a later time than the promulgation of the Code, is the election of the Roman Pontiff, whose particular law (*Universi Dominici gregis*) reflects what the Code establishes in general (cf. c. 332 § 1). Certainly, in reference to a specific case, the legislation is much more detailed than that offered in the *CIC*, but is suitable for it. Thus this norm, although not expressly called for in the *CIC* (as it was in the *CIC*/1917: cf. c. 160), continues to have power and offers useful indications when studying the collegial norm of election. Logically, in each specific case of canonical election it is necessary to examine, in addition to the norm of the Code, the particular, regulatory, or statutory legislation, or the applicable customary norms.

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5. Cf. ibid.
6. Cf. L. GALATERIA-M. STIPO, *Manuale di diritto amministrativo*, I (Turin 1989), p. 195.
7. Cf. ibid., p. 193ff.
8. Cf. F. GONZÁLEZ NAVARRO, *Derecho administrativo español*, I (Pamplona 1987), p. 652–653.

4. As a system of provision of offices, the election is defined as the indication of the candidate or the provision strictly speaking of the vacant office, through suffrage carried out by a college or group of persons possessing such a right. It should be confirmed by the superior or completed by the acceptance of the elected party.[9] The election can be, then, of two types. The first is *collative*, if in itself it confers the office with the acceptance of the elected party (cf. c. 178). The second is *non-collative,* if it must be confirmed by the authority and does not grant the office in itself but only an *ius ad rem*. In reality, we can speak of other types of election. These include one that requires an act of postulation to the competent authority (cf. c. 180), one that is made by compromise (cf. cc. 174–175),[10] etc.

The collative election is different from presentation or the indication of candidates who should be considered for free conferral, precisely in that it is the election itself that confers the office. In the other systems, the provision corresponds to the authority (by free conferral, by institution, by confirmation ...); here, it corresponds to the electoral college.

The non-collative election, although it requires confirmation by the competent authority, is also different from presentation and indication of candidates in the system of free conferral, in that it confers a true right to the office (an *ius ad rem*, according to the words of c. 178). This right to the office does not always exist in presentation, although there is always the obligation of institution by the authority.[11] It exists much less in free conferral.

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9. Cf. F. X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 308; M. CONTE A CORONATA, *Institutiones iuris canonici*, I (Taurine 1928), p. 247; A. VERMEERSCH-J. CREUSEN, *Epitome iuris canonici*, I (Malines-Rome 1935), p. 240–241; F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), p. 333–335.

10. Cf., e.g., F. X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 307–310; A. VERMEERSCH-J. CREUSEN, *Epitome...*, cit., p. 241; etc.

11. Cf. F. MAROTO, *Instituciones...*, cit., p. 338; F. X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 308–309.

165 **Nisi aliud iure aut legitimis collegii vel coetus statutis cautum sit, si cui collegio aut coetui personarum sit ius eligendi ad officium, electio ne differatur ultra trimestre utile computandum ab habita notitia vacationis officii; quo termino inutiliter elapso, auctoritas ecclesiastica, cui ius confirmandae electionis vel ius providendi successive competit, officio vacanti libere provideat.**

Unless it is otherwise provided in the law or in the statutes of the college or group, if a college or a group of persons enjoys the right to elect to an office, the election is not to be deferred beyond three canonical months, to be reckoned from the receipt of notification of the vacancy of the office. If the election does not take place within that time, the ecclesiastical authority who has the right of confirming the election or the right to make provision otherwise, is freely to provide for the vacant office.

SOURCES: c. 161

CROSS REFERENCES: cc. 153 § 2, 158 § 1, 184 § 3, 201–203

COMMENTARY

Jesús Miñambres

With the goal of not leaving the office vacant for an indeterminate or excessive time, the legislator has indicated in this canon a time limit for exercising the right-obligation of election: three months from the time notice of the vacancy of office is received. This deals with a norm parallel to that established for the case of presentation (cf. c. 158 § 1). It also recalls the criteria established in general by c. 57 § 1 for the issuance of administrative acts in the case of petition. In many cases, nonetheless, "the law or the statutes of the college or group" can indicate a different time limit. Thus, for example, in the *CIC* itself, the college of consultants should carry out the election of the diocesan administrator within a period of eight days (cf. c. 421 § 1).

If the period established passes and the college has not proceeded to the election, the office is conferred by the supplementary system of free conferral (cf. c. 157. See commentary on c. 162). This substitution will correspond to the authority responsible for the confirmation, if the election is not collative. Otherwise, if the election is collative, the provision by free conferral should be carried out by the authority to whom the provision of office corresponds (cf. cc. 148, 178–179), which is not the hierarchical su-

perior in all cases. For example, c. 421 § 2 indicates that when the diocesan administrator is not elected by a college of consultors within the designated time, the provision will be carried out by the metropolitan or the oldest suffragan bishop. This, certainly, is not the hierarchical superior of the college of consultants of another diocese.

The period of three months indicated here in which the college should proceed to election implies that the college has been convoked within a sufficient period of time, although the legislator has not expressly indicated the term for the convocation. It has been established, however, in a specific case of canonical election: that of the Roman Pontiff. *Universi Dominici gregis*, 38, determined that, for the convocation of the conclave, fifteen days, or at most twenty, must be allowed to pass from the time of death of the previous Pontiff. In collative elections the possibility that the elected person will not accept should be kept in mind (cf. c. 177). In such a case, the college should be convoked again in a period of one month.

The time period begins to run *ab habita notitia vacationis officii* on the part of the electoral body. Thus, the authority that knows of the vacancy should communicate it to the electoral body in a form susceptible to proof and as soon as possible (cf. c. 184 § 3. See commentary on c. 158).[1] In any case, it does not appear that it is always necessary to make the convocation after the vacancy is produced. Canon 153 § 2 permits even the provision, *a fortiori* the convocation of the college, of offices conferred for the determined time within six months prior to the expiration of the period in which it should have been conferred. Previously, the *CIC*/1917, in c. 162 § 5, prohibited a convocation made before the vacancy only for lifelong offices. For those that had a fixed term, it was permitted to convoke the college before the expiration of the term in order to speed up the proceeding. Although the current norm does not expressly consider such a possibility, a norm similar to that established in the *CIC* on this point can be inferred from the general regulation of c. 153, placed between the norms that establish the common regimen of provision for ecclesiastical offices.

The canon makes express mention of the statutory law of the electoral college. If this indicates a longer period for the proceeding of the election, such prescription should be respected. If, on the other hand, the statutory norm indicates a shorter period, it does not appear that the authority can proceed by free conferral before the three months indicated by this canon, except where the statutes expressly foresee this act. In such a case, the college could proceed to the election outside of the period indicated by the statutes but within the three months established by this

1. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 315.

canon, without prejudice of a possible objection of the election by an infraction of the statutory norm.

The doctrine prior to the codification of 1917 indicated the possibility of rescission of an election carried out within the established time period, but during nocturnal hours, although this circumstance did not create anything *ipso iure*. For the circumstance of nighttime meetings, the election raised suspicion of fraudulence and could be annulled. The norm of the Code does not establish anything in relation to the hour the election takes place, although, save in the case of urgency, all suspicion of fraudulent action in this sense should be avoided.[2]

2. Cf. ibid., p. 316.

166 **§ 1. Collegii aut coetus praeses convocet omnes ad collegium aut ad coetum pertinentes; convocatio autem, quando personalis esse debet, valet, si fiat in loco domicilii vel quasi-domicilii aut in loco commorationis.**

§ 2. Si quis ex vocandis neglectus et ideo absens fuerit, electio valet; attamen ad eiusdem instantiam, probata quidem praeteritione et absentia, electio, etiam si confirmata fuerit, a competenti auctoritate rescindi debet, dummodo iuridice constet recursum saltem intra triduum ab habita notitia electionis fuisse transmissum.

§ 3. Quod si plures quam tertia pars electorum neglecti fuerint, electio est ipso iure nulla, nisi omnes neglecti reapse interfuerint.

§ 1. The one who presides over the college or group is to summon all those who belong to the college or group. When it has to be personal, the summons is valid if it is made in the place of domicile or quasi-domicile or in the place of residence.

§ 2. If someone who should have been summoned was overlooked and was therefore absent, the election is valid. However, if that person insists and gives proof of being overlooked and of absence, the election, even if confirmed, must be rescinded by the competent authority, provided it is juridically established that the recourse was submitted within no more than three days of having received notification of the election.

§ 3. If more than one third of the voters were overlooked, the election is invalid by virtue of the law itself, unless all those overlooked were in fact present.

SOURCES: § 1: c. 162 § 1; SCR Resp. I, 2 iul. 1921 (*AAS* 13 [1921] 481–482)
§ 2: c. 162 § 2
§ 3: c. 162 §§ 3 et 4

CROSS REFERENCES: cc. 100–106, 119,1°, 127 § 1

COMMENTARY

Jesús Miñambres

This norm deals with the regulations of those convoked to a college named to carry out an election. In reality what is indicated here serves for all classes of summons of a college that must make any type of decision (cf. c. 127 § 1), except when the contrary is indicated by a statutory or particular norm presented legitimately (see commentary on c. 164).

1. It is characteristic of the juridical working of the college that decisions must be made by a majority. Thus, the doctrine customarily refers to two types of *quorum*. That is, it refers to two computable elements in the formation of the act: the designated structural *quorum*, relative to the composition of the collegial group; and the functional *quorum*, required to make a concrete decision on the part of the college (see commentary on 167 and 173).[1]

2. In order to guarantee the formation of the necessary structural *quorum* and to avoid injuring the rights of the members of the college, regulation of the performance of the college customarily deals first—as does the canon we discuss here—with the summoning of the college itself. Summoning is understood as the call or invitation made to those who should come together for the formation of the collegial will to be present at the place of the meeting.[2] In the canonical order this function is the responsibility of the president of the electoral group, who is responsible to summon all those who possess the right of suffrage.

The summoning of all those with the right and obligation to contribute to the formation of the will of the college will be made based on the established norms governing the college in question. These are normally the statutes. The communication of this will be completed through the publication of the summons in an official bulletin of the college or corporation, through notice in a determined publication, etc. The summons and the communication, as noted, are in reality distinct acts,[3] although the legislator uses here the broad concept of summoning that embraces both. If the law itself requires that the summons be made personally, it is necessary to remember what is indicated in the last phrase of § 1: the personal communication must be made in the place of domicile, quasi-domicile, or residence (cf. cc. 100–106) of those who must be summoned.

1. Cf. L. GALATERIA-M. STIPO, *Manuale di diritto amministrativo*, I (Turin 1989), p. 195–197; VERBARI, "Organi collegiali," in *Enciclopedia del Diritto*, XXXI (Milan 1981), p. 66; S. VALENTINI, *La collegialità nella teoria dell'organizzazione* (Milan 1980).

2. Cf., among others, F. MAROTO, *Instituciones de derecho canónico*, II (Madrid 1919), p. 349; S. VALENTINI, *La collegialità...*, cit., p. 245.

3. Cf. L. GALATERIA-M. STIPO, *Manuale...*, cit., p. 200.

The convocation is, then, the first procedural act of the college, in that it sets the college in motion. It is also an internal act of the college, belonging to the president. The *CIC* does not foresee the so-called hetero-convocation,[4] which can belong to an authority outside of the college. This includes the college convened to confirm the non-collegial election, or that corresponding to free conferral in the case of deferral of the right of election (cf. c. 165). Convocation of this type may be required, nonetheless, by the statutory or regulatory legislation applicable to the concrete election.

3. Paragraph 2 of the canon establishes a hypothesis that the election may be annulled in the case where one of those with the right of suffrage has not been duly summoned for the act of the election. In this case, the election carried out by the remainder of the college is, in principle, valid, but may be annulled even after it has been confirmed by the competent authority (in the elections where this is required, or non-collegial elections). This can be done if it is proven that recourse has been taken against it within three days of receipt of notice of the election. If all of these conditions are present and a moral certainty can be reached that the person requesting recourse acted in the time limit of three days following notice of the election, the competent authority *should* annul the election. In all other cases, the election remains valid.

4. A different hypothesis is established in § 3 of the canon. This section deals with a true cause of nullity that absolutely invalidates the election. The assumption of such nullity occurs when at least one third plus one of those that should be summoned are not. Nevertheless, based on the general canonical principle of the validity of acts, the legislator has established that if, although they were not summoned, all those with the right of suffrage are in fact present at the election, the collegial act will not be nullified.

5. In addition to what is expressly established in this canon, in order for a college to proceed to election, at least half plus one of all members with the right of suffrage must be present at the time of the vote (cf. c. 119, 1°; see commentary on c. 167).

On the other hand, at the time the convocation occurs, the agenda for the meeting should also be established so that, in communicating this to the members of the college, each may begin to work over the materials which will be treated. Normally, the statutes will establish the manner of elaborating and communicating the agenda for each meeting.[5]

6. The mention of the president and of the members that the legislator introduces in this canon permits the discovery of a certain internal structure in those groups that act collegially. This is because, effectively,

4. Cf. F. GONZÁLEZ NAVARRO, *Derecho administrativo español*, I (Pamplona 1987), pp. 656–657.
5. Cf. S. VALENTINI, *La collegialità...*, cit., pp. 250–254.

all collegial groups have qualified members and other members (called, sometimes, voice members, non-qualified members, etc.).[6] Among the first, we find the president (sometimes designated by different names: director, coordinator, etc.). The president directs the sessions, coordinates the discussion, grants or withdraws the right to speak, convokes a meeting, signs the acts (cf. c. 173), proclaims the elected (cf. c. 176), receives the person's acceptance (cf. c. 177), processes, where applicable, the postulation to the competent authority (cf. c. 182), etc.

The president may be designated through the same law that creates the collegial group (president by law), by the authority that should constitute the college, or by election among the members of the college itself. It is typical of collegial proceedings for the president to occupy a position of primacy (*primus inter pares*) and not of hierarchy with respect to the members of the college.[7]

In the Church, on the other hand, by the foundational will of Christ, the episcopal college does not follow this principle. It is presided over by the Pope who, on one hand, is a member of the college itself, but on the other hand occupies a position of hierarchy with respect to the other members (cf. cc. 330, 331, 336). By ecclesiastical determination, some other collegial groups follow this principle. For example, the presbyteral council (cf. cc. 495ff) should always be presided over by the bishop (cf. c. 500), that is, by someone who is found to be in a position of hierarchy with respect to the other members of the collegial entity.[8]

Nonetheless, the principle of primacy without hierarchical dependence does apply in the case of the college of cardinals; in fact, c. 352 § 1 defines the dean of the college as *primus inter pares*. There may also be cases in which the person who presides over collegial sessions does not in fact pertain to the college (e.g., the Cardinal protector of a religious institute).[9] Keep in mind that this deals with—or can deal with—two distinct types of presidency: the presidency of a college (to which this canon refers) and the presidency of the sessions, which may be honorary.

7. Another qualified member of the college is the secretary (cf., e.g., *UDG* 46), although in theory this may also be someone outside of the college itself.[10] Normally, it is the secretary's responsibility to assist the president, record the acts of the session, deal with the material aspects, etc. In this article of the *CIC* dedicated to election, it is possible to see this figure in the role of the *actuary* (cf. c. 173).

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6. Cf. F. GONZÁLEZ NAVARRO, *Derecho administrativo*..., cit., pp. 654–655.
7. Cf. L. GALATERIA-M. STIPO, *Manuale*..., cit., p. 198.
8. Cf. D. GARCÍA HERVÁS, *Régimen jurídico de la colegialidad en el Código de derecho canónico* (Santiago de Compostela 1990).
9. Cf. R. NAZ, "Élection," in *Dictionnaire de droit canonique* V (Paris 1953), col. 243.
10. Cf. L. GALATERIA-M. STIPO, *Manuale*..., cit., p. 199; F. GONZÁLEZ NAVARRO, *Derecho administrativo*..., cit., p. 655.

167 **§ 1. Convocatione legitima facta, suffragium ferendi ius habent praesentes die et loco in eadem convocatione determinatis, exclusa, nisi aliud statutis legitime caveatur, facultate ferendi suffragia sive per epistolam sive per procuratorem.**

§ 2. Si quis ex electoribus praesens in ea domo sit, in qua fit electio, sed electioni ob infirmam valetudinem interesse nequeat, suffragium eius scriptum a scrutatoribus exquiratur.

§ 1. When the summons has been lawfully made, those who are present on the day and in the place specified in the summons have the right to vote. Unless it is otherwise lawfully provided in the statutes, votes cast by letter or by proxy cannot be admitted.

§ 2. If an elector is present in the building in which the election is being held, but because of infirmity is unable to be present at the election, a written vote is to be sought from that person by the scrutineers.

SOURCES: § 1: c. 163
§ 2: c. 168

CROSS REFERENCES: cc. 119, 517 § 1

COMMENTARY

Jesús Miñambres

1. With this canon, the *CIC* leaves the theme of the right of suffrage or the right to participate in an election and moves on to discuss the concrete right to vote in the elective framework constituted once the college has met. All that will be established here, except legitimate prescription contrary to the statutory rule, is applicable to any vote held within the canonical order. However, this does not deal with an election for the provision of offices.

2. Paragraph 1 applies what is established in c. 119, 1° for collegial acts in general to the concrete case of the canonical election. Reference is made to what the doctrine has called a structural *quorum*, relative to the composition of a collegial meeting. That is, the term refers to the number of components of the collegial body that should convene in order that this body or college be understood as constituted. In contrast is the functional *quorum*, which would be necessary for the validity of the decisions, that is, the number of members of the college who should exercise the right to

vote in order to validly adopt a decision, realize an act, etc. (see commentary on c. 166).[1]

The structural *quorum* can be *whole*, if the presence of all members of the college is required, or *partial*, which in its turn may be an *absolute majority* (half plus one of the members) or *special* (two thirds of the members, three quarters, etc.), *joint* (when the presence of exactly half of the members is sufficient) or *minority* (if the number required to be present is less than half of the components of the college).[2]

In the Code, the structural *quorum* required in order for the college to act is the *absolute majority*, that is, at least half plus one of the members who should have been convoked. This diverges from c. 119, 1° and 2°. Already in the first sessions of the revision of the Code the following had been affirmed: "Pro omnibus vero negotiis, requiritur ut praesens sit maior pars eorum qui convocari debent."[3] This is one of the innovations of the *CIC* relative to the formation of the collegial acts. The *CIC*/1917 did not take the structural *quorum* into consideration, in that it made legitimate the convocation of the college, where the decision was made by those who were in fact present at the place and time indicated. This was the case even if the numbers present were very few with respect to the whole group, or only one (cf. c. 163 *CIC*/1917).[4]

However, the whole *quorum* is always required when the decision affects each and every member of the college (cf. c. 119, 3°). This appears to be the case, for example, in parishes entrusted jointly to various priests (cf. c. 517 § 1), or in the retraction of a presentation already processed (see commentary on c. 160), etc.

3. With the electoral college composed of these requirements, the legislator concretely establishes the general principle—already foreseen in c. 163 of the *CIC*/1917—that the vote should be cast only by those present: that is, only those present at the location of the vote at the moment in which it is taken. This deals with a principle of universal law that, therefore, can have licit exceptions in particular law, statutory or regulatory, applicable to a concrete case. This same canon expressly states this.

The place and time of which we speak here will be indicated in the act of convocation of the meeting of the college, or by legitimate custom, or by statutes. In reference to the location of convocation of the general chapter of a religious diocesan congregation extended over various dioceses, the Sacred Congregation for Religious declared in 1921 that this does not correspond to the ordinary of the place. Instead, it falls to the

1. Cf. L. GALATERIA-M. STIPO, *Manuale di diritto amministrativo*, I (Turin 1989), p. 202; S. VALENTINI, *La collegialità nella teoria dell'organizzazione* (Milan 1980), pp. 255ff.
2. Cf. ibid.
3. *Comm.* 6 (1974), pp. 99–100.
4. Cf. J. CANOSA, "La maggioranza richiesta nella elezione canonica," in *Ius Ecclesiae* 3 (1991), p. 370.

constitutions or to the superior general to determine in which house the convocation will be carried out.[5]

4. The exception established in § 2, which will be applicable to all votes where the statutes do not expressly state otherwise, is contrary to the general rule indicated previously. This deals with a traditional prescription—taken literally from c. 168 of the *CIC*/1917—which was also conserved in the revision of 1983. It probably comes from a possible hypothesis overall in cases of religious, but it is also applicable in other elections for those where the electors are enclosed in a determined location (this occurred, e.g., with the conclave charged with selecting the Supreme Pontiff).

5. The legislator has expressly excluded, as a general rule, the possibility of voting by letter or by proxy, even in the case of an ill person with the right to vote. This is done in a manner of requiring that the electors be personally present in the place of suffrage.[6] Nonetheless, it considers the possibility that the normative statutes can legitimately contradict this prescription (§ 1, *in fine*). In such a case, the statutes should establish a system of voting by letter or by proxy that guarantees the qualities of the vote required by c. 172, over all that the vote be free and secret. And where applicable, at the time of computation of the *quorum*, the absent members should be counted who in fact have a right to participate in the formation of the collegial act.

5. Cf. *AAS* 13 (1921), p. 481.
6. Cf. *Comm.* 22 (1990), p. 142.

168 **Etsi quis plures ob titulos ius habeat ferendi nomine proprio suffragii, non potest nisi unicum suffragium ferre.**

Even if someone has a right to vote in his or her own name by reason of a number of titles, that person may cast only one vote.

SOURCES: c. 164

CROSS REFERENCES: —

COMMENTARY

Jesús Miñambres

It is possible that one person may possess various titles that give him a right to participate in the vote. The legislator does not give value to these various titles at the time the vote is taken.

The justification for this precept is found in the so-called *personality* of the right of suffrage.[1] That is, the canonical rule values the classic principle of suffrage, *one person, one vote.*[2]

The different titles to which the legislator refers are always attributed to the same physical person and in proper name. This hypothesis is shown, for example, in the bishops' conference, when the same person holds the office of diocesan bishop of a territory and that of apostolic administrator of another, within the territory of the conference. Nevertheless, as the bishops' conference is a meeting of bishops (cf. c. 447), and not of entities—of territories—only one vote falls to each person. This is consistent with what is indicated in the canon we discuss here, and by reason of the nature of the electoral body itself. The prohibition can in fact be applied, nonetheless, in its characteristic sense to the election of the members of the presbyteral college. This would be the case if a priest, who is a member of a society of apostolic life residing in the diocese and having some duty there, would be incardinated in the same dioceses (cf. c. 498 § 1, 1° and 2°): he would only have the right to one vote.

If the statutes, or the particular or regulatory law, foresee the possibility of voting by delegates (cf. c. 167 § 1), and a person with the right to

1. Cf. A. ALONSO LOBO, *ad loc.*, in *Comentarios al Código de Derecho canónico*, I (Madrid 1963), p. 471.

2. Regarding the taking of the majority decision, with express reference to the canonical system, cf. E. RUFFINI, *Il principio maggioritario. Profilo storico*, 2nd ed. (Milan 1987), especially pp. 22–34.

vote is named delegate of one or several other distinct voters, he or she would be able to vote for each person represented, as well as himself or herself. The hypothesis is not addressed in the canon we discuss here, since the vote by delegation is not taken in the name of the voter, but the person delegating the vote.

The delegated vote may be given, for example, in elections carried out in a religious institute in accordance with its constitutions (cf. c. 625), in associations of the faithful following their statutes, etc. It is expressly excluded, on the other hand, in elections destined to provide other offices, as for example in the election of the Roman Pontiff, which should be carried out exclusively by the cardinals present in the conclave (cf. *UDG*, 40).

The prescription of this canon has been taken literally from c. 164 of the *CIC*/1917.[3]

The individual vote dealt with here is, in fact, the only relevant juridical act of each of the members of a college in the proceeding that brings about the formulation of the collegial act. In other words, the opinion of each of the *colleagues* is only legally relevant in that it is manifested in a vote. The individual interventions throughout the collegial proceedings are many and of diverse types (relations, observations, reflections ...); psychologically, each member of the college forms a decision personally, but inasmuch as the act is collegial, the individual process of the formation of the will of each member is indifferent until it is manifested in the vote.[4] Hence, in the collegial legislation, the defects that are indicated affect either the election as a whole (cf. c. 170), or the vote in particular, as a single legally relevant expression of the individual contribution to the formation of the collegial will (cf. c. 172).

3. In Spain, nonetheless, by virtue of article 10 of the Concordat of 1954, the Agreement between the Holy See and the Spanish State of July 16, 1946, whose article 7 § 2 established that "when the election of a candidate to a benefice took place with pre-existing opposition on the part of the Ordinary and the cathedral chapter, the Prelate, in that case, would have the right to three, four, or five votes, according to whether the number of capitulars was sixteen or less, twenty, or more than twenty" (Cited in A. ALONSO LOBO, *ad loc.*, in *Comentarios*..., cit., p. 472) had been in effect until 1979. Although strictly it cannot be said that this legislative agreement contradicted the general canonical rule, since it did not deal with several votes plures ob titulos, but various votes by a single title. (Cf. M. CONTE A CORONATA, *Institutiones iuris canonici*, I (Taurine 1928), p. 256–257, with notes 6 and 1, respectively)

4. Cf. S. VALENTINI, *La collegialità nella teoria dell'organizzazione* (Milan 1980), p. 276.

169 **Ut valida sit electio, nemo ad suffragium admitti potest, qui ad collegium vel coetum non pertineat.**

In order that an election be valid, no one may be allowed to vote who does not belong to the college or group.

SOURCES: c. 165

CROSS REFERENCES: c. 625 § 2

COMMENTARY

Jesús Miñambres

This canon and the next establish requisites for the validity of the voting as a whole; cc. 171 through 173, on the other hand, refer to the validity of each vote in particular.

Among the different phases that carry out the formulation of the collegial will, the act of voting certainly assumes a special relevance. With it, the college determines the election in favor of one or another person, or, in some cases, in favor of one or another proposal, etc. The forms of carrying out the voting are diverse. The principal classifications distinguish between public and secret votes, based on whether or not the vote is carried out in a manner whereby each vote is known by all. In the canonical order, elections should be made by secret vote (cf. c. 172 § 1, 2°). The secret vote, in its turn, can be carried out through the allocation of ballot papers, of balls, or through electronic systems. The canonical legislator appears to prefer the system of ballots (cf. c. 173 § 2).

As has been indicated in c. 165 of the *CIC*/1917, no one may be admitted to vote that is not a member of the electoral body. This does not mean that they may not be present in the place where the vote takes place, or assist in its development, but simply that they may not participate in the vote itself.[1] Only in this way is the presence of the diocesan bishop justified in the election of the superior of an autonomous monastery, as prescribed in c. 625 § 2. The bishop will normally be outside of the electoral body and so may not participate in the voting. Nonetheless, he should be present at the election.

There may also be cases where, for specific elections, either by privilege or by legitimately prescribed custom, persons may be admitted who habitually—for the formation of other types of acts—do not participate in

1. Cf. M. CONTE A CORONATA, *Institutiones Iuris canonici*, I (Taurine 1928), p. 257.

the sessions of the group dealing with those acts. Notwithstanding, such persons should be convoked (cf. c. 166) when the group must proceed in an election in which such persons enjoy the right of suffrage,[2] since they pertain to the "electoral body."

In the law prior to the codification of 1917, participation in the election of a cleric outside of the electoral body was permitted if the voters unanimously agreed.[3] The legislation of the code, on the other hand, explicitly prohibited this possibility.

The possible presence of outside persons is especially regulated in the conclave meeting to elect the Roman Pontiff. The apostolic constitution *Romano Pontifici eligendo* expressly anticipated the presence of some religious priests who are able to hear confessions in the principal languages, two doctors, one or two nurses, the architect of the conclave and two experts, and some assistants and officials (cf. *UDG*, 42).

Admitting to the vote a person outside of the electoral body is sanctioned with the absolute nullity of the election. This canon does not deal, as does c. 166 § 2, with the annullable aspect of a defective election; in this case the election is invalid and cannot provide any legal effect. Such absolute nullity would not be given, according to some authors,[4] if a person was admitted to vote who did not enjoy the right of suffrage for the concrete election but did form part of the college or group. In this case, which is dealt with in the hypothesis of c. 171 § 1, 2°, the election would not be invalid, but only revocable (cf. c. 171 § 2).

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2. Cf. F. X. Wernz-P. Vidal, *Ius canonicum*, II, 3rd ed. (Rome 1943), pp. 312–313, with note 12.
3. Cf. F. Maroto, *Instituciones de Derecho canónico*, II (Madrid 1919), p. 356, note 2.
4. Cf. M. Conte a Coronata, *Institutiones...*, cit., p. 257.

170 **Electio, cuius libertas quoquo modo reapse impedita fuerit, ipso iure invalida est.**

If the freedom of an election has in any way been in fact impeded, the election is invalid by virtue of the law itself.

SOURCES: c. 166

CROSS REFERENCES: cc. 149, 1375

COMMENTARY

Jesús Miñambres

In order for an election to be valid, the voting, in general, must be free. Canon 172 § 1, 1° indicates some of the reasons that can invalidate a vote for lack of freedom. Analogously, these can be accurately applied also to the validity of the voting in general.

Certainly it will be very difficult to prove lack of freedom in the voting in general, except in notorious cases. It appears easier to prove lack of freedom in the concrete vote or of some or many of them, based on what is anticipated by c. 172. Perhaps through proving lack of freedom of a certain number of individual votes, one can arrive at a moral certainty of the lack of freedom in the voting in general.

In the doctrine prior to the *CIC*, some authors had isolated up to ten hypotheses of possible interventions that could hinder the freedom of the election. These included the physical introduction of votes into the ballot box by persons outside of the electoral body; the requirement for the permission of the civil authority in order to proceed with the election; force exercised over the voters that they vote for a particular person; bribery of voters; the requirement of approval of the election by a non-ecclesiastical authority; pretense by persons outside of the electoral body in exercising some task—president, scrutineer, etc.—in the voting; the imposition of rules about voting by a person who does not have the right to impose them; threats; and any other act capable of effectively limiting the freedom of the election.[1] It is evident that these hypotheses are sufficiently heterogeneous that they should be evaluated on a case by case basis.

On the other hand, the legislator has established that persons who impede the freedom of an election may be justly punished (cf. c. 1375).

1. Cf. F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), p. 408.

The canon under discussion stems from c. 166 of the *CIC*/1917, certainly improving upon it. The former canon considered that a lack of freedom in voting—called *canonical freedom*—always derived from the intervention of laity (*sese immiscuerint*). Today, with better criteria, the cause of a lack of freedom in voting may originate from any person, whether or not he or she is a member of the people of God.

Nonetheless, the doctrine does not customarily specify the concept of *lay* in reference to the civil authority, or *lay powers*, in contrast to *sacred powers*.[2] Thus, the content of this canon would refer more to the freedom of the Church in the provision of ecclesiastical offices, than to the concrete freedom of an election in the canonical system.

In addition to admitting persons outside of the college to vote (cf. c. 169) or of the completion of voting without freedom, an election made with simony is also invalid by virtue of the law itself (*ipso iure*) (cf. c. 149 § 3).

2. Cf., among others, B. OJETTI, *Commentarium in Codicem Iuris canonici, Liber II* (Rome 1931), p. 64; M. CONTE A CORONATA, *Institutiones Iuris canonici*, I (Taurine 1928), p. 258; F. MAROTO, *Instituciones*..., cit., p. 407.

171 **§ 1. Inhabiles sunt ad suffragium ferendum:**
1° incapax actus humani;
2° carens voce activa;
3° poena excommunicationis innodatus sive per sententiam iudicialem sive per decretum quo poena irrogatur vel declaratur;
4° qui ab Ecclesiae communione notorie defecit.

§ 2. Si quis ex praedictis admittatur, eius suffragium est nullum, sed electio valet, nisi constet, eo dempto, electum non rettulisse requisitum suffragiorum numerum.

§ 1. The following are legally incapable of casting a vote:
1° one incapable of a human act;
2° one lacking active voice;
3° one who is excommunicated, whether by judgment of a court or by a decree whereby this penalty is imposed or declared;
4° one who notoriously defected from communion with the Church.

§ 2. If any of the above persons is admitted, the vote cast is invalid. The election, however, is valid, unless it is established that, without this vote, the person elected would not have gained the requisite number of votes.

SOURCES: § 1: c. 167 § 1, 1° et 3°–5°
§ 2: c. 167 § 2

CROSS REFERENCES: cc. 10, 18, 119, 1°

COMMENTARY

Jesús Miñambres

1. The legislator establishes a series of criteria that determine incapacity to vote, and, therefore, the invalidity of the vote if a vote is cast. It deals with a rule that limits the exercise of the right, and that therefore, by virtue of c. 18, must be strictly interpreted (cf. also c. 10).

The doctrine discussed in the *CIC*/1917, customarily referred to these incapacities in dealing with the qualifications of voters.[1] The *CIC*

1. Cf., among others, F. X. WERNZ-P. VIDAL *Ius canonicum*, II, 3rd ed. (Rome 1943), pp. 311–314; A. VERMEERSCH-J. CREUSEN, *Epitome Iuris canonici*, I (Malines-Rome 1935), pp. 243–244; F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), p. 356–359; M. CONTE A CORONATA, *Institutiones Iuris canonici*, I (Taurine 1928), pp. 254–262.

has maintained, on this point, what was established by c. 167 of the *CIC*/1917, improving it technically.

a) A person who is incapable of a human act is determined incapable of voting. Given that the right of suffrage depends on personal conditions and must be personally exercised (cf. c. 167 § 1), the act of voting through a guardian or other representative is not permitted. This incapacity traditionally refers to those persons with mental incapacities or defects.[2] One author specified that the incapacity to perform human acts impeded the acquisition of the right of suffrage or its exercise by someone who already possessed that right. However, this did not imply the loss of the right itself if the incapacity or defect came upon the person after the acquisition of the right.[3]

b) The person lacking active voice is also incapable of voting. In an election, active voice is understood as the situation of one who is able to cast valid votes. Deep down, the incapacity established by § 1, 2° of this canon is tautological: the person is legally incapable of voting who is legally incapable of voting. The lack of active voice can come about, in some cases, by sanction envisioned in the law applicable to the election,[4] or even as a consequence for an offence punished by the expiatory penalty of c. 1336 § 1, 2°.[5]

c) The canon also establishes the incapacity of those forming part of the electoral body who are capable of human acts, and who would possess active voice in principle, but have incurred an excommunication *ferendae sententiae* or declared *latae sententiae*. The prescription must be interpreted in the strict sense and, therefore, does not affect those who have been subjected to other penalties, or to excommunication not declared *latae sententiae* through judicial sentence or decree; whose right of suffrage remains intact. Nonetheless, in this last case, incapacity may be demonstrated by number 4°—notorious separation from communion with the Church—if the excommunication *latae sententiae* in question implies such notoriety.

Canon 167 § 1, 3° of the *CIC*/1917, indicated this same incapacity for election in much broader terms, relative to any type of censure or infamy of law, which would have been established by sentence. Although some sector of interpretation[6] extended incapacity to cases of notorious offences even before any declaration of penalty, or the condemnatory sentence where applicable, had been issued, it does not appear that such an extensive interpretation of the words of the canon could be sustained. *A fortiori*, the actual rule, which requires a strict interpretation of the

2. Cf. F. X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 313.
3. Cf. F. MAROTO, *Instituciones...*, cit., p. 356, note 1.
4. Cf. ibid., p. 358.
5. Cf. F. X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 314.
6. Cf. ibid., p. 313, note 17.

incapacities, limits this number only to what is expressly established, in such a way that it guarantees juridical security relative to the exercise of the right of suffrage.

Nonetheless, what is anticipated by this number 3° does not affect the election of the Roman Pontiff. *Universi Dominici gregis*, 5, establishes that "no cardinal elector may be excluded from the election of the Pontiff, be it actively or passively, by means of or under the pretext of excommunication, suspension, interdict, or any other ecclesiastical impediment, for whatever cause or reason; these censures are to be considered suspended only insofar as the election is concerned." Historical reasons guarantee the establishment of a rule of this tenor in the specific case of the election of the Pope. In other cases of canonical election the particular applicable law, statutory or regulatory, may dispense from the rule established in this canon.

d) The determination of the fourth hypothesis of incapacity stated in § 1 of the canon sets forth major difficulties and, dealing with an incapacitating rule (cf. c. 10), must be interpreted strictly (cf. c. 18). The difficulty is relevant primarily in the appraisal of the notoriety. Can it be said that one who has not been excommunicated has notoriously defected from communion with the Church? What criteria can be used to appraise the notoriety of such a situation? Does a great separation from communion with the Church deal with quantitative notoriety—a situation known by many—or rather qualitative? It is not a given to determine these extremes in a taxative manner. If one seeks to avoid arbitrariness and injustice, it is best not to apply this rule of the code, unless the particular statutory or regulatory legislation offers unequivocal criteria for interpretation, which guarantee juridical security.

Originally, the rule recalled in this number appears to have come from c. 167 § 1, 4° of the *CIC*/1917, which established the incapacity to vote of "those who have joined or given public allegiance to a schismatic or heretical sect." Now, in the *CIC*, heresy as well as apostasy and schism (cf. definition of these offences in c. 751) are condemned with excommunication *latae sententiae*. Perhaps the incapacity of those censured with excommunication *latae sententiae* could be deduced here when the offensive act is notorious—what some authors include in number 3° of this paragraph (see *supra*)—but this deduction contradicts the letter of the third number, which requires the declaration of the penalty. Wernz-Vidal[7] solved the contradiction, noting that in the case of public adherence to a heretical sect or schism—and only in such a case—declaration of the penalty was not required.

In the current regimen, given the broader amplitude and vagueness of the normative prescription, it does not appear that such an interpretation can be followed. In order for a penalty of excommunication to cause

7. Cf. F. X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 314, note 18.

incapacity for the exercise of the right of suffrage, it must be declared (n. 3°). Notorious separation from communion with the Church should be determined in general norms—even of particular law—that require a declaration of such notoriety, in such a way that the person incurring the notoriety may be aware of his or her juridical situation. Otherwise, the difficulties a juridical rule configured in this way make the practical application of this norm, in fact, very difficult. Prudence in the government, the common ecclesial good, justice itself, and other considerations of similar nature—not least of all juridical security—require specific cautions in the determination of incapacity due to notorious separation from ecclesial communion.

2. Paragraph 2 of the canon establishes the consequence of personal incapacity in the exercise of the right of suffrage: the vote issued by the incapable person is null. However, a null vote does not directly cause the nullity of the election. In order to activate the proceeding, the legislator indicates that, if the null vote did not clearly influence the result of the election, the vote itself is valid. Only if it is established with certainty that the null vote caused the obtaining of a majority for the elected candidate can the election be annulled. The canon thus establishes two distinct sanctions: the absolute invalidity of the vote cast by the incapable person; and the ability to nullify the election if it can be demonstrated that the invalid vote decisively influenced the final result of the election.

In reality, when dealing with a single null vote, the election will be invalid if the candidate obtained the minimal majority, that is, half plus one of the votes in the first two counts or one vote more than the next candidate in the third voting (relative minimum majority). This is also true if there is a draw in the third count where the election of the candidate was later determined due to seniority with respect to the other candidate. A final possible hypothesis is that the null vote causes a third candidate to surpass the others in the second count, if none of the elected candidates has obtained an absolute majority. This would even occur in a mere draw with another two or more candidates in the same vote, if by this act the person becomes one of the two candidates who will be voted on in the third scrutiny (cf. c. 119, 1°).

172 **§ 1. Suffragium, ut validum sit, esse debet:**
1° liberum; ideoque invalidum est suffragium eius, qui metu gravi aut dolo, directe vel indirecte, adactus fuerit ad eligendam certam personam aut diversas personas disiunctive;
2° secretum, certum, absolutum, determinatum.

§ 2. Condiciones ante electionem suffragio appositae tamquam non adiectae habeantur.

§ 1. For a vote to be valid, it must be:
1° free; a vote is therefore invalid if, through grave fear or deceit, someone was directly or indirectly made to choose a certain person or several persons separately;
2° secret, certain, absolute and determinate.

§ 2. Conditions attached to a vote before an election are to be considered non-existent.

SOURCES: § 1: c. 169 § 1
§ 2: c. 169 § 2

CROSS REFERENCES: cc. 124 § 2, 125 § 2, 1375

COMMENTARY

Jesús Miñambres

1. Canon 171 outlined the requirements necessary in order for the vote of a particular voter to be valid. The current canon indicates the requirements for the vote itself, of each individual vote, not of the voting in general, which has already been discussed in canons 169 and 170. As in all the canons of this article, what is discussed here in terms of the elective vote as a mode of conferring offices is also applicable to any vote carried out with respect to the canonical order. This case does not appear to deal with a mere rule of *ius dispositivum*, and, therefore, what is indicated by this canon will always remain in force (*ius cogens*). The normative contrary to the particular statutory or regulatory norm would have to be considered not to have been placed. In any case, a vote cast without the requirements indicated here would always be invalid.

The canon does not nullify, in the case of voting, the presumption of c. 124 § 2, which prescribes the validity presumed of juridical acts duly realized based on their external elements. However, it does contradict the

norm found in c. 125 § 2 that prescribes the validity of those acts carried out under grave fear or deceit, conceding their possible nullification by the instance of the injured party or ex officio. In the case of the canon discussed here, the vote cast without freedom is not simply able to be annulled, but is invalid by virtue of the law itself. Thus, a vote by the general rule of juridical acts is excluded in the juridical system of the Church.

In any case, the person alleging the invalidity of a vote should prove the lack of freedom or one of the other requirements for its invalidity and, therefore, the vote—although invalid in itself—will be presumed valid until the cause of its invalidity is proven. Nonetheless, given that in reality the juridical act is absolutely invalid, all the effects produced by it until the moment of the *declarative* act of nullification, would be considered unjustified due to lack of cause and will be annulled in their turn. That is, the vote is nullified *ex tunc.* If this dealt with an act that could simply be annulled, the effects that would have been produced before the presentation of the petition of effective nullification of the act would be valid. That is, the vote would be null only *ex nunc*, from the moment of the *constitutive* act of nullification.[1]

a) The first requirement that any vote must meet is that it be cast freely by the person who possesses the right of suffrage. The legislator expressly anticipated the lack of freedom by deceit or grave fear, but it does not seem to seek an exhaustive enumeration of the causes that can remove freedom from a vote. If it can be demonstrated that the vote was coerced—for example, by force, fraud, bribery,[2] etc.—it would have to be considered invalid.[3] In any case, grave fear, fraud, or other circumstances that actually restrict the freedom of a vote should be cause, at least indirectly, "to choose a certain person or different persons separately," and not to any other purpose, although in fact they could have some influence on the election.[4] In addition, they should be sufficient to remove freedom from the vote. The canon does not prevent any person from making suggestions, insinuations, proposals, etc. to the voters.

As in the case where the person restricts the freedom of the election in general (cf. cc. 170 and 1375), the person who coerces a voter can also be punished with a just penalty (cf. c. 1375).

b) Another requirement for the validity of the vote is its *secret* character. That is, that the person casting the vote is not identified, or if one prefers, it is not identified in favor of whom the vote is cast. The doctrine

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1. Cf. E. LABANDEIRA, *Tratado de Derecho administrativo canónico*, 2nd expanded ed. (Pamplona 1993), pp. 401–405.
2. Cf. F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), pp. 410–412.
3. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 319; on the contrary, cf. R. NAZ, "Élection," in *Dictionnaire de droit canonique* V (Paris 1953), col. 242; F. MAROTO, *Instituciones...*, cit., pp. 369–370.
4. Cf. F. MAROTO, *Instituciones...*, cit., p. 409.

customarily refers to this requirement in terms of the moment at which the vote is cast. Its manifestation before or after the election does not in itself affect the validity of the vote.[5] Nonetheless, it is the norm of recommended prudence "to refrain from revealing the voters either before or after the balloting."[6] Canon 171 § 1 of the *CIC*/1917 imposed this obligation of secrecy upon the president as well as the scrutineers after the election and required a prior oath from them. In the current universal law such an obligation after the election remains in force only for participants in the conclave (cf. *RPE* 55–61). The statutes or particular norms applicable to other types of election may also establish this.

c) The vote must also be *certain*, inasmuch as it clearly manifests the will of the voter, without any doubt as to its content. The vote that expressed various preferences would therefore be invalid.[7] Some authors have arrived at the opinion that a blank vote must be considered invalid in that it would be "completely indeterminate";[8] however, it does not appear that this interpretation would be sustainable.

d) The vote must be *absolute*, in that it would be invalid if conditions were set for the elected candidate. This is different from placing general conditions on the candidate in general who becomes elected, or on a specific candidate, if that candidate becomes elected, since these last conditions, not expressed in the vote itself, are those considered by § 2 of this same canon. The doctrine specifies that a vote in which conditions are required by the law or by the nature of the position itself can be considered absolute (e.g., "I elect X if he is suitable").[9]

e) Finally, the vote must be *determined* in its content; it cannot refer to any of the members of an unspecified group, or to those who possess certain characteristics, without indicating a specific candidate. Nor can it express an alternative ("I elect X or Y") or be expressed in such a way that is does not indicate current will ("I would like to elect …").[10]

2. Paragraph 2 determines that the conditions added before the election will be considered non-existent. This, logically, deals with conditions that do not determine a lack of freedom in the election. On the other hand, the election will be invalid in accord with what is prescribed in c. 170.

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5. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 320; F. MAROTO, *Instituciones…*, cit., p. 370.
6. A. ALONSO LOBO, in *Comentarios al Código de Derecho canónico*, I (Madrid 1963), pp. 469–470.
7. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 320.
8. F. MAROTO, *Instituciones…*, cit., p. 371.
9. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 321; F. MAROTO, *Instituciones…*, cit., p. 371.
10. Cf. ibid.

The content of this canon conforms to c. 169 of the *CIC*/1917 without modifications. The legislation of 1917 recalled in the following canon (c. 170) the invalidity of a vote cast in favor of oneself. In the present Code such cause for invalidity has been suppressed.[11] "This is treated as an odious issue, which is difficult to investigate and to prove and therefore for the election of the Roman Pontiff it was abolished by the *Motu proprio Summi Pontificis electio* of John XXIII, September 5, 1962 (*AAS* 54 [1962], pp. 632–640)".[12]

11. Cf. *Comm.* 22 (1990), p. 89.
12. J.I. ARRIETA, commentary on c. 172, in *Pamplona Com.*

173 **§ 1. Antequam incipiat electio, deputentur e gremio collegii aut coetus duo saltem scrutatores.**

§ 2. Scrutatores suffragia colligant et coram praeside electionis inspiciant an schedularum numerus respondeat numero electorum, suffragia ipsa scrutentur palamque faciant quot quisque rettulerit.

§ 3. Si numerus suffragiorum superet numerum eligentium, nihil est actum.

§ 4. Omnia electionis acta ab eo qui actuarii munere fungitur accurate describantur, et saltem ab eodem actuario, praeside ac scrutatoribus subscripta, in collegii tabulario diligenter asserventur.

§ 1. Before an election begins, at least two scrutineers are to be appointed from among the college or group.

§ 2. The scrutineers are to collect the votes and, in the presence of the one who presides at the election, to check whether the number of votes corresponds to the number of electors; they are then to examine the votes and to announce how many each person has received.

§ 3. If the number of votes exceeds the number of electors, the act is null.

§ 4. All the proceedings of an election are to be accurately recorded by the one who acts as notary. They are to be signed at least by that notary, by the person who presides, and by the scrutineers, and they are to be carefully preserved in the archive of the college.

SOURCES: § 1: c. 171 § 1
§ 2: c. 171 § 2
§ 3: c. 171 § 3
§ 4: c. 171 § 5

CROSS REFERENCES: cc. 119, 180–183

COMMENTARY

Jesús Miñambres

The requirements for the validity of voting in general have already been established (cc. 169 and 170), as have those for each one of the votes—both on the part of the voters (c. 171), and for the conditions of the vote itself (c. 172). Now the legislator establishes the rule regarding the habitual manners in which a vote can be carried out. This canon indicates

how it should proceed in the case of normal voting, with regard to the scrutiny of the votes cast. The following canons (cc. 174 and 175) will deal with the special system of election by compromise.

The Code is not concerned with establishing a rule concerning the possible third system of election anticipated, at least, for the Roman Pontiff. This system is called election by *acclamation* or *inspiration*. That is, "when the cardinal electors, illumined, as it were, by the Holy Spirit, freely and spontaneously, with a unanimous voice acclaim aloud someone" (*RPE* 63). In spite of the absence of regulation by the Code, it appears that election by inspiration could also be anticipated for the provision of other offices by statutory rules.

1. In the general rule of voting, it is assumed that votes are cast in writing on separate ballots for each voter. One can imagine other systems of casting votes—indicating the vote in a common list of all voters, by the system of raising hands, or by word. However, it would be difficult to carry out these types of votes with the requirements for validity established for the vote itself in c. 172. One should not exclude *a priori*, nonetheless, the possibility of voting using electronic systems which guarantee the respect of what is indicated by c. 172.

The canon indicates some of the typical phases of the entire vote. The vote is referred to in its general sense, being considered as a juridically relevant act. Nothing prevents particular law or custom from imposing other incidental solemnities or formalities as well. These may include the celebration of a Mass of the Holy Spirit on the day of the election, the invocation of the Holy Spirit to illuminate the voters, the oath of the president of the college, etc. However, none of these acts have relevance with respect to the voting in itself.[1]

2. Before initiating the voting, the first proceeding should be the designation of the scrutineers. At least two should be named, and they should be members of the electoral body. These will be the persons responsible to carry out the functions of collecting and counting the votes. This should be done without prejudice to the statutory, regulatory, or particular law which may indicate other actions that should be applied to the election in question. It is not difficult to imagine, for example, that the statutes of an electoral body indicate that specific duties be entrusted to the task of the scrutineer. In such a case, it would not be necessary to elect them each time, since the scrutineers have already been designated in general by the applicable rule. The same can be said of the rest of the proceedings of the vote. The directives of the particular, statutory, or regulatory law must always be kept in mind.

1. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 321; R. NAZ, art. "Élection," in *Dictionnaire de droit canonique* V (Paris 1953), col. 242.

3. The scrutineers thus designated are responsible to collect the votes of those that possess the right of suffrage. Thus the vote passes to the second phase of the proceeding: the voting in a strict sense. At this moment the so-called functional *quorum*, that is, the number of votes necessary for the proposal to be considered approved, enters into play (this is distinct from the structural *quorum* relative to the formation of the meeting:[2] see commentary on c. 167). The canonical legislator does not repeat here the rule regarding majorities, which has already been generally established in c. 119.

Depending on the type of collegial act, it is customary to require a distinct *quorum*. *Unanimity* is required for those decisions that affect each and every member of the college (cf. c. 119, 3°). This total *quorum* demonstrates the agreement of all the members of the college and is, therefore, the ideal. However, in many cases great practical difficulties are created. For this reason, it is required only when the decision individually affects each and every one of the voters. There also exist so-called *qualified majorities*, which are given when approval requires a number higher than half plus one of the votes to meet the basic criteria. Such basic criteria can refer to all the votes cast, or only to valid votes, or to the so-called decisive votes which would effectively express a preference. That is, blank votes would not count, although they are valid (this sense was expressed, for example, in c. 101 § 1, 1° of the *CIC*/1917).[3] From here we acquire the distinct juridical consideration of a blank vote or an abstention. The statutes of the electoral body can sometimes count these in the qualified majorities. Thus, for example, *Romano Pontifici eligendo* 65 always requires the qualified majority of two-thirds plus one of the votes for the election of the Roman Pontiff. Another type of *quorum* is the ***absolute majority***, which constitutes the normal rule of votes (cf. c. 119, 1° and 2°) and means half plus one of the votes that are taken as a base. Finally, the ***simple*** or ***relative*** majority, specified as the most voted possibility. This type of *quorum* has not been expressly anticipated in the Code. The *CIC*/1917, indicated this for the third scrutiny (cf. c. 101 § 1, 1°), and this manner of voting was also considered in c. 76 of the *Schema de Populo Dei*, of 1977. Nonetheless, it was not maintained in the successive editions of the text. In reply to the Pontifical Council for the Interpretation of Legislative Texts, of June 28, 1990,[4] the *quorum* of relative majority remains in force in those elections where in the third scrutiny there is no tie (cf. c. 119, 1°. See commentary on c. 176).[5]

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2. Cf. L. GALATERIA-M. STIPO, *Manuale di diritto amministrativo*, I (Turin 1989), p. 204.
3. See commentary on c. 176, which explains the application of these principles in the specific case of a canonical election, with reference to doctrine.
4. *AAS* 82 (1990), p. 845.
5. Cf. J. CANOSA, "La maggioranza richiesta nella elezione canonica," in *Ius Ecclesiae* 3 (1991), pp. 367–374.

4. The voting phase will be immediately followed by the examination of the number of votes cast, the recount of those received by each of the voters and the publication of the results of the vote. During the phase of examination and recount it will be proven if the number of votes is equal or less than the number of voters. If the number of ballots is more than the number of voters, the voting would be nullified (§ 3). The scrutineers will also examine whether each vote maintains the conditions of secrecy, certainty, and absolute and determined proclamation of the candidate, as is required by c. 172 § 1, 2° for the validity of each vote.

5. The next phase is the proclamation of the elected (cf. c. 176) and the drawing up of the act[6] of the vote that should be signed by, at least, the president, the person who drew up the act (normally the actuary) and the scrutineers (§ 4). In general, the act should contain all the points of the act that has just been completed. These include date (day, month and year) of the meeting, location, name of the person who has assumed the presidency, names of the scrutineers and the actuary, roll of the members present and absent, etc.; that is, all references to the meeting of the college should be included. In addition, it should indicate what is relevant to the voting: the system utilized, the number of votes obtained by each candidate, the number of times the vote was carried out, with the results of each, etc. Where applicable, special attention should be given in the act to all reference to the third voting. This should include the candidates designated, whether or not any dispensable impediments were known for any of them (cf. cc. 180–183), votes obtained by each of them, age of the candidates elected in the case of a tie, etc.

The habitual practice in collegial bodies anticipates the editing of the act after the session and its approval in the following session. Given the nature of the act of election, which generally assumes a special session, it does not appear that this requisite must be demanded. In any case, for the validity of the act at least the signatures of the persons mentioned in the canon are required. The act thus edited, approved, and signed is given public faith in its contents. Thus, any accusation of falsity or omission must be proven.

6. The proceeding is concluded with the communication of the result of the voting to the elected, if the person was not present (cf. c. 177 § 1). The *CIC*/1917, added a final step, consisting of the burning of the ballots (cf. c. 171 § 4), which was suppressed in the current universal regulation. It remains obligatory, nonetheless, in the election of the Roman Pontiff (cf. *UDG*, 70).

6. Cf. L. GALATERIA-M. STIPO, *Manuale…*, cit., p. 206; F. GONZÁLEZ NAVARRO, *Derecho administrativo español*, I (Pamplona 1987), pp. 659–662; S. VALENTINI, *La collegialità nella teoria dell'organizzazione* (Milan 1980), p. 313ff.

174 **§ 1. Electio, nisi aliud iure aut statutis caveatur, fieri etiam potest per compromissum, dummodo nempe electores, unanimi et scripto consensu, in unum vel plures idoneos sive de gremio sive extraneos ius eligendi pro ea vice transferant, qui nomine omnium ex recepta facultate eligant.**

§ 2. Si agatur de collegio aut coetu ex solis clericis constanti, compromissarii in sacris debent esse constituti; secus electio est invalida.

§ 3. Compromissarii debent iuris praescripta de electione servare atque, ad validitatem electionis, condiciones compromisso appositas, iuri non contrarias, observare; condiciones autem iuri contrariae pro non appositis habeantur.

§ 1. Unless the law or the statutes provide otherwise, an election can be made by compromise, that is the electors by unanimous and written consent transfer the right of election for this occasion to one or more suitable persons, whether they belong to the college or are outside it, who in virtue of this authority are to elect in the name of all.

§ 2. If the college or group consists solely of clerics, the persons to whom the power of election is transferred must be in sacred orders; otherwise the election is invalid.

§ 3. Those to whom the power of election is transferred must observe the provisions of law concerning an election and, for the validity of the election, they must observe the conditions attached to the compromise, unless these conditions are contrary to the law. Conditions which are contrary to the law are to be regarded as non-existent.

SOURCES: § 1: c. 172 § 1
§ 2: c. 172 § 2
§ 3: c. 172 § 3

CROSS REFERENCES: c. 180 § 2

COMMENTARY

Jesús Miñambres

This precept and the next establish the rules that should be followed in the case where a special system of election is used: election by compromise. Such a system should be in accord with the particular, statutory, or regulatory law applicable to the specific case. The Code establishes only general guidelines for the functioning of the system, in cases where it is legal to do so. It does not establish reasons for resorting to this process. In principle, it may be used in any election in which it is unanimously decided to do so in writing by the electoral body or, rather, by each of its components, as it does not appear necessary that the college meet. It is enough that each of the members, unanimously, consent in writing to the use of compromise for the specific election.[1] The use of election by compromise, therefore, must be expressly established each time it is used.

Election by compromise consists of the designation of a certain number of persons—generally reduced and, if possible, an odd number[2]—to whom the right of suffrage is transferred in order to carry out the election. Such persons (commissioners) may or may not be members of the electoral body. In any case, if said electoral body is formed entirely by clerics, the commissioners should also be clerics; otherwise the election is invalid. Moreover, the persons designated to carry out the election by compromise should be capable, that is, at least not having any of the invalidating characteristics outlined in c. 171 § 1. Particular law may indicate other requirements for suitability.

There may also be cases of sole compromise where, logically, an election is not made by voting, since, in the terms of the mandate which grants it, the individual will is expressed, in this case, as the will of the electoral college.

The compromise should be granted in a written document, in which some conditions are indicated. In order for the election to be valid, these conditions must be met, as long as they are not contrary to the law. In this case, the conditions contrary to the law are considered non-existent. In addition, the commissioners should follow all the rules concerning the election, although they have not been expressly mentioned in the act granting the compromise, as they have been established by the universal legislation as admissible under the applicable particular, statutory, or regulatory law. By virtue of the presence or lack of conditions in the act of

1. Cf. F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), p. 387.
2. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum* II, 3rd ed. (Rome 1943), p. 326.

compromise, this method of election is customarily divided into either absolute or conditioned.[3]

In principle, the commissioners may not postulate a candidate who possesses a canonical impediment from which a dispensation is usually given, unless they have been expressly authorized to do so in the compromise (cf. c. 180 § 2).

The canonical election carried out by compromise is as valid as a normal election and, therefore, confers the office if it is constitutive, or *ius ad rem* if it requires confirmation by the authority.[4]

3. Cf. ibid.; F. MAROTO, *Instituciones...*, cit., p. 386.

4. Cf. R. NAZ, art. "Élection," in *Dictionnaire de droit canonique* V (Paris 1953), col. 244; F. MAROTO, *Instituciones...*, cit., p. 390; F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., pp. 326–327.

175 Cessat compromissum et ius suffragium ferendi redit ad compromittentes:

1° revocatione a collegio aut coetu facta, re integra;

2° non impleta aliqua condicione compromisso apposita;

3° electione absoluta, si fuerit nulla.

A compromise ceases, and the right to vote reverts to those who transferred it, when:

1° it is revoked by the college or group before it has been put into effect.

2° a condition attached to the compromise has not been fulfilled.

3° the election has been held, but invalidly.

SOURCES: c. 173

CROSS REFERENCES: c. 119

COMMENTARY

Jesús Miñambres

The compromise transmits the right of the vote only to a specific case. The termination of the compromise occurs, therefore, once the commissioners have completed the election. That is, it ends once they have completed the mandate they received. This is true as much by the nature of the right of election itself, as by the nature of the mandate of the compromise itself. This canon deals, therefore, with the *normal* mode of termination of a compromise.

In some cases it may happen that the commissioners fail to arrive at a suitable candidate for election to the office in the designated time period. In this case—although it is not expressly understood in any of the hypotheses of the canon discussed here—the compromise is also terminated at the same time the right of election for this term lapses (cf. c. 165).[1]

On the other hand, the legislator establishes that the compromise can be revoked at any moment prior to the election, *re integra*—while the issue is whole, according to the canon with classic juridical expression. According to the doctrine, an agreement of the majority of members of the college would be sufficient to revoke the compromise, and the unanimity required to utilize the system of election by compromise would not be

1. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 327.

necessary.[2] At the moment at which the electoral body presents the agreement to revoke the compromise—based on the general rules of c. 119—the final proceeding of the commissioners no longer has any validity, since the order that gave them legitimacy is lacking.

The legislator establishes, in the second place, the termination of the compromise when any of the conditions indicated in the act of compromise are not met (cf. c. 174 § 3). This termination may be produced—as in the prior case—also while the issue is *res integra*, since once the election is produced without respect to one of the conditions, it is invalid.

Number 3° of the canon expressly established that the invalidity of the election terminates the compromise. This has caused some authors to consider what would happen if the election carried out by the commissioners were valid but the candidate elected did not accept the election. These authors suggest that the right to vote a second time would revert to the same commissioners and not to the principal electoral body (cf. c. 177 § 2). On the contrary, the nullity of the election carried out by the commissioners would terminate the compromise and the right of suffrage would return to the principal college, which would then be able to proceed to a new election.[3] Effectively, this is the only way in which what is indicated in number 3° of this canon makes sense.

Whether the compromise is terminated by completion of the mandate or by passing of the term, the remaining steps for the effective provision of the office—depending on whether or not the election was accepted (cf. cc. 176–179)—would follow the normal course. That is, it would follow the same course that would be followed if the designation had been carried out by the principal electoral body. On the other hand, in the three cases of termination of compromise indicated in the canon discussed here, the right of suffrage returns to the principal body, which proceeds to the election either directly or through another order of compromise.

2. Cf. R. NAZ, "Élection," in *Dictionnaire de droit canonique* V (Paris 1953), col. 244; F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), p. 390.

3. Cf. R. NAZ, "Élection," cit., col. 244; on the contrary, F. MAROTO, *Instituciones*..., cit., p. 392, which does not offer conclusive arguments.

176 Nisi aliud iure aut statutis caveatur, is electus habeatur et a collegii aut coetus praeside proclametur, qui requisitum suffragiorum numerum rettulerit, ad normam can. 119, n. 1.

Unless it is otherwise provided in the law or the statutes, the person who has received the requisite number of votes in accordance with can. 119 n. 1, is deemed elected and is to be proclaimed by the person who presides over the college or group.

SOURCES: c. 174

CROSS REFERENCES: c. 119

COMMENTARY

Jesús Miñambres

The norm of this canon establishes who is elected and states the need for a proclamation of the result of the election which puts an end to the electoral processes. This proclamation, nonetheless, does not immediately confer the office of the person who has been elected, since the provision itself depends on the acceptance by the designated person (cf. c. 178) and on confirmation, where applicable, on the part of the competent authority (cf. c. 179).

In accordance with what is indicated by c. 119, 1°, if the particular, statutory, or regulatory law does not indicate otherwise, the person who obtains the absolute majority—half plus one—of the votes of those present is elected. In the specific aspect of the functional *quorum* required for elections relative to the basis by which the majority is calculated, there has been an important change with respect to*CIC*/1917. Canon 101 of the *CIC*/1917, took as a basis only the valid votes, or decisive votes plus blank votes,[1] but not abstentions, or, of course, invalid votes. The *CIC*, on the other hand, takes as a basis for the *quorum* all of those present (*placuerit parti absolute maiori eorum qui sunt praesentes,*

1. Cf., on the contrary, J. CANOSA, "La maggioranza richiesta nella elezione canonica," in *Ius Ecclesiae* 3 (1991), p. 370, which cites M. CONTE A CORONATA, *Institutiones Iuris canonici*, I (Taurine 1928), pp. 171–172. All of the authors who consider the blank vote to be invalid because it is "absolutely indeterminate" express themselves in the same way (see commentary on c. 172); among others, cf. F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), p. 121, note 1; p. 371.

c. 119, 1°), thus granting a certain juridical significance—although negative—to null votes and abstentions.

On the other hand, the aforementioned c. 101 of the *CIC*/1917, took into consideration many more possibilities of resolution in the third voting. These include the relative majority, the qualifying vote of the president of the college in the case of a tie, seniority in the sacred order or in the religious profession and, finally, age (cf. c. 101 § 1, 1° *CIC*/1917). In the *CIC* only the relative majority remains—based on the real interpretation of June 28, 1990[2]—and age (cf. c. 119, 1°). The *Codex canonum Ecclesiarum orientalium* is more similar to the *CIC*/1917, except for the elimination of the qualifying vote of the president (cf. c. 956 § 1 *CCEO*). It expressly refers to the relative majority and, for elections among clerics, the seniority of ordination, or among religious, of the profession.

In any case, it can be affirmed—as Canosa indicated[3]—that, at least implicitly, the relative majority is also present in c. 119, 1° of the *CIC* for the selection of those candidates who will be voted upon in the third scrutiny. In any case, the basis upon which the majority is calculated is constituted by the decisive votes, and does not consider the invalid votes, blank votes, or abstentions (*post duo inefficacia scrutinia suffragatio fiat super duobus candidatis qui maiorem suffragorum partem obtinuerint*).

The required majority (half plus one) will not always be easy to obtain. If there are at least three candidates, the required sum of votes will be difficult to obtain for any one of them. In order to avoid excessive prolongation of the election, the legislator has established that after two ineffective scrutinies only those two candidates previously receiving the most votes will be included, or, in the case of a tie among more than two candidates, among the two oldest in age. This criterion of the age is arguable, since it does not necessarily imply greater suitability, or greater capability to fulfill the office, or a consensus among the electoral body. Nonetheless, it confers juridical security to the canonical electoral rule and, in this sense, it usefully demonstrates the practice to avoid possible conflicts.

The individuation of the elected person is arrived at through the application of these criteria: it formulates the collegial will concerning one of the candidates. The individual opinion of each of the electors is not important here, nor is the possible disagreement of one or more of them—the minority—over the elected candidate. With the proclamation of the results by the president—an act which gives finality to the voting phase—the election of the candidate becomes imputable to one or more members of the college and becomes the collegial will. This does not mean that all of the electors are in agreement with the result or that they should submit to the decision of the majority. It only indicates that their individual opin-

2. *AAS* 82 (1990), p. 845.
3. Cf. J. CANOSA, "*La maggioranza...*," cit., pp. 373–374.

ion is no longer important. The election is provided by the college, and not by one or another of its members. Therefore, it is futile to try to look for devices to be able to say that the dissenting member accepts the result of the election. In reality, his or her personal will is now indifferent.[4]

Everything said to this point constitutes the general universal rule; the particular, statutory, or regulatory rules can stipulate other things. This is expressly indicated both in the canon discussed here and in c. 119.

At the moment that the person designated for the office has been named, the college should proceed to the public proclamation of the result by the president of the electoral body. This should be done as long as the statutes or the particular or customary law do not call for some other system of proclamation.

Nothing is established regarding the act of proclamation in the regulations for the election of the Roman Pontiff. Perhaps the fact that the scrutiny and the counting of ballots is done publicly before the voters (cf. *UDG*, 69–70) replaces, in this specific case, the act of proclamation of the result by the president. However, it may also be considered that, as the *Romano Pontifici eligendo* is a special rule for a specific election, and does not expressly indicate anything with regard to the proclamation, the general rule indicated by the *CIC* would apply. Therefore, the person presiding over the elective act should provide the final results of the same.

In any case, this proclamation of the result of the election before the electoral group is different from the publication of the same for general knowledge (cf., e.g., *UDG*, 89). The act of publication is not essential for the provision of an office by election, at least in the rule of the Code and except for legitimate contrary prescriptions of the applicable particular or statutory legislation.[5]

From this time, the provision for office by election depends only on the acceptance by the elected person and, where applicable, on confirmation by the competent authority.

4. Cf. S. VALENTINI, *La collegialità nella teoria dell'organizzazione* (Milan 1980), p. 279.
5. Cf., F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 324.

177 **§ 1. Electio illico intimanda est electo, qui debet intra octiduum utile a recepta intimatione significare collegii aut coetus praesidi utrum electionem acceptet necne; secus electio effectum non habet.**

§ 2. Si electus non acceptaverit, omne ius ex electione amittit nec subsequenti acceptatione convalescit, sed rursus eligi potest; collegium autem aut coetus intra mensem a cognita non-acceptatione ad novam electionem procedere debet.

§ 1. The election is to be notified immediately to the person elected who must, within eight canonical days from the receipt of notification of the election, intimate to the person who presides over the college or group whether or not he or she accepts the election; otherwise, the election has no effect.

§ 2. The person elected who has not accepted loses every right deriving from the election, nor is any right revived by subsequent acceptance; the person may, however, be elected again. The college or group must proceed to a new election within one month of being notified of non-acceptance.

SOURCES: § 1: c. 175; CodCom Resp. 1 et 2, 4 nov. 1919
§ 2: c. 176 § 1; CodCom Resp. 1 et 2, 4 nov. 1919

CROSS REFERENCES: cc. 55, 201–203, 1509

COMMENTARY

Jesús Miñambres

Upon completion of the voting, the result of the election must be communicated to the person elected, if this person is not a member of the electoral body. If the elected is a member of the electoral body, such communication is not always necessary. In this case, the proclamation of the result of the election would suffice (cf. c. 176); nevertheless, the notification will be necessary if the elected, although a member of the electoral body, was not in fact present at the proclamation of the result of the election.

The act of communication is absolutely necessary because it indicates the start of the term conceded to the elected for his or her acceptance or refusal of the result of the election. As for the method of

notification, by analogy,[1] what is established in c. 1509 § 1 for the notification of citations, decrees, sentences, and other judicial acts may be applied: that is, "with due regard to the norms laid down by particular law, the notification ... is to be done by means of the public postal service, or by some other particularly secure means" (see also commentary on c. 166). In extraordinary cases this can be done through reading of the act "in the presence of a notary or two witnesses; a record of the occasion is to be drawn up and signed by all present" (c. 55).[2] In addition, it appears suitable that the act of election establish that "the fact and the manner of notification must be shown" (c. 1509 § 2).

Given the possibility of passive behavior on the part of the elected—which causes the election to be ineffective—it will be appropriate to utilize a method of communication that allows for certain knowledge, with the possibility of proof, of the date of reception of the notification by the elected person. This is because it is from this date that the eight-day term begins.

At the moment the elected candidate receives the communication three possibilities arise: *a*) the express acceptance of the result of the election within term of eight canonical days; *b*) the express renunciation within the same amount of time; *c*) silence during the eight canonical days, which causes the loss of juridical effectiveness of the election and, therefore, can be compared with a tacit renunciation. The acceptance—that in the constitutive election confers the office, and in the election that requires confirmation grants to the elected an *ius ad rem* that only requires the act of the competent authority (cf. c. 178)—should be communicated to the president of the electoral college although it must be confirmed by an authority outside the college itself. In this latter case, it is necessary to distinguish the act of the acceptance—which must be done before the president of the electoral body—from the petition of confirmation to the authority who should grant it (cf. c. 179). The particular or statutory law can establish rules regarding the mode with which to communicate the acceptance to the president of the college. In any case, it would be appropriate to record it in writing, and to have it signed by witnesses as to the date in which the communication was produced and its content. This should be done to avoid the possible recourse of nullity of the election for failure to complete the prescribed procedural steps.

In the case where the elected candidate does not accept the election by express renunciation, he or she loses any right deriving from the election itself. In this specific situation, the legislator has determined the following manner of proceeding: "the college or group must proceed to a

1. Cf. C. J. ERRÁZURIZ, "Circa l'equiparazione quale uso dell'analogia in diritto canonico," in *Ius Ecclesiae* 4 (1992), p. 215–224.
2. Cf. E. LABANDEIRA, *Tratado de Derecho administrativo canónico*, 2nd expanded ed. (Pamplona 1993), p. 374.

new election within one month of being notified of non-acceptance" (§ 2). This term of one month is added to the canonical trimester indicated in c. 165, and the extension applies only to this case. This occurs because the term of three months does not refer to the completion of all of the elective proceedings, but only to the opening of the proceedings, although in fact the election may be produced outside of this term.[3]

Some authors have attempted to resolve the difficulty that may be presented in the case where the president of the electoral college comes to know of the revocation of the renunciation, and the consequent express acceptance by the candidate before the renunciation itself is complete. In such a case, the authors suppose that the acceptance would be valid because the issue remained whole.[4] This opinion is justified by the bilateral nature of the acts of acceptance and renunciation, which are complete only upon the reception of the same by the president of the electoral group. Before said reception, the act is not complete and may be revoked. This deals, then, with a different case than that considered in § 2, which implies that the renunciation is accepted.

In the case of silence during the eight days following reception of the notification of the result of the collegial decision (§ 1, *in fine*), the election is ineffective. Contrary to what occurs in the case of an express renunciation, here the legislator does not indicate what should be done once the term of eight days passes without answer from the elected candidate. It appears that the electoral body may proceed to a new election, but in this case the additional term of one month is not allowed. Therefore, the new vote must be initiated before the expiration of the general term of three months to carry out the election.

The legislator does not indicate a limit to the number of elections that may be carried out by this system,[5] whereby the college will continue voting—within the canonical trimester of c. 165—as long as no candidate is found who is willing to accept election within the term of eight days determined by this canon. The acceptance outside of the term of eight days has no juridical effect, although it could, in fact, determine a reelection of the candidate who would be known to accept the election on the next opportunity.

The term of eight days indicated for the acceptance must meet the criteria of c. 201 § 2—which defines canonical time—and those of cc. 202 § 1 and 203—which establish the criteria for the computation of canonical time. In short, the term begins at midnight on the day in which notice of the election is received and ends eight days later, also at midnight. That is, if notice of the election is given to the elected on a Monday at 11:00 in the

3. Cf. *Comm.* 22 (1990), p. 142.
4. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 328.
5. Cf. J.I. ARRIETA, commentary on c. 177, in *Pamplona Com.*

morning, the term of eight days begins at 12:00 midnight of the same day, and lasts until 12:00 midnight on the Tuesday of the following week (see commentary on cc. 200–203).

The norm of this canon, which refers to the necessity of notifying the elected candidate; and to the term of eight canonical days in which the elected must expressly accept or renounce the election; and the rendering the election ineffective by silence during this period of time; as well as the college completing the final acts of the election, are by law necessary and therefore may not be changed by statutes or particular applicable law.

In the rule of the Code, the acceptance is configured as a free act by the candidate, who can accept or decline the office. The doctrine nonetheless indicates that, on occasion, by virtue of particular law—mainly in elections required by the constitutions of some institutions of consecrated life—the elected may be obligated to accept the election made by the electoral body.[6] *Universi Dominici gregis*, as far as it is concerned, *urges* the elected for the office of Roman Pontiff to accept the election made in the conclave (cf. no. 86).

6. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 327, note 51*.

178 **Electus, acceptata electione, quae confirmatione non egeat, officium pleno iure statim obtinet; secus non aquirit nisi ius ad rem.**

If the election does not require confirmation, by accepting the election the person elected immediately obtains the office with all its rights; otherwise, he or she acquires only a right to the office.

SOURCES: c. 176 § 2; CodCom Resp. 4, 4 nov. 1919

CROSS REFERENCES: cc. 382, 404, 527, 542, 3°, 1732, 1737

COMMENTARY

Jesús Miñambres

The juridical effects of the acceptance by the elected candidate (see commentary on c. 177) vary based on whether or not the election was constitutive. In the case of the constitutive election, the acceptance confers the office. In the non-constitutive election, where confirmation by the competent authority is required, the acceptance concedes the right to the office—*ius ad rem,* following the classic formula utilized by the legislator—which needs the confirmation itself.

This is the culminating moment of the election. After acceptance by the designated candidate (that should be carried out before the president of the electoral college: cf. c. 177 § 1), the elective proceeding itself is terminated. The final acts (confirmation, taking of possession, etc.) then correspond to the initiative of the elected and not to the electoral body. The intervention of the college after acceptance by the elected candidate is only required in the case where postulation is necessary (cf. cc. 180ff).

Nonetheless, the acts subsequent to the acceptance do not have the same juridical nature. Some are essential for the actual provision of the office, such as the confirmation (cf. c. 179). Others are essential, by universal law, in relation to some specific offices, to be able to exercise the functions that correspond to the office. Some examples are the taking of possession by the diocesan bishop (cf. c. 382), of the coadjutor bishop and the auxiliary (cf. c. 404); of a parish priest (cf. c. 527), or by a priest solely charged with the pastoral care of one or more parishes. (cf. c. 542, 3°), etc.

For other offices, the particular or statutory law regulating their provision can determine other acts, not essential to the provision, but legitimately required through diverse concepts, that should be carried out by the elected, or by the electoral group, or even by third parties. Thus, for exam-

ple, the publication of the result of the election may be required, or the prayer of the *Te Deum* in an action of thanksgiving, or other prayers, etc.[1]

In the case where someone—whether or not that person is a member of the electoral body—feels wronged by the act of provision (cf. c. 1732), he or she may give notice of recourse within a term of fifteen canonical days (cf. c. 1737). Certainly, for this possibility to be acted upon, there ought to be a just motive and a personal, direct, and actual interest in the one elected by the one appealing.[2] When the election is constitutive, notice of the recourse should be given before the authority responsible for the alternate provision of office due to loss of the right of suffrage in a specific case (cf. c. 165). For the election that requires confirmation, that is, direct intervention on the part of an ecclesiastical authority outside—at least pertaining to the development of this function—of the elective body, notice of the recourse should be given before that authority (see commentary on c. 179).

In those cases where the election requires confirmation, the acceptance by the elected confers a *ius ad rem*. It is not an easy task to determine what this right consists of. Negatively, it is customarily indicated that the designated person, before the confirmation, cannot become involved in the administration of the ecclesiastical office, nor in what is referred to as spiritual welfare, nor in any material affairs (cf. c. 179 § 4).[3] Further, the *CIC*/1917, established penalties for this case of assuming office (cf. c. 2394) that, nonetheless, is not considered a type of delict in the *CIC* (cf. c. 1381).

As for what is referred to as the positive content of the *ius ad rem*, the translation of the canon refers to the office itself. Nonetheless, the text of c. 179 § 2 could make one think that the right refers rather to the confirmation and, therefore, is exhausted by its concession or denial, such that the designated person cannot reclaim the office without the confirming act (see commentary on c. 179). In any case, what does appear clear is that the confirmation is not a discretional act, but due to justice (*ius ad rem*). Therefore, justice demands that if the elected is suitable and the election was carried out lawfully the confirmation will be granted.[4]

1. Cf. F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), pp. 393–394.
2. Cf. E. LABANDEIRA, commentary on c. 1737, in *Pamplona Com.*
3. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 328.
4. Cf. ibid., p. 329.

179 **§ 1. Electus, si electio confirmatione indigeat, intra octiduum utilea die acceptate electionis confirmationem ab auctoritate competenti petere per se vel per alium debet; secus omni iure privatur, nisi probaverit se a petenda confirmatione iusto impedimento detentum fuisse.**

§ 2. Competens auctoritas, si electum reppererit idoneum ad normam can. 149 § 1, et electio ad normam iuris fuerit peracta, confirmationem denegare nequit.

§ 3. Confirmatio in scriptis dari debet.

§ 4. Ante intimatam confirmationem, electo non licet sese immiscere administrationi officii sive in spiritualibus sive in temporalibus et actus ab eo forte positi nulli sunt.

§ 5. Intimata confirmatione, electus pleno iure officium obtinet, nisi aliud iure caveatur.

§ 1. If the election requires confirmation, the person elected must, either personally or through another, ask for confirmation by the competent authority within eight canonical days of acceptance of the office; otherwise that person is deprived of every right, unless he or she has established that there was just reason which prevented confirmation being sought.

§ 2. The competent authority cannot refuse confirmation if it has found the person elected suitable in accordance with can. 149 § 1, and the election has been carried out in accordance with the law.

§ 3. Confirmation must be given in writing.

§ 4. Before receiving notice of the confirmation, the person elected may not become involved in the administration of the office, neither in spiritual nor in material affairs; any acts possibly performed by that person are invalid.

§ 5. When confirmation has been notified, the person elected obtains full right to the office, unless the law provides otherwise.

SOURCES: § 1: c. 177 § 1
§ 2: c. 177 § 2; CodCom Resp. 3, 4 nov. 1919
§ 3: c. 177 § 3
§ 4: c. 176 § 3; CodCom Resp., 15 aug. 1918
§ 5: c. 177 § 4

CROSS REFERENCES: cc. 51, 57, 148, 149 § 1, 1737

COMMENTARY

Jesús Miñambres

In the case where the election is not constitutive, the legislator establishes the need for the elected person to ask for confirmation, either personally or through another. Such petition must be made to the competent authority within eight canonical days, different from the term of acceptance, but with the same characteristics. The term begins at midnight of the day on which the notification of acceptance of the election was made to the president of the college. If the term is allowed to pass without a request for confirmation the elected person loses the right to the confirmation, the *ius ad rem* that had been acquired by the acceptance.[1]

The confirmation is not a discretional act of the authority. If the elected person meets the requirements that the law—universal, particular, statutory, or regulatory—indicates, he or she should be named to the office in question. The authority should determine if the candidate is suitable for the office (not that he or she is the most suitable of all the candidates[2]) and if he or she is in communion with the Church (cf. c. 149 § 1). In addition, the authority is responsible to examine the legality of the election. If all these requirements are met, the confirmation is a proper act.

The confirmation, or its refusal, should be given in a written document in which the motive for the decision is given, especially in the case of a refusal (cf. c. 51), since the designated person has a right to the confirmation (see commentary on c. 178). Although it is up to the authority to determine the suitability of the elected for the office, the right of the candidate cannot be refused without reason. One who feels wronged by the decree of confirmation or refusal can lodge a recourse before the hierarchical superior of the authority from whom the decree was issued or before the actual authority within a term of fifteen canonical days (cf. c. 1737).[3]

The notification of confirmation confers the office *pleno iure*. Before such notification, the elected cannot carry out any acts corresponding to the office in question, under penalty of nullity. The elected does not possess any right to carry out acts of the office. His or her right (*ius ad rem*) refers to the confirmation, and not to the office itself, as long as there is no notification of the decree of confirmation. Effectively, "the mere issuance of the act of administrative will—in our case, confirmation—does not

1. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), p. 329; F. MAROTO, *Instituciones de Derecho canónico*, II (Madrid 1919), pp. 398–399.
2. Cf. *Comm.* 22 (1990), pp. 125–126; A. ALONSO LOBO, in *Comentarios al Código de Derecho canónico*, I (Madrid 1963), p. 475.
3. Cf. E. LABANDEIRA, *Tratado de Derecho administrativo canónico*, 2nd ed. (Pamplona 1993), pp. 423ff.

suffice to produce its effects, as if the administration alone existed and worked solely by its own agency. To the contrary, the characteristic of the *imperium* which public authorities possess is that their acts interfere in the subjective sphere of those under their administration by affecting their rights and interests. That is why one condition for the efficacy of the administrative act is that it be communicated to the incumbents."[4] It can be argued whether this deals with a requirement of the administrative act or its effectiveness. In any case, given that the acts are made to give effectiveness, the notification is indispensable (see commentary on cc. 166 and 177).

The legislator does not establish a time frame under which the authority must give notification of the confirmation or refusal. The rule established by c. 57 applies here. This rule states that if three months pass without an express decision by the authority, the confirmation will be understood to be refused, allowing the possible lodging of recourse (cf. c. 1737), by virtue of the negative administrative silence declared by the legislator.[5]

The authority to whom this canon refers is determined by the law applicable to the provision of the office in question (statutes, constitutions, particular law, custom, etc.) or, lacking express indication, by what is established in c. 148.

4. Ibid., p. 373.
5. Cf. ibid., pp. 405ff.

ART. 4
De postulatione

ART. 4
Postulation

180 **§ 1. Si electioni illius quem electores aptiorem putent ac praeerant impedimentum canonicum obstet, super quo dispensatio concedi possit ac soleat, suis ipsi suffragiis eum possunt, nisi aliud iure caveatur, a competenti auctoritate postulare.**

§ 2. Compromissarii postulare nequeunt, nisi id in compromisso fuerit expressum.

§ 1. If a canonical impediment, from which a dispensation can be and usually is given, stands in the way of the election of a person whom the electors judge more suitable and prefer, they can, unless the law provides otherwise, postulate that person from the competent authority.

§ 2. Those to whom the power of electing has been transferred by compromise may not make a postulation, unless this is expressly stated in the terms of the compromise.

SOURCES: § 1: c. 179 § 1
§ 2: c. 179 § 2

CROSS REFERENCES: cc. 119,1°, 147, 158 § 2, 159, 179 § 2

COMMENTARY

Jesús Miñambres

1. The postulation of ecclesiastical office is a petition of the electoral college, presented to the competent ecclesiastical authority so that a person who by common law may not be elected to carry out a specific office due to a canonical defect or impediment may be admitted to fulfill the office. This is done through a commonly granted dispensation. That is, it

becomes a variant of the election in which, from the voting of the electoral body, a person is elected who does not possess all the required conditions for fulfillment of the office in question.

2. The doctrine has repeatedly indicated the similarities and differences that exist between the systems of election and postulation. Gratian had already clearly stated that *aliud est postulari, aliud eligi*. In the *CIC*/1917, postulation appeared as an autonomous system that could not coincide with election, although certainly the two were very similar (cf. c. 180 § 1). In the *CIC*, nonetheless, postulation is clearly expounded in the framework of the election and, until the moment of designation of the candidate, follows its rules.

The main juridical difference between election and postulation is that the latter does not confer on the postulated the right to the office (*ius ad rem*), while election does grant such right to the elected (cf. c. 178). Thus, it can be stated that the confirmation of the elected is due in justice and cannot be denied without some injury of the right (cf. c. 179 § 2), while the admission of the postulated is granted as a favor and its refusal cannot produce injury to any right. Another difference is seen from the point of view of the conditions the candidate (elected or postulated) should meet. While it is enough for the elected to be a worthy and suitable person, the postulated should be the most able person for the office who, nonetheless, due to an impediment, is not suitable to fulfill that office. (This is a result of the literal tenor of the text of this canon.)

Nonetheless, in order to better define the juridical framework of postulation in relation to election, it is useful to keep in mind that c. 147 places postulation in the same verbal framework as the confirmation, separating both systems of provision from the conferring election. In effect, the intervention of the authority that implies the confirmation of the election could make the rule regarding postulation superfluous. It would have been sufficient to add the regulation that would permit dispensation of the impediment in the same act as the confirmation to the rules regarding confirmation. Perhaps this would require an express petition of dispensation by the electoral body. In this way, the confirmation and the dispensation of the impediment could have been conceded in a single act by the authority.

On the other hand, the conferring election does not require any act by the authority. Therefore, his or her intervention is only necessary in the case where the candidate deemed most able and preferred by the electors suffers from some impediment that can, and commonly does, receive dispensation, that is, in the case of postulation. This makes the specific rules regarding this system of provision necessary. Thus, although in this canon, with respect to its predecessor in the *CIC*/1917 (c. 179), the explicit reference to the conferring election has been eliminated, at the time of its drafting the conferring election was considered overall.

Postulation is also different from the presentation carried out by a college or group of people (cf. c. 158 § 2), for several reasons. First, as is obvious, the two differ because the right exercised by the college in postulation is a right of election, while in presentation it is a simple right to indicate a candidate to the authority who should appoint him or her. But overall, what distinguishes postulation from presentation is the right acquired by the designated person—by the fact of the designation itself—and the different nature of the action of the authority. Thus, although the candidate presented to the authority does not acquire any right to the office, the authority is obligated to appoint the designated person (cf. c. 163). Such obligation should have a corresponding right, interest, or legitimate expectation for the person presented. In postulation, nonetheless, neither does the candidate acquire any right (he or she is juridically *impeded* from it), nor does the authority have any obligation to grant the postulation (cf. c. 182 § 3).

Finally, postulation is not a type of free conferral with indication of the candidate by an electoral group. In those cases where the possibility of postulation is anticipated, the provision of the office corresponds to the electoral college. The intervention of the authority is limited to the dispensation of the canonical impediment. In free conferral, on the other hand, although a consultation with some person or college appears to be expected, the provision is directly carried out by the competent authority (see commentary on c. 157).

3. Some authors speak of the existence of an improper—or simple—postulation that would be given when an authority is asked for permission to elect one of his or her subjects, or when the authority is asked to provide an office in favor of some person. All emphasize that in neither of these cases is the term postulation used in a technically juridical sense, nor is its normal Latin significance commonly synonymous with petition, since in neither case does the candidate possess a canonical impediment, nor does the nature of the act of provision change.

4. Postulation in a technically canonical sense is, then, a system of provision, different from election, in the case where the college responsible to elect the candidate elects by a wide majority (cf. c. 181 § 1) a person who suffers some canonical impediment to fulfill the office. It implies, therefore, three distinct juridical acts: election of the candidate, the postulation, and the dispensation of the impediment by the competent authority.

In principle, this system is always concurrent with that of election. That is, unless the law applicable to the specific case—rules, statutes, particular legislation—expressly excludes it, anyone who can elect can also postulate. An exception to this rule would be presented, according to some authors, in the law of religious. In this environment, despite the lack of an express prescription in the *CIC*, c. 507 § 3 of the *CIC*/1917, would remain in force. This stated that postulation was considered extraordinary

in elections made in the chapters, and it would only be permitted if it were indicated in the constitutions.

Universal law excludes postulation in the case of election by compromise (§ 2), unless the act of compromise expressly established the possibility of postulation.

5. In order to be configured as a form of election (as has already been indicated), the proceeding of designation of the candidate is very similar to what is prescribed by cc. 166–173. In postulation, the rules of election must be observed, with the exception of those that assume the suitability of the person that must be elected. In this first phase of designation of the candidate the college must proceed, therefore, under the rules already set forth for the case of election (see commentary on cc. 166–173). These include convocation of the college or group, communication of the same by those means prescribed by the law, establishment of the elective meeting with respect to the structural *quorum*, naming of the scrutineers, counting of the votes, proof of their validity and of the validity of the election itself, compilation of the acts with corresponding signatures, etc.

The procedural differences are manifested only in the number of votes required for the candidate to be postulated (cf. c. 181 § 1) and in the necessity that the will to postulate be expressed in the vote itself (cf. c. 181 § 2). Consequently, it appears that the college should also proceed to the proclamation of the elected by the president (cf. c. 176) but not to the notification of the result of the election (cf. c. 177). This is because the initiation of the postulation—the second phase in this system of provision—corresponds to the president of the college or group (cf. c. 181 § 1) and does not require any intervention by the candidate. This emphasizes the lack of acquisition of rights by the postulated (cf. c. 182 § 3), whose only intervention revolves around the moment of acceptance (cf. c. 183 §§ 2 and 3).

If the election is carried out by compromise to those who expressly concede the power to postulate, the proceeding will follow the rules of cc. 174 and 175.

181 **§ 1. Ut postulatio vim habeat, requiruntur saltem duae tertiae partes suffragiorum.**

§ 2. Suffragium pro postulatione exprimi debet per verbum: *postulo*, aut aequivalens; formula: *eligo vel postulo*, aut aequipollens, valet pro electione, si impedimentum non exsistat, secus pro postulatione.

§ 1. For a postulation to have effect, at least two thirds of the votes are required.

§ 2. A vote for postulation must be expressed by the term 'I postulate', or an equivalent. The formula 'I elect or postulate', or its equivalent, is valid for election if there is no impediment; otherwise, it is valid for postulation.

SOURCES: § 1: c. 180 § 1; CodCom Resp. 5–7, 4 nov. 1919; CodCom Resp. 1 et 2, 1 iul. 1922 (*AAS* 14 [1922] 406)
§ 2: c.180 § 2

CROSS REFERENCES: cc. 119; 176

COMMENTARY

Jesús Miñambres

This canon indicates the procedural differences between postulation and election relative to the designation of the candidate (§ 2), and in the requirement of the qualified functional *quorum* to be able to proceed to the effective postulation of the same (§ 1).

1. The procedural differences with election, at least in the phase of designation of the candidate, are minimal (see commentary on c. 180). In § 2, the legislator has established one of these differences: it requires that the petition of postulation by the voters be express, in a manner that guarantees the voter's effective will to postulate.

The expression of a will to postulate, in a case where the person receiving the vote suffers from some impediment that is not known at the moment of the vote, is permitted in the same vote as one to elect if there is no impediment. This may be done in order to avoid a proceeding of excessive duration, and recalls a traditional prescription (cf. c. 180 § 2 *CIC*/1917). In this case, if the candidate is not affected by any impediment, the vote serves to elect him or her. If an impediment exists, it also serves for the postulation. Thus the proceeding, in a single vote, acts upon the rights

of both election and postulation. That is, it reveals "a dual intention: that of electing a candidate and that of requesting the dispensation from the impediment."[1]

The legislator has attempted to indicate here the formulas that should be followed in the vote to express the proper will. As for the reference to "equivalent" possibilities, the doctrine clarifies that the words *rogo* or *peto*, may be used in place of *postulo*, or the expressions *eligo et postulo, eligo et peto*, etc.[2] Nonetheless, the same authors deny the validity of the forms *eligo postulando, postulo eligendo, eligo postulandum, eligo in postulandum*, etc.[3]

2. Paragraph 1 indicates the requirement of a qualified majority of two-thirds of the votes of the electors in favor of the postulated candidate to be able to proceed to the postulation of the same to the authority. This rule simplifies the provision of c. 180 § 1 of the *CIC*/1917, which established two possibilities: *a*) that a vote would have been made only for postulation, in which case the person who obtained the absolute majority, or half plus one, could be postulated; *b*) that together with a candidate who requires postulation, there can also be another or others who do not. In the second case, the postulating must be by two-thirds of the total votes issued.[4]

In the case in which the voting results in a tie among various candidates, of whom anyone would require postulation, and none of the candidates acquired the majority required for election (half plus one of the votes of those present: cf. cc. 176 and 119 § 1; or the two thirds necessary for postulation: cf. c. 181 § 1), it appears that the general norm regarding the necessary *quorum* for election should be followed (see commentary on c. 176), and that, in any case, postulation must always require a two-thirds majority.[5]

The lack of clarity in the previous legislation had provoked a reply from the Pontifical Commission for the Authentic Interpretation of the Canons of the Code of Canon Law,[6] in which the manner of proceeding was established for the third scrutiny when both elective and postula-

1. J.I. ARRIETA, commentary on c. 181, in *Pamplona Com.*
2. Cf. M. CONTE A CORONATA, *Institutiones Iuris canonici*, I (Taurine 1928), p. 293.
3. Cf. ibid., note 10; F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), pp. 337–338; F. MAROTO, *Instituciones de derecho canónico*, II (Madrid 1919), pp. 426–427.
4. Cf. commentary on c. 180, in *Código de derecho canónico y legislación complementaria* (Madrid 1954); M. CONTE A CORONATA, *Institutiones...*, cit., pp. 292–295; R. NAZ, "Offices ecclésiastiques," in *Dictionnaire de droit canonique*, VI (Paris 1953), cols 1094–1095; F.X. WERNZ-P. VIDAL, *Ius canonicum...*, cit., p. 338.
5. Cf. F.J. URRUTIA, *De normis generalibus. Adnotationes in Codicem: Liber I* (Rome 1983), p. 117; J. MANZANARES, commentary on c. 181, in *Salamanca Com*; E. KNEAL, commentary on c. 181, in *The Code of Canon Law, A Text and Commentary* (New York 1985).
6. July 1, 1922, cf. *AAS* 14 (1922), p. 406.

tional votes occurred in the same proceeding. In this case, the person who obtained the relative majority and was free of impediment would be elected, while the postulated candidate who did not acquire two-thirds of the vote would always be excluded. The current legislation has incorporated this interpretation in reference to the requirement of the two-thirds vote in favor of the postulated candidate, simplifying the system to require this majority in all cases.

182 **§ 1. Postulatio a praeside intra octiduum utile mitti debet ad auctoritatem competentem ad quam pertinet electionem confirmare cuius est dispensationem de impedimento concedere, aut si hanc potestatem non habeat, eandem ab auctoritate superiore petere; si non requiritur confirmatio, postulatio mitti debet ad auctoritatem competentem ut dispensatio concedatur.**

§ 2. Si intra praescriptum tempus postulatio missa non fuerit, ipso facto nulla est, et collegium vel coetus pro ea vice privatur iure eligendi aut postulandi nisi probetur praesidem a mittenda postulatione iusto fuisse detentum impedimento aut dolo vel neglegentia ab eadem tempore opportuno mittenda abstinuisse.

§ 3. Postulato nullum ius acquiritur ex postulatione; eam admittendi auctoritas competens obligatione non tenetur.

§ 4. Factam auctoritati competenti postulationem electores revocare non possunt, nisi auctoritate consentiente.

§ 1. The postulation must be sent, within eight canonical days, by the person who presides to the authority competent to confirm the election, to whom it belongs to grant the dispensation from the impediment or, if the person has not this authority, to seek the dispensation from a superior authority. If confirmation is not required, the postulation must be sent to the authority competent to grant the dispensation.

§ 2. If the postulation is not forwarded within the prescribed time, it is by that very fact invalid, and the college or group is for that occasion deprived of the right of election or of postulation, unless it is proved that the person presiding was prevented by a just impediment from forwarding the postulation, or did not do so in due time because of malice or negligence.

§ 3. The person postulated does not acquire any right from the postulation; the competent authority is not obliged to admit the postulation.

§ 4. The electors may not revoke a postulation made to the competent authority, except with the consent of that authority.

SOURCES: § 1: c. 181 § 1; CodCom Resp. 8, 4 nov. 1919
§ 2: c. 181 § 2
§ 3: c. 181 § 3
§ 4: c. 181 § 4

CROSS REFERENCES: cc. 57, 85–93, 160 § 1, 165

COMMENTARY

Jesús Miñambres

From the moment at which the electoral body has decided by majority to make the postulation of the candidate who suffers from a canonical impediment for the office in question, the second phase of this system of provision is initiated. This is the postulation in the strict sense, that is, the petition of dispensation of the impediment to the competent authority.

1. This is also a collegial act, pertaining to the electoral body;[1] thus, the procedural initiative corresponds to the president, in the name of the college or group, and not to the candidate, who may not yet know of the designation (see commentary on c. 181).[2] Specifically, the canon establishes that the president of the electoral college initiates the proceeding through the sending of the postulation to the authority within eight days.

2. The authority to whom the postulation should be sent in the case of non-constitutive elections is the same who should make the confirmation of the elected. In this case, nonetheless, the petition is not for confirmation but for postulation. That is, it is for dispensation of the impediment, by the same authority or by the superior to whom it corresponds, and for admission of the postulation.

In the case of conferring election, the postulation will be made to the authority competent to grant the dispensation of the impediment (cf. cc. 85–93), and not necessarily to the person to whom corresponds the free conferral of the office by loss of the right of election (cf. c. 165) if that person does not possess the power to dispense the impediment in question.[3] That is, the authority is determined by the power to grant dispensation, not by the power to provide the office.

3. The term of eight days established for postulation is peremptory, and its passing without the postulation being sent to the authority causes deprivation not only of the validity of the postulation itself *ipso iure*, but also of the right of election on this occasion. This rule is a necessary law and, therefore, cannot be dispensed by particular, statutory, or regulatory law applicable to each election.

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1. Cf. F.J. URRUTIA, *De normis generalibus. Adnotationes in Codicem: Liber I* (Rome 1983), p. 118. For the *CIC*/1917, cf. A. ALONSO LOBO, commentary on cc. 145–195, in *Comentarios al Código de derecho canónico,* I (Madrid 1963), p. 476.
2. Cf. also, M. CONTE A CORONATA, *Institutiones Iuris canonici,* I (Taurine 1928), p. 294; F.X. WERNZ-P. VIDAL, *Ius canonicum,* II, 3rd ed. (Rome 1943), p. 339; F. MAROTO, *Instituciones de derecho canónico,* II (Madrid 1919), p. 427.
3. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum...*, cit., p. 339; F. MAROTO, *Instituciones...*, cit., p. 427; F.J. URRUTIA, *De normis...*, cit., p. 118; E. KNEAL, commentary on c. 182, in *The Code of Canon Law, A Text and Commentary* (New York 1985).

The canon anticipates the possibility that in a specific case the postulation could not have been sent within the term of eight days for a just cause. In such circumstances, which must be proven—otherwise, the postulation is null *ipso facto*—it can be made outside of the prescribed term.

The canon also protects the situation of the electoral body in the case where the president of the body did not send the postulation due to fraud (fraudulent intent) or by negligence (lack of due diligence). In this case, if the fraud or negligence can be proven, the postulation can be processed outside of the prescribed term.

4. Contrary to what occurs in presentation (cf. c. 160 § 1), for which the possibility of revocation is anticipated until the moment of institution, the postulation already sent to the authority cannot be revoked by the electoral college without the consent of the same authority.[4] The juridical nature of the two acts (revocation of the presentation and revocation of the postulation) although similar, present notable differences. On the part of the subject, they differ in that in presentation there is already a certain right or interest or, at least, the expectation of such (see commentary on c. 159), while "the person postulated does not acquire any right from the postulation" (§ 3). In terms of the authority, they differ in that the intervention of the authority provides the office in presentation (cf. c. 163), while in this phase of postulation it only refers to the dispensation of an impediment (cf. c. 183).

Regarding the possibility of revocation, some authors have pointed out an essential difference between postulation and election, since in election, once the result of the voting has been proclaimed (cf. c. 176), the college cannot retract it. On the other hand, in postulation, since it does not confer any right in favor of the candidate, the electoral body may retract the postulation until the moment of admission of the postulation by the authority, if the authority consents.[5]

5. The juridical situation of the postulant does not change because of the postulation. Contrary to what occurs in election, in which there is a true *ius ad rem* relative to the confirmation, the admission of the postulation by the authority is a plainly gracious act and, therefore, there is no reason, nor any recourse, against a failure to admit. The authority, nonetheless, is still obligated to give an express response in the term of three months, during which time the postulation is not considered admitted (cf. c. 57) and the right of election returns to the college.

6. In reference to the content of the act of the authority, the doctrine discussed in the *CIC*/1917, keeping in mind that the postulation of a candidate with an impediment that cannot be dispensed causes the loss of the right to provide the office by the electoral body (cf. c. 182 § 1 *CIC*/1917),

4. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 338.
5. Cf. M. CONTE A CORONATA, *Institutiones*..., cit., p. 293.

indicated what types of impediments can, and customarily do, receive dispensation. It indicated, among others, illegitimate status due to mere fornication, lack of the required age for certain offices or prescribed grade of sacrament of orders, lack of an academic degree, lack of required taking of solemn vows, the so-called "spiritual bond" or "spiritual marriage" referring primarily to bishops in relation to an office already exercised, etc.[6] This doctrine can also offer useful instructions for the current regulations.

6. Cf., among others, F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 336; F. MAROTO, *Instituciones...*, cit., p. 422–423; B. OJETTI, *Commentarium in Codicem iuris canonici*, II (Rome 1931), pp. 107–108.

183 **§ 1. Non admissa ab auctoritate competenti postulatione, ius eligendi ad collegium vel coetum redit.**

§ 2. Quod si postulatio admissa fuerit, id significetur postulato, qui respondere debet ad normam can. 177 § 1.

§ 3. Qui admissam postulationem acceptat, pleno iure statim officium obtinet.

§ 1. If a postulation is not admitted by the competent authority, the right of election reverts to the college or group.

§ 2. If the postulation has been admitted, this is to be notified to the person postulated, who must reply in accordance with can. 177 § 1.

§ 3. The person who accepts a postulation which has been admitted, immediately obtains full right to the office.

SOURCES: § 1: c. 182 § 1
§ 2: c. 182 § 2
§ 3: c. 182 § 3

CROSS REFERENCES: cc. 57, 159, 163, 177, 178, 1737

COMMENTARY

Jesús Miñambres

1. The authority to which the postulation is presented can admit the postulation or not. This is taken as an act of favor on the part of the authority.[1] In any case, it appears that a resolution must be made, positive or negative. If the authority remains silent for the three months allowed for a response, the postulation is understood as rejected (cf. c. 57), even though the possibility remains that recourse may be presented due to failure to complete the duty of the office (cf. c. 1737). The electoral body can present this recourse, and perhaps also the postulated candidate. Although he or she "does not require any right from the postulation" (c. 182 § 3), the candidate may have a legitimate expectation[2] in the decree of

1. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, II, 3rd ed. (Rome 1943), pp. 339–340; B. OJETTI, *Commentarium in Codicem iuris canonici*, II (Rome 1931), p. 113.

2. Cf. F.J. URRUTIA, *De normis generalibus. Adnotationes in Codicem: Liber I* (Rome 1983), p. 118.

postulation and a just motive to appeal (cf. c. 1737 § 1). This is similar to what occurs with the presented candidate (cf. cc. 159, 163).

If the response is negative, the right of election returns to the electoral body, which will start anew the proceedings for a new convocation and vote. Canon 182 § 1 of the *CIC*/1917, the immediate predecessor to the canon discussed here, anticipated a case in which the refusal of the postulation did not return the right of provision for the office to the electoral body. Instead it would be returned to the authority. This occurred when the college knowingly postulated a candidate with an impediment that could not be and was not customarily dispensed. Thus it dealt with the idea "of punishing those who have abused the right which they had been granted."[3] In the current law this norm has been abolished and the right of election returns in any case to the electoral body. This simplified the preceding regulations, in which it would not have been easy to prove that in the postulation they had the knowledge, nor could it be required that every member of the group knew of all the impediments which could be and customarily were dispensed.[4]

2. An affirmative response by the authority does not immediately confer the office. Notification of the postulated and his or her acceptance are required.

Notification of the admission of the postulation begins a term of eight canonical days (cf. c. 201 § 2) for the acceptance of the office by the postulated, or for his or her refusal (cf. c. 177 § 1). Some authors indicate that the ancient law (prior to the *CIC*/1917) demanded the notification of the candidate prior to the act of the authority, in a manner whereby the postulated should first accept conditionally, so that afterward it could be done in a complete manner.[5] The current rule (since the *CIC*/1917) provides for the act of acceptance only after the admission of the postulation by the authority.

If the candidate does not accept, the postulation produces no effect, and it appears that the college should then proceed to a new election although the legislator has not expressly indicated it in this case.

If, on the other hand, the postulated accepts the office, he or she immediately obtains rights to the office *pleno iure*, without the necessity of further confirmations by any authority, although the election was not conferring (§ 3).[6] This is true except for universal or particular prescriptions

3. A. ALONSO LOBO, commentary on cc. 145–195, in *Comentarios al Código de derecho canónico*, I (Madrid 1963), p. 479.

4. Cf. F.J. URRUTIA, *De normis...*, cit., p. 119; E. KNEAL, commentary on c. 183, in *The Code of Canon Law, A Text and Commentary* (New York 1985).

5. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 339; B. OJETTI, *Commentarium...*, cit., p. 125.

6. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 340. Contra, cf. A. ALONSO LOBO, commentary on cc. 145–195, cit., p. 479.

regarding the taking of possession and acts after the provision in the strict sense (see commentary on c. 178).

Upon notification of the postulation, the candidate to the office may still remain silent during the eight-day term allowed. The consequences of this silence are the same as those of a lack of express acceptance within the indicated term (cf. c. 177).

The rule of c. 177 § 2, which permits the reelection of a person who did not accept on a prior occasion, does not apply to postulation. Perhaps for this reason, and due to the fact that the postulated does not possess any right, the legislator, in the canon discussed here, does not refer to c. 177 in general, but only to § 1. Nonetheless, it would be useful to know whether the electoral college should proceed to a new designation (election or postulation of another candidate) in the term of one month. This occurs in the case of refusal of an election (cf. c. 177 § 2),[7] or if the proceeding is renewed by restitution of the right to the electoral group, as if nothing had occurred.[8] When dealing with a lack of express disposition, we are inclined to accept the second possibility, which appears to be in agreement with what is established by this same c. 183 in § 1.

7. Cf. B. OJETTI, *Commentarium...*, cit., pp. 114–115.
8. Cf. F.X. WERNZ-P. VIDAL, *Ius canonicum*, cit., p. 340.

CAPUT II
De amissione officii ecclesiastici

CHAPTER II
Loss of Ecclesiastical Office

184 **§ 1. Amittitur officium ecclesiasticum lapsu temporis praefiniti, expleta aetate iure definita, renuntiatione, translatione, amotione necnon privatione.**

§ 2. Resoluto quovis modo iure auctoritatis a qua fuit collatum, officium ecclesiasticum non amittitur, nisi aliud iure caveatur.

§ 3. Officii amissio, quae effectum sortita est, quam primum omnibus nota fiat, quibus aliquod ius in officii provisionem competit.

§ 1. An ecclesiastical office is lost on the expiry of a pre-determined time; on reaching the age limit defined by law; by resignation; by transfer; by removal; by deprivation.

§ 2. An ecclesiastical office is not lost on the expiry, in whatever way, of the authority of the one by whom it was conferred, unless the law provides otherwise.

§ 3. The loss of an office, once it has taken effect, is to be notified as soon as possible to those who have any right in regard to the provision of the office.

SOURCES: § 1: c. 183 § 1
§ 2: c. 183 § 2
§ 3: c. 191 § 2

CROSS REFERENCES: cc. 143 § 1, 185–196, 538, 975

COMMENTARY

Pablo Gefaell

1. *Preliminaries*

While the *CIC*/1917, presented the canons of this section without subdivisions, in the present Code the chapter regarding loss of office has been structured into articles based on the diverse causes of the loss (resignation, transfer, removal, and deprivation). It nonetheless maintains three canons outside of the articles. Canon 184 is the general canon that initiates chapter II. Canons 185–186, which address age and time limit, have also been placed outside of a specific subdivision due to the difficulties found in the editorial process to contain them apart *a se*, or in an article common to the two, or in article 1 regarding resignation (see commentary on cc. 185 and 186). These difficulties are due to the fact that they are not generally due to causes of loss but are reasons to tender the resignation. The *Codex canonum Ecclesiarum orientalium*, recalling this experience and maintaining the content, has united these three canons into one (c. 965), and has separated § 3 of c. 184 of the *CIC* making it a second introductory canon: c. 966.

2. *Notion of the loss of office*

The loss of ecclesiastical office is the cessation of the holding and possession of said office. Correcting the ancient personal vision of the authority that spoke of *ius proprietatis officii*,[1] the doctrine closest to Vatican Council II had preferred to speak of "title" instead of "property."[2]

This general canon explains the diverse juridical mechanisms by which one can lose ecclesiastical offices (office is understood here in the broad sense).[3] Traditionally we distinguish between *ammissio officii plena*, *amissio officii de iure*, and *amissio officii de facto*.[4] The full loss of the office occurs when the juridical qualification and possession itself are lost. The mere *de facto* loss is produced when the holder of the office, retaining his or her right to the office, loses possession (e.g., if the office-holder has resigned out of fear). The loss simply *de iure* can occur if the holder of the office has lost the title but has not abandoned the office (e.g.,

1. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, t. II (Rome 1943), p. 387, no. 22.
2. Cf. M. CONTE A CORONATA, *Compendium Iuris Canonici*, vol. I (Taurine-Rome 1950), p. 301, no. 499.
3. Cf. *Comm.* 14 (1982), p. 154.
4. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*..., cit., p. 387, no. 322.

in many cases of loss *ipso iure* considered in c. 194). In cases where the canonical provision has been formalized through a civil contract, the canonical mechanisms of loss of office should also be recognized civilly through opportune clauses, for which the loss of office *de iure* can effectively become full loss. This should be taken care of at the time of the creation of statutes of a juridical person recognized civilly, or at the time when work contracts are established.

This canon does not claim to anticipate all the events that produce the vacancy of an office, as occurs, obviously, with the death of the office-holder.[5] On the other hand, reference is made to the death of a bishop when speaking of the methods by which an episcopal see becomes vacant (c. 416). Nonetheless, in such a case, real death cannot be arbitrarily compared with similar cases of "civil death" (e.g., deportation of the bishop, imprisonment, etc).[6]

With the loss of office, the incumbent also loses the vicarious ordinary power of the office (c. 143 § 1). Nonetheless, we should distinguish between the loss of the office and suspension of the same. Suspension consists only of preventing (or, affecting the validity of the acts) or in prohibiting (affecting only the legality) the exercise of the proper functions of the office (cf., e.g., cc. 1331 § 1, 3°, 1333 § 1).

3. *The juridical modes of loss of office*

The modes of loss of office can be structured in three categories: *a*) by initiative of the incumbent (resignation); *b*) by an extrinsic objective determination (passage of a determined period of time: c. 186; reaching the age limit: c. 186; loss by causes established in the law: cc. 184 § 2 and 194); *c*) by initiative of the authority (transfer: cc. 190–191; removal: cc. 192–195; deprivation: c. 196). Nonetheless, these causes are not automatically effective: "even if the loss of office is based upon a juridically relevant fact ... its juridical efficacy normally depends upon the act of the responsible authority, and not merely on the 'fact' which, in and of itself, lacks any automatic efficacy."[7] Effectively, in the editorial process of the canons of this chapter we find attempts to introduce *ipso facto* causes of loss, without necessary intervention by the authority (see commentary on cc. 186 and 194). However, in all of these cases the initial proposal was always modified, and the need for a formal act by the authority established in order for the effective loss of office.

5. Cf. *Comm.* 14 (1982), p. 153, c. 181 ad § 1.
6. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum...*, cit., p. 388, no. 322 I, note 10.
7. J.I. ARRIETA, *Organizzazione ecclesiastica, lezioni di Parte generale (ad usum scholarum)* (Rome 1991–1992), p. 255.

The new *Regolamento generale della Curia Romana* also follows this line in establishing the effective dismissal of offices "from the moment of the communication of the appropriate *provvedimento*" (cf. arts. 41 § 5, 43 § 3 and 44).

"Depending on the case, this *act* may be administrative—a notification or decree (cf. cc. 48ff), of a constitutive or declarative nature (cf. c. 194)—or it may be judicial in character, given by means of a sentence. The nature of the *cause* or motive of the loss will differ—the cause must be just, proportional, or grave—according to the juridical effects desired and according to the attitude of the incumbent. The *procedure* or formal course of action will also depend on these two factors as well as on the norms of the following canons and of cc. 1740–1752."[8]

Exceptions to the need for an act by a hierarchical superior are, first, some cases of resignation that do not require acceptance (see commentary on c. 189). Another exception is given in those vicarious offices that are lost upon the loss of authority by the capital office upon which they depend (see commentary on c. 184 § 2), without requiring a formal act of the superior.[9]

4. *The "process" and content of* c. 184

This canon stems from c. 183 of the *CIC*/1917, to which was added the new § 3. In the current § 1 the reaching of an age limit has been added as a new cause for the loss of an office (see commentary on c. 185).

In addition to some minor changes—which are nonetheless significant (*collatum* in place of *concessum*)—another modification with respect to c. 183 § 2 of the *CIC*/1917 is the suppression of a reference to the clause *ad beneplacitum nostrum* as a manner of limiting the duration of the office. As in the *CIC*/1917, so does c. 183 § 2 of the *CIC* affirm that the office is not lost by the expiry of the authority that conferred it. Under the previous rule, if upon conferring the office the aforementioned clause had been attached, upon the termination of the conferring authority, the consent for the office would also be assumed terminated, and thus the office would be lost. The suppression of this indication was decided "because it did not sound well at the time,"[10] but this does not mean that it is prohibited to include this clause in the act of conferral of the office. In fact, c. 193 § 3 speaks of those offices conferred "for a time at the prudent discretion of the competent authority." It is fitting, then, to ask whether in those cases the termination of the conferring authority produces the termination of the conferred. The general rule § 2 appears to clearly indicate

8. J.I. ARRIETA, commentary on c. 184, in *Pamplona Com.*
9. Cf. ibid.
10. *Comm.* 21 (1989), p. 227.

that this is not the case. Nonetheless, some authors affirm the loss of office in this case when the office was conferred *ad beneplacitum nostrum*, supported by c. 81.[11] But to support this affirmation in a canon that refers to privileges does not appear consistent—as we will see shortly—with the current conception of ecclesiastical office.

In effect, according to the theory of ecclesiastical organization, with the conferral of the office, its holder—if the office has power (see commentary on c. 145)—obtains an ordinary power (cf. c. 131) that remains until the office is lost (cf. c. 143 § 1). This office is not lost *resoluto iure auctoritatis a qua fuit collatum* (cf. cc. 183 and 208 *CIC*/1917). This stability of the office and of the power attached to it is explained today by looking at the institutional view of the office as a stable center of jurisdictional competencies (see commentary on c. 145). This new vision prevented the ordinary power of the office from being excessively tied to a physical person. Previously, one had to explain the permanence of the power in the officeholder once the granting authority had ceased by recourse to a comparison of ordinary power to privilege *praeter ius* and the conferral of office to a grant.[12] It is understandable, therefore, that in this canon the commentators of the *CIC*/1917, would have made reference to c. 73, which dealt with the non-cessation of such privileges *resoluto iure concedentis*.[13] This is a comparison that was framed within the placement of the power as a favor benefiting the holder of the office. This view was replaced by the consideration of the power as a service. Therefore, to use privilege today to explain the stability of the office does not seem acceptable.

Nonetheless, certain cases should be excepted from the general principal of c. 184 § 2. These are cases in which the law, whether universal or particular, establishes the loss of the office in the given circumstance. Thus, as has been stated, vicarious offices are lost when the corresponding capital office becomes vacant. In reality there is no canon that establishes a general norm of this tenor. However, this would be the traditional doctrine deduced by the representative and substitutive nature of these offices and that is reflected in the specific norm referring to the offices of vicars (vicar general or episcopal vicar: c. 481). Nonetheless, there are a large number of cases in which the vicarious office is not terminated—pontifical legate, judicial vicars, and others.[14] It is also difficult to establish which are the vicarious offices—except for the offices of the Roman Pontiff and the diocesan bishop, the rest appear to have vicarious nature.

11. V. DE PAOLIS-A. MONTAN, "Normae Generali," in *Il Diritto nel mistero della Chiesa*, vol. I (Rome 1988), p. 423; L. CHIAPPETTA, *Il Codice di Diritto Canonico, commento giuridico-pastorale*, vol. I (Naples 1988), p. 243, no. 1085.

12. Cf. B. OJETTI, *Commentarium in Codicem iuris canonici*, t. IV (Rome 1931), p. 117.

13. Cf. M. CABREROS, commentary on c. 183, in *Código de Derecho Canónico, y legislación complementaria (texto latino y versión castellana, con jurisprudencia y comentarios)*, Madrid 1957.

14. Canons 367, 1420 § 5. Cf. UDG, 14 and RGCR, 42.

The vicariate concept has also changed—since full organic responsibility is recognized (cf. cc. 1734ff.) Given all these issues, it would be better not to consider vicarious offices as an exception to the general principle of continuance and limit ourselves to saying—as does the canon—that, in itself, none terminates, although the law can establish termination in some cases.

The ceasing of the office of the diocesan administrator with the taking of possession of a new bishop (c. 430) is, nonetheless, a mode of loss of office not well framed in those cases anticipated in this chapter. It appears, therefore, that another type of loss of office should be considered: the provisional office, which is lost with the taking of possession by its permanent holder.

We have stated previously that § 3 of this canon is a new part of the current *CIc*. Nonetheless, as some authors have noted well,[15] it deals with a generalization of what was already established for the case of resignation in c. 191 § 2 of the *CIC*/1917. This was decided in the very first schema of the revision of the Code.[16] In c. 184 § 3, although not expressly stated, it is understood that the person who should make the notification of the vacancy of the office to those who have a right to its provision is not the person losing the office. Rather, it is the responsibility of the same authority that issued the act that made the loss of office effective (acceptance of the resignation, decree of transfer, etc.). Even though until *CIC*/1917, the obligation to *publish* the loss of the benefice (by resignation) existed, this was considered repealed with the Pio-Benedictine Code,[17] and in this way only the obligation to notify the legitimately interested parties remained.

The lack of official notification to the interested parties—according to some authors—is not a condition to affect the validity of acts, if the vacancy of the office is established in such a way that it is certain they will be able to exercise their rights.[18]

15. Cf. R.A. HILL, commentary on c. 184, in CORIDEN-GREEN-HEINTSCHEL (Eds.), *The Code of Canon Law, a Text and Commentary* (New York 1985).
16. Cf. *Comm.* 21 (1989), p. 229.
17. F.X. WERNZ-P. VIDAL, *Ius Canonicum*..., cit., p. 396, no. 330.
18. J. MANZANARES, commentary on c. 184, in *Salamanca Com*; L. CHIAPPETTA, *Il Codice di Diritto Canonico*..., cit., p. 243, no. 1086.

185 Ei, qui ob impletam aetatem aut renuntiationem acceptatam officium amittit, titulus emeriti conferri potest.

The title 'emeritus' may be conferred on one who loses office by reason of age, or of resignation which has been accepted.

SOURCES: —

CROSS REFERENCES: cc. 184 § 1, 186–189, 402 § 1, 443 § 2, c. 707 § 1, 1242

COMMENTARY

Pablo Gefaell

The loss of office by reaching a determined age limit is new in the *CIC*. However, in the majority of cases the fixing of an age limit establishes more properly a cause for renunciation, and not a legitimate cause for removal, if the officeholder does not resign (see commentary on cc. 184 and 186).

In order to understand the origin of the regulation of c. 185 regarding "emeritus" one must keep in mind the process of c. 184 in reference to age. In 1969 this new cause had been introduced with the name *emeritatus* ("quando aetatis gratia quis ab officio cessat"),[1] that was placed in the canon that was the precursor to c. 184 § 1, saying that the office was lost "expletione aetatis qua quis ad normam iuris fit emeritus." Simultaneously a new section was created—"1, *De emeritatu* (*vel de emeritis*)"—in which a single canon was found: the precedent for c. 186.[2] But finally, in 1980 it was decided not to speak of the "emeritus" in the general canon regarding the modes of loss of office (c. 184), simply indicating, in this canon, loss by reaching an age limit. At once, the section *De emeritatu* was eliminated. The Code Commission made this decision because emeritus is not a mode of loss of office, but an honorific title conceded at the discretion of the authority to former holders of certain offices, and is not *ipso iure* for any type of office as the project anticipated. It should then have spoken of the *age* as a cause for loss of office, and not yet of the "emeritus," since this comes after the cessation of the office. For these reasons the precedent of c. 185 then also introduced the possibility of conceding the title of emeritus to those that cease to hold an office, not only by age, but also by resignation.[3]

1. *Comm.* 21 (1989), p. 227.
2. Cf. ibid., pp. 227–228 and 242.
3. Cf. *Comm.* 23 (1991), p. 263.

It seems logical that the authority competent to grant the title of emeritus is the same that is competent to provide for that office.[4]

The only case in which the common law granted *ipso iure* the title of emeritus is that of a diocesan bishop who resigns (c. 402 § 1; cf. c. 443 § 2). In 1988 the Congregation for bishops presented some rules regarding bishops who cease to hold their office, in which it is indicated that the title of *emeritus* will also be granted automatically to those ceasing to hold an office in the Roman Curia, as papal legates or in other charges "expleto mandato, revocatione, vel renuntiatione."[5] In these cases, therefore, the title of emeritus is not only conceded if the office has been lost by an accepted resignation, but also by revocation or by completion of the order.

The title of emeritus or retired, as we have said, is merely honorific, and—by common law—does not confer any juridical attribute over the office, although this may be granted by particular law. The current Code establishes the possibility that bishops emeritus be granted a deliberative vote in the particular council (c. 443 § 2).[6] In addition, the norms of the Congregation for Bishops mentioned above stipulate some new functional possibilities for a bishop emeritus.[7]

It is questionable where to place the case of diocesan bishops who leave the see in order to dedicate themselves to other offices that do not have an attached *portio Populi Dei* (offices of the Roman Curia, secretary to the bishops' conference, etc.). These formally *resign* from the diocesan office, and thus obtain the title of bishop emeritus of this see, but substantially this deals with a *transfer* of office, and therefore this case should also be included among those stated above.

If a diocesan bishop emeritus is religious, he may continue to reside outside the house of his institute (c. 707). A diocesan bishop emeritus can be interred in his proper church (c. 1242).

Regarding the title of emeritus applied to other offices, some dispositions of particular law can also be found. Thus, in Spain, "every lawfully retired incumbent priest can use the title of the last office possessed along with the qualification 'retired' or 'emeritus'."[8]

4. Cf. V. DE PAOLIS-A. MONTAN, "Normae Generali," in *Il Diritto nel mistero della Chiesa*, vol. I (Rome 1988), p. 423.
5. CB, *Normae de episcopis ab officio cessantibus*, October 31, 1988, in *Comm.* 20 (1988), pp. 167–168.
6. Cf., e.g., CONFERENZA EPISCOPALE POLACCA, "Regolamento del II Sinodo Plenario, 17 ottobre 1991," in *Ius Ecclesiae* 5 (1993), pp. 403–404, no. III.1.
7. See commentary on c. 402 § 1, which also cites the response of the PCITL of October 10, 1991, *AAS* 23 (1991), p. 1.
8. CBS, *Documentación complementaria al decreto general del November 26, 1983*, art. 14, 1.A.3c.

186 **Lapsu temporis praefiniti vel adimpleta aetate, amissio officii effectum habet tantum a momento, quo a competenti auctoritate scripto intimatur.**

Loss of office by reason of the expiry of a predetermined time or of reaching the age limit, has effect only from the moment that this is communicated in writing by the competent authority.

SOURCES: —

CROSS REFERENCES: cc. 184 § 1, 185, 354, 401 § 1, 538 § 3, 184 § 1, 193 §§ 1 and 2, 477 § 1, 481 § 1, 492 § 2, 494 § 2, 522, 538 § 1, 554 § 2, 501 § 1, 513 § 1, 624, 1422, 1751 § 2

COMMENTARY

Pablo Gefaell

This canon deals with the loss of office by expiry of a predetermined time limit or by reaching an age limit. These in themselves do not cause the loss of office *per se* (see commentary on c. 184), but constitute only a motive for the competent authority to consider when deciding whether or not to make the loss of office effective by means of written notification to the incumbent. If this is not done, the tacit extension of the office is assumed, and as the office is not lost, its exercise is maintained *pleno iure.*[1]

In this respect, the process of the current canon is interesting. The *CIC*/1917, gathered the "lapsu temporis praefiniti" only within the general canon regarding loss of offices (c. 183), without clarifying whether the loss was produced automatically or if the announcement of the authority was necessary for the loss to be effective. In 1969 the consultants of the Code Commission proposed that the loss was "*ipso facto* elapsi temporis, potius quam intimationi ab auctoritate faciendae post exactum tempus. Est res minus odiosa."[2] It attempted, in this way, to avoid the inconvenient duty of notification for the authority.[3] Nonetheless, with respect to the cessation of the office due to age, the proposed rule required a written notification in order for the loss of office to take effect.[4] The two canons were then the only ones contained in the section "De Lapsu temporis," which has since

1. Cf. P.V. PINTO, commentary on c. 186, in *Commento al Codice di Diritto Canonico*, a cura di P.V. Pinto (Rome 1985).
2. *Comm.* 21 (1989), p. 250.
3. Ibid., p. 270, c. 2.
4. Cf. ibid., p. 270, c. 3.

disappeared. In the following fusion of these two canons the loss of office *ipso facto* disappears, without reasons to explain it.[5] Thus the new canon requires the written announcement for the effective loss of office in both cases.[6] Canon 186 thus acquired its definitive text. We can say that the initial proposal of the loss of office *ipso facto* has been expressly rejected. In order to explain this one could turn to the reason that the secretary of the Commission at that time pointed out for age limits: "cessatio ab officio non venit expletione aetatis sed per auctoritatis actum."[7]

1. *Loss through age*

The Code does not mention any cessation by reason of reaching a certain age. The terms that the common law indicates for cardinals who head dicasteries of the Curia (c. 354), diocesan bishops (c. 401 § 1), coadjutor and auxiliary bishops (c. 411) and parish priests (c. 538 § 3), are not really fixed age limits for the loss of office. Rather, they are ages at which the submission of resignation is recommended.[8] For this reason it was even proposed to include the canons regarding age in the section on resignation.[9] If the officeholder does not wish to resign, the competent authority can use age as a legitimate cause for removal. This removal is subject to paternal force in order to persuade the officeholder to resign[10] (this would not be valid for the case of age limit of the diocesan bishop: see commentary on c. 192).

In particular law we also encounter examples of age limits where a dismissal may be requested or imposed if the office is not resigned spontaneously. Thus, in Spain, "starting at seventy-five years of age every priest requests retirement within the social security system for priests.... The bishop can impose said retirement on those priests who have completed seventy years of age, without any exceptions owing to an ecclesiastical office ..." Nonetheless, the Holy See has requested that this particular legislation be adapted as much as possible to the rule of the Code.[11]

We have seen that age limits established in the Code are merely recommendations for retirement. Nonetheless, there are also age limits fixed by law that are not mere recommendations for the submission of resignation, but are properly framed as causes for the loss of office. Thus, for ex-

5. Cf. *Comm.* 22 (1990), pp. 96 and 114.
6. *Comm.* 23 (1991), p. 263.
7. Ibid.
8. Cf., for example, *CD*, 21 and 31; and *ES*, 11 and 20 §3.
9. Cf. *Comm.* 23 (1991), p. 263.
10. Cf. c. 1742 § 1. Cf. also PCIDSVC, Response of July 7, 1978, in *AAS* 70 (1978), p. 534.
11. CBS, *Decreto general sobre algunas cuestiones especiales en materia económica*, December 1, 1984, art. 3. Confirmed *ad quinquenium* by the SCB el June 8, 1985, and renewed for three more years on May 6, 1993 (cf. *Boletín Oficial de la Conferencia Episcopal Española*, X (1993), p. 152). (See commentary on c. 538).

ample, the *Regolamento generale della Curia Romana,* in defining age limits for the termination of service, distinguishes between what is set for cardinals ("*compiuti il settanta cinquesimo anno di età sono pregati di presentare le dimissioni*"), and for all other holders of curial offices ("*compiuto il ... anno di età, decadono ...*" or "*cessano* ..."). For the heads of Curia, secretaries and similar offices, the age limit is seventy-five years of age. Members of diverse bodies are subject to an age limit of eighty years. Secretaries of the Roman rota have an age limit of seventy-four years. Subsecretaries or the equivalent have an age limit of seventy years, as do those officials who are priests or religious. Lay officials have an age limit of sixty-five years.[12]

Ecclesiastical offices are generally conferred for a time, determinate or indeterminate (cf. c. 193 §§ 1 and 2). Lifetime offices are an exception.

2. *Loss through lapse of time*

a) *Offices conferred for a pre-determined period of time*

In the common law, some offices are conferred for a pre-determined period of time. A listing of these offices follows: *a*) The offices of vicar general and episcopal vicar can have a determined duration (c. 481), and, if the episcopal vicar is not an auxiliary bishop, the duration of the mandate should be determined (c. 477 § 1). *b*) Members of the finance committee of the diocese should be named for a term of five years, and the appointment is renewable (c. 492 § 2). *c*) The diocesan finance officer is to be named for a period of five years, which may be renewed (c. 494 § 2). *d*) Members of the council of priests who are not *ex officio* are appointed for a period determined in the statutes (c. 501 § 1). *e*) Members of the college of consultors are named for five years, which can be extended until the constitution of the new college (c. 502 § 1). *f*) The pastoral council is constituted for a determinate period (c. 513 § 1). *g*) A vicar forane should be named for a period determined by the particular law (c. 554 § 2). *h*) In principle, the superiors of religious institutes should be named for a determinate period (c. 624 § 1). *i*) The judicial vicar, associate judicial vicars, and all other judges of the diocese should be appointed for a determinate period (c. 1422).

In particular law, the appointment of a parish priest should be for a determinate period only if this has been allowed by the bishops' conference (c. 522).[13] Also in particular law, the following are named for a period

12. RGCR, 41 and 43

13. Cf., e.g., CBS, *Primer Decreto General,* art. 4, in *BOCEE* III (1984), p. 98; CBI, *delibera* no. *5*, in *Notiziario CEI*, December 23, 1983, p. 206; idem, *delibera* no. *17* in *Notiziario CEI,* September 6, 1984, p. 204. (For Complementary Norms promulgated by English language bishops' conferences, see Volume V, Appendix 3). See commentary on c. 522.

of five years: prefects, presidents, members, superior prelates, subsecretaries and the equivalent, and consultors of dicasteries of the Roman Curia (*RGCR* 12 § 2).

Based on the canon discussed here, the passage of the time limit is not enough to produce the loss of office. Rather, the competent authority must issue a decree of notification to the holder of the office. Some authors (based on c. 10) maintain that oral notification would be valid, although illicit.[14] However, it appears to us that c. 186 not only expressly demands the notification, but also the mode in which it must be given.

Problems may arise if, once the designated time period has passed, the competent authority is negligent in presenting a written notification of the loss of office. It is clear that as long as the notification is not given, the incumbent retains the office. But does the authority indefinitely retain the right of notification of the loss of office? It appears so, although this situation of instability in the office should be avoided (see commentary on c. 522). As the offices are conferred for a determinate period, they become offices *ad nutum auctoritatis* (cf. c. 193). Perhaps the administrative silence could be alleged to be positive and confirmation of the office for another period of time could be presumed if the authority does not make notification of the termination. However, this appears to rather force the sense of c. 57, which in dealing with negative administrative silence presupposes a negative decision after three months of silence. Therefore, one must presume that with silence the termination is rejected, and this appears a bit forced in this case. (In the case of resignation from the office, nonetheless, administrative silence clearly applies: see c. 189 § 3 and commentary.)

b) *Offices conferred for an indeterminate period of time*:

In the common law, the vicar general can be named for an indeterminate time, as can the episcopal vicar if also an auxiliary bishop (c. 477 § 1). Also, the parish priest should be named for an indeterminate time, with the exception cited above (c. 522), but, as we have seen, a resignation is recommended at seventy-five years of age (c. 538 § 3).

In the particular law of the of the Roman Curia, the officials of the Curia are included for an indeterminate time within the *Tabella organica*. Here, they are appointed to one or more bodies of the Curia, having only the age limit already mentioned.[15]

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14. Cf. V. V. DE PAOLIS-A. MONTAN, "Normae Generali," in *Il Diritto nel mistero della Chiesa*, vol. I (Rome 1988), p. 423.
15. RGCR, 7, 13, 41, and 43

ART. 1
De renuntiatione

ART. 1
Resignation

187 **Quisquis sui compos potest officio ecclesiastico iusta de causa renuntiare.**

Anyone who is capable of personal responsibility can resign from an ecclesiastical office for a just reason.

SOURCES: c. 184

CROSS REFERENCES: cc. 184, 185, 188–189, 332 § 2, 354, 367, 401, 402, 411, 416, 430 § 2, 481 § 1, 538, 1742, 1743

COMMENTARY
Pablo Gefaell

Canon 187 affirms the right to renounce an office. Renunciation, in the proper sense, is the free termination, resignation, or abdication of ecclesiastical office for a just cause, although formerly various nuances were given to these terms.[1] This should be put into the hands of the authority that is generally competent to accept or reject it.

1. *The right to resign*

The presentation of the resignation, as a juridical act, should meet the requirements found in cc. 124ff. for the validity of such acts. Canon 187 indicates one of these requirements: the possession of sound judgment

1. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, t. II (Rome 1943), p. 389, no. 324.

("quisquis sui compos potest ..."). This requirement of c. 187 sums up the "legally capable person" of c. 124, given that, in our case, only the holder of the office can be considered competent to make his or her own resignation. This person will be able, provided that he or she is of sound mind, since—as we will promptly see—in the current regulations no other subjective circumstances can exist which influence, in absence of juridical legitimacy, the realization of the act of resignation.

In effect, the present canon originates from c. 184 *CIC*/1917, but, in relation to this, a notable difference appears. The former legal text admitted the possibility of prohibiting a resignation ("nisi speciale prohibitione renunciatio sit ipsi interdicta"). This clause has been discussed since the beginning of the works of revision and, although it was not immediately suppressed,[2] the decision to omit it was made in 1974.[3]

The decision to suppress this phrase clearly indicated a desire to suppress any form of prohibiting the right of resignation.[4] This was true as much for the common law (cf., e.g., cc. 568 and 1485 *CIC*/1917) as for those put forth by particular law or in the same act as the conferral of the office.

2. *The just reason for resignation*

The right to resign, nonetheless, contemplates only the power to submit the resignation. It does not deal with a right to arbitrarily separate oneself from a duty which has a character of ecclesial service and was accepted freely. Thus the canon specifies that there must be "just cause" for resignation. This is required for its acceptance or at least for its lawfulness (see commentary on c. 189).

In the *Corpus Iuris Canonici*, just causes for the resignation of a bishop are indicated: "debilis, ignarus, male conscius, irregularis, quem mala plebs odit, dans scandala, cedere possit" (X I, 9, 10). That is, a person may resign who would have knowledge of a crime, of disorder, of being hated by the public, or of creating scandal, with the fitting nuances of each case.[5] These causes are applied *a fortiori* to all inferior offices, while in the Roman Curia other lesser causes are also allowed.[6] Nonetheless, until the *CIC*/1917, for the majority of offices just causes for resignation

2. Cf. *Comm.* 21 (1989), p. 228.
3. Cf. *Comm.* 23 (1991), pp. 67 and 104.
4. Cf., e.g., F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., pp. 392–392, no. 325–326; B. OJETTI, *Commentarium in Codicem iuris canonici*, t. IV (Rome 1931), pp. 120–121.
5. Cf. B. OJETTI, *Commentarium*..., cit., t. IV (Rome 1931), pp. 119–120.
6. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 394, no. 327 III.

were taxatively established.[7] Beginning with the *CIC*/1917, the ability to resign was considered for any reason, which in itself did not necessarily have to be grave, but proportional in importance to the office and to the harm that could cause the resignation.[8]

As we have said, this right to resign refers only to the act of submitting the resignation, since, in general, the presentation of resignation is not enough for the effective loss of office. For that, before all else, the requirements of capacity for the validity of a juridical act of resignation are demanded (cc. 188, 189 § 1). In the majority of cases its acceptance by the competent authority is also required (see c. 189 § 2).

3. *Tacit resignation*

In the Pio-Benedictine Code two types of resignation are distinguished: "express" and "tacit" (c. 188). The latter has disappeared—at least nominally—from the current *CIC*. Tacit resignation was "the meaning behind certain acts voluntarily carried out by the officeholder, in virtue of which the law presumes, with a presumption *iuris et de iure*, the intention to resign and the acceptance of the resignation."[9] During the works of revision a decision was made to change the conceptualization of these assumptions, and consider them not only "resignation" but also "removal *ipso iure*,"[10] giving origin to the current c. 194 (see commentary).

It appears to us that the solution adopted in the previous legislative body was more convenient, since there are certain behaviors that, in reality, presuppose simply the resignation. These appear less adequate when considered as quasi-offenses that deserve removal. In fact, in the *Regolamento generale della Curia Romana*, which is later than the *CIC*, the loss of office is still anticipated through a system similar to tacit resignation ("rinuncia dichiarata d'ufficio" *RGCR*, 69). Thus, it is a less drastic mechanism than removal *ipso iure*.

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7. Cf. ibid.; and also W.H.W. FANNING, "Renunciation" in *The Catholic Encyclopedia*, vol. XII (London 1911), p. 774.

8. Cf. M. CABREROS, commentary on c. 184, in *Código de Derecho Canónico, y legislación complementaria (texto latino y versión castellana, con jurisprudencia y comentarios)* (Madrid 1957); R.A. HILL, commentary on c. 187, in CORIDEN-GREEN-HEINTSCHEL (Eds.), *The Code of Canon Law, a Text and Commentary* (New York 1985).

9. M. CABREROS, commentary on c. 187, in *Código*..., cit.

10. Cf. *Comm.* 21 (1989), p. 229.

4. *Conditional resignation*

Since antiquity, express resignation could be presented with conditions.[11] In the law previous to the Code, with the typical office-benefice union, the same could be resigned in favor of a third person, or reserving the pension, or reserving the right of return, access, or admission, or to exchange it for another benefice.[12] In the *CIC*/1917, the possibility of conditional resignation was substantially limited.[13] A decision of the Signatura, of 1970, affirmed that the possibility of conditional resignation no longer existed, because "Summus Pontifex abrogavit canonem 2150 § 3 (motu proprio *Ecclesiae Sanctae*, no. 20 § 1)."[14] Nonetheless, the text of the *Motu proprio* cited by the decision did not really refer to conditional resignations, but to free removal. In fact, the current Code, precisely reflecting c. 2150 § 3 of the *CIC*/1917, permits conditional resignation in the case of the parish priest asked to resign before being removed (c. 1743). Therefore—since no other canon exists that prohibits it—it must be supposed that the *CIC* admits, in general, the possibility of placing conditions on a resignation. It is clear that, in this case, its effectiveness depends on the acceptance of the authority. Furthermore, the conditions that affect the provision of the office should be understood as not acceptable by the inferior authority, and the possible placement of the condition will always be *in devolutivo*, not *in suspensivo*.[15]

In the *CIC*/1917, the "exchange" of offices or benefices was regulated by cc. 1487–1489, limiting much of the preceding regulations.[16] The exchange of offices was not exactly a bilateral contract between the holders of the exchanged offices, but a free mutual resignation of these offices to the competent authority with the added condition by both officeholders that each would be conferred the office resigned by the other.[17] In this way, it was also seen as a reciprocal transfer made by the bishop subject to the condition placed by both transferees, and—when dealing with the right of patronage—with the consent of the trustee.[18] This is not exactly considered resignation in favor of another,[19] because the condition placed

11. Cf. M. CONTE A CORONATA, *Compendium Iuris Canonici*, vol. I (Taurine-Rome 1950), p. 303, no. 505, 2°; W.H.W. FANNING, "Abdication," in *The Catholic Encyclopedia*, vol. I (London 1907), p. 31; M. CABREROS, commentary on c. 184, in *Código*..., cit.; F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 390, no. 324.

12. For example, *VI* III, 10, ch. only; cf. also, W.H.W. FANNING, "Renunciation" in *The Catholic Encyclopedia*, vol. XII (London 1911), p. 774.

13. Cf. cc. 1486, 2150 § 3 *CIC*/1917; also PCI, Response May 20, 1923, in *AAS* 16 (1923), p. 116 (a lifetime pension as a possible lawful condition for resignation).

14. Decision of the Signatura of June 9, 1970, in X. OCHOA, *Leges Ecclesiae*, vol. IV (Rome 1974), no. 3867, col. 5840.

15. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 395, no. 328, I.

16. Cf. ibid., p. 339–408, nos. 333–347.

17. Cf. ibid., p. 403, no. 337.

18. Cf. c. 1487 *CIC*/1917.

19. Cf. c. 1486 *CIC*/1917.

on the resignation is directed at obtaining another office, not that the holder of the other office will obtain the one resigned. The exchange of offices-benefices found in many dioceses should be made with the consent of the respective local ordinaries.[20]

The exchange of offices-benefices is not continued in the Code, since the benefice system has been abolished (c. 1272). But the existing possibility of placing conditions on a resignation opens up the possibility of a condition of this type.

5. *Specific cases of resignations*

The following are specific cases of resignations: of the Roman Pontiff (c. 332 § 2); of the cardinals of the Curia (c. 354); of the papal legate (c. 367); of the diocesan bishop (c. 4160; of the coadjutor or auxiliary bishop (c. 411); of the diocesan administrator (c. 430 § 2); of the vicar general or episcopal vicar (c. 481 § 1); of the parish priest (cc. 538, 1742 § 1 and 1743); and in the Roman Curia (*RGCR*, 44 § 3, 57 and 67–69).

20. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 404, no. 339.

188 Renuntiatio ex metu gravi, iniuste incusso, dolo vel errore substantiali aut simoniace facta, *ipso iure* irrita est.

A resignation which is made as a result of grave fear unjustly inflicted, or of deceit, or of substantial error, or of simony, is invalid by virtue of the law itself.

SOURCES: c. 185

CROSS REFERENCES: cc. 124–126, 184 § 1, 185, 187, 189

COMMENTARY

Pablo Gefaell

The submission of the resignation should contain the requirements noted in cc. 124ff. for the validity of juridical acts.

Canon 188 sets forth four circumstances that make the act of resignation invalid by affecting the freedom of the person presenting the resignation. As occurs in the most important juridical negotiations (matrimony: cc. 1098 and 1103; issue of votes: c. 1191 § 3, etc.), grave and unjustly inflicted fear and deceit do not merely cause the act to be rescindable (c. 125 § 2), but are real causes for the nullity of the act. Thus, c. 188 is an exception to c. 125, which contains these exceptions ("nisi aliud iure caveatur"). This disposition seeks to protect the titleholder of the office from being unjustly forced to resign. Therefore, "for the validity of the resignation one needs more than what the law generally requires for the validity of a juridical act."[1]

Logically, these causes of nullity of the act must contain the requirements established in law and doctrine.

1. *Fear* must be subjectively grave, provoked by an external and human threat of serious and unjust harm that can only be avoided—at least in the judgment of the subject—by resigning from the office. If the threat is just (e.g., threat of removal for a just cause) the fear does not nullify the resignation.[2] This does not apply to matrimony, in which all fear provoked is unjust (see commentary on c. 1103). One could discuss whether it is necessary that the fear be inflicted *in order* to obtain the res-

1. J. MANZANARES, commentary on c. 188, in *Salamanca Com.*
2. Cf., with regard to this subject, the decision of the SCCouncil of April 24, 1880, *AAS* 13, p. 501ff.

ignation[3] or whether it is enough—as in the case of matrimony—that it be provoked by an external threat that does not seek to obtain the resignation, but does provoke it.

2. *Substantial error*, which is similar to substantial ignorance, is an error in judgment regarding the essential elements of the resignation: that is: *a*) error regarding the cause or motive of the resignation (e.g., resignation because an incompatibility of offices was erroneously determined); or *b*) error—or ignorance—regarding the nature of the resignation itself and its consequences.[4] The resignation will also be invalid if error or ignorance exists with regard to a condition *sine qua non* (c. 126), that is, that the condition stipulated between the person resigning and the authority has been erroneously understood by the person resigning.

3. *Deceit* is the deception provoked in order to cause the resignation. The deception can deal with the causes of the resignation (e.g., deception of the officeholder to convince him or her of having gravely harmed someone in the exercise of the office), or its effects, or with false future possibilities.[5] Thus, the deceitful error regarding the possibility of reaching a better future, better but incompatible with the office possessed, would also be included in this case. We do not agree with Chiappetta,[6] who admits only deceit that causes substantial error. Deceit is included as a cause of invalidity, and not simply as a reason to rescind the office, because it seeks to protect the person presenting the resignation from any sufficiently grave harm (in the manner of deceit in matrimony). If strictly the deceit that causes substantial error were to be admitted, it could not be included as a cause in itself.

4. *Simony*, as well as invalidating the provision for office (c. 149 § 3), also makes a resignation invalid. Simony, in this case, consists of the deliberate intention to buy or sell for a temporal price the resignation of an ecclesiastical office (cf. c. 727 § 1 *CIC*/1917). Buying and selling here should be understood in the broad sense. That is, any contract, whether express or tacit, carrying an effect or not (c. 728 *CIC*/1917). The doctrine included other cases (*internal* simony, *external mental* simony) in which no agreement intervenes and that are not characterized as offenses.[7] We agree that these cases should not be considered in this canon. In order to

3. Cf. R.A. HILL, commentary on c. 188, in CORIDEN-GREEN-HEINTSCHEL (Eds.), *The Code of Canon Law, a Text and Commentary* (New York 1985).

4. Cf., e.g., the decision of the Signatura of June 9, 1970, in X. OCHOA, *Leges Ecclesiae*, vol. IV (Rome 1974), no. 3867, col. 5840.

5. Cf. *VI* I, 7, 2.

6. L. CHIAPPETTA, *Il Codice di Diritto Canonico, commento giuridico-pastorale*, vol. I (Naples 1988), p. 246, no. 1097 and note 1.

7. Cf. M. CABREROS, commentary on c. 727, in *Código de Derecho Canónico, y legislación complementaria (texto latino y versión castellana, con jurisprudencia y comentarios)*, Madrid 1957.

avoid simoniac resignations, the *CIC*/1917, limited resignations greatly in favor of third parties.[8]

Canon 188 almost exactly reproduces c. 185 of the *CIC*/1917. The only objection presented against it during the works of codification consisted in that the new *CIC* did not define the notion of "simony." Therefore, the canon remained unclear and lacked juridical certainty for the use of the term. Along with the decision to avoid as much as possible the definitions in the Code, a response to this problem stated that "notio sufficienter definitur a doctrina et iurisprudentia."[9]

Logically, these bases of nullity of the act of resignation have a practical importance at the time of hierarchical recourse or an administrative cause against the resignation adversely affected in these cases.

8. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, t. II (Rome 1943), p. 395, no. 328.
9. *Comm.* 14 (1982), p. 153.

189 § 1. **Renuntiatio, ut valeat, sive acceptatione eget sive non, auctoritati fieri debet cui provisio ad officium de quo agitur pertinet, et quidem scripto vel oretenus coram duobus testibus.**

§ 2. **Auctoritas renuntiationem iusta et proportionata causa non innixam ne acceptet.**

§ 3. **Renuntiatio quae acceptatione indiget, nisi intra tres menses acceptetur, omni vi caret; quae acceptatione non indiget effectum sortitur communicatione renuntiantis ad normam iuris facta.**

§ 4. **Renuntiatio, quamdiu effectum sortita non fuerit, a renuntiante revocari potest; effectu secuto revocari nequit, sed qui renuntiavit, officium alio ex titulo consequi potest.**

§ 1. For a resignation to be valid, whether it requires acceptance or not, it must be made to the authority which is competent to provide for the office in question, and it must be made either in writing, or orally before two witnesses.

§ 2. The authority is not to accept a resignation which is not based on a just and proportionate reason.

§ 3. A resignation which requires acceptance has no force unless it is accepted within three months. One which does not require acceptance takes effect when the person resigning communicates it in accordance with the law.

§ 4. Until a resignation takes effect, it can be revoked by the person resigning. Once it has taken effect, it cannot be revoked, but the person who resigned can obtain the office on the basis of another title.

SOURCES: § 1: cc. 186, 187
§ 2: c. 189 § 1
§ 3: c. 189 § 2; CodCom Resp. III/1, 14 iul. 1922 (*AAS* 14 [1922] 526–527)
§ 4: c. 191 § 1; CodCom Resp. III/2, 14 iul. 1922 (*AAS* 14 [1922] 526–527)

CROSS REFERENCES: cc. 57, 184, 185, 187,188, 332 § 2, 402, 416, 430 § 2, 538 § 3, 1743

COMMENTARY

Pablo Gefaell

This long canon originates from the fusion of cc. 186, 187, 189 and 191 § 1 of the *CIC*/1917. Here, they have been reorganized and simplified, and some changes have been introduced.

1. *The formal requisites of the act of resignation* (§ 1)

Paragraph 1 puts forth the formal requirements for the submission of a resignation. These are as necessary for the validity of the resignation as are the substantial requirements of cc. 187–188.

Canon 186 of the *CIC*/1917, was included later (in 1980) as an incidental clause in the current § 1, allowing resignation *in writing or orally* before the competent authority and two witnesses, but deleted the reference to resignation by procurator.[1] However, some authors still consider resignation by procurator possible.[2] The written resignation should include: the person resigning, the office that person yields, the cause claimed, request to the authority to admit the resignation, signature of the party seeking resignation, and the date.[3] For greater security, this statement can also be legalized before a notary and filed in the archive of the Curia.[4] The written or oral presentation before the competent authority and two witnesses is a necessary requirement, not only for the lawfulness of the resignation, but for its validity.[5]

With respect to the *authority competent* to receive the resignation, c. 187 of the *CIC*/1917, forms the principal body of § 1 of the present canon, but has been notably simplified. It establishes that the resignation—"whether it requires acceptance or not"—can be presented only before the authority responsible for the provision of the new titleholder of the office. Formerly, the rule was complicated by the existence of various authorities competent to confer the office and receive the resignation of the same.[6] Also, as the right of patronage existed, so did the rule that prohibited and punished the resignation presented to the laity.[7]

1. Cf. *Comm.* 23 (1991), p. 264.
2. L. CHIAPPETTA, *Il Codice di Diritto Canonico, commento giuridico-pastorale*, vol. I (Naples 1988), p. 247, no. 1103.
3. Cf. A. ALONSO LOBO, "Oficios eclesiásticos," in *Comentarios al Código de Derecho Canónico*, t. I (Madrid 1963), p. 483, no. 477.
4. Ibid.; cf. c. 186 *CIC*/1917.
5. L. CHIAPPETTA, *Il Codice*..., cit., p. 246, n, 1102.
6. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, t. II (Rome 1943), pp. 396–398, no. 331; A. ALONSO LOBO, "Oficios eclesiásticos," cit., p. 483, note 36.
7. Canon 2400 *CIC*/1917; cf., also, B. OJETTI, *Commentarium in Codicem iuris canonici*, t. IV (Rome 1931), pp. 125–126.

2. *The just reason for accepting the resignation* (§ 2)

Canon 189 § 1 of the *CIC*/1917, established that the authority required a just and proportioned cause—where applicable—to accept the resignation. During the revision work there was a desire to clarify that the just cause for acceptance of the resignation is not different from the just cause for submitting it. The authority should only investigate and judge whether the person presenting the resignation based it truly on a just and proportional cause. Therefore, there are not two causes but two judgments—that of the person resigning and that of the authority—of the same cause.[8] We have already seen the just causes for resignation (see commentary on c. 187). Now we consider that these causes "convince" the authority, who must consider the proportionality of the cause presented against other information that makes up the other side of the proportion. The authority should, then, keep in mind the requirements of service,[9] the existence of possible replacements, the appropriate support of the clergy,[10] the presence of a disciplinary process regarding the interested party (cf. *RGCR*, 67), etc.

3. *The deadline for responding to resignation* (§ 3)

The *CIC*/1917 (in c. 189 § 2, the precedent of the current c. 189 § 3), demanded a response from the local ordinary, whether positive or negative, within one month of the presentation of the resignation. The legal text was less precise in that it also required a response—at least according to the text of the canon—for resignations that did not require acceptance. Nonetheless, c. 189 § 3 of the *CIC* fixes a term of three months to reply to the resignation that requires acceptance. If a reply is not given within this time limit the resignation *omni vi caret*, being a direct application of "negative administrative silence," which in these cases implies a denial of the petition (c. 57).

We see that, in the case where someone has presented a resignation and the time limit for the response has passed without result, the resignation should be considered denied. But then, could the authority accept the resignation later without the resignation having to be presented again? If we follow the response to the PCI of July 14, 1922,[11] it would appear so.[12] Nonetheless, we think that this interpretation, in making reference to the prior Code, cannot be considered. Furthermore, we think that the text of the current c. 189 § 3 in stating "renuntiatio... omni vi caret" annuls any

8. Cf. *Comm.* 21 (1989), p. 228.
9. Cf., e.g., RGCR, 61.
10. Cf. cc. 568 and 1484 *CIC*/1917.
11. *AAS* 14 (1922), p. 526.
12. Cf. M. CABREROS, commentary on c. 189, in *Código...*, cit.

possible juridical effect of the initial act of presentation of the resignation if it has not been accepted within the legal time limit.

The practice (used in some civil scopes) of signing the resignation without a defined date does not appear very correct. Since this leaves to the authority the possibility of specifying a date at his or her will, it can be a mechanism of coercion over the titleholder and harm the stability of the office. Nonetheless, we do not think the Code prohibits anything of this type.[13]

The acceptance is the act of the authority that makes the loss of office effective (see commentary on c. 184). The mere presentation of the resignation is in itself ineffective. This general principle admits the exception of constitutive resignations, which do not require acceptance (c. 189 § 3). In these cases, the resignation is effective when the person resigning notifies the competent authority according to the rule of law, that is, completing the substantial and formal requirements (cc. 187–189). Such an order was not put forth—as a general rule—in the *CIC*/1917. Perhaps this was due to its infrequent practice in the common law (in particular law, on the other hand, it is often practiced), since in the Code only two cases of resignation that do not require acceptance exist. These are the resignation of the Roman Pontiff (c. 332 § 2)[14] and the resignation of the diocesan administrator (c. 430 § 2).

4. *Revocation of the resignation (§ 4)*

This new paragraph contradicts the provision contained in c. 191 § 1 of the *CIC*/1917, that affirms the impossibility of retracting a resignation once it has been legitimately made.[15] In the aforementioned canon, the expression "legitime facta renuntiatione," does not make clear whether the impossibility of retracting the resignation comes about once the resignation is "presented" or once it "has taken effect." Appealing to the clear sense of this expression in the previous canon (190 § 1 *CIC*/1917) it would appear that the irrevocability became effective once the resignation had been presented. However, since antiquity, the doctrine had accepted that "ante aceptationem a Superiore factam, resignans suum actum unilateralem potest revocare, cum res adhuc sit integra."[16] This brought about an authentic reply[17] that clarified the question, establishing that a resigna-

13. For the contrary opinion, cf., e.g., R.A. HILL, commentary on c. 189, in CORIDEN-GREEN-HEINTSCHEL (Eds.), *The Code of Canon Law, a Text and Commentary* (New York 1985).
14. Cf. *VI* I, 7, 1.
15. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 398, no. 331. Cf., also, the decision of the Signatura of June 11, 1972, in X. OCHOA, *Leges Ecclesiae*, vol. IV (Rome 1974), no. 4072.
16. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 398, no. 331; cf. B. OJETTI, *Commentarium...*, cit., p. 133–134.
17. CPI, RESPONSE of July 14, 1922: *AAS* 14 (1922), p. 526.

tion could be revoked if it had not yet been accepted. The text currently in force puts forth this authentic interpretation and extends it also to those resignations that do not require acceptance. Thus it is clear that the person resigning can revoke the resignation as long as it has not produced effect (by not yet being accepted or for other reasons).

Canon 190 of the *CIC*/1917 indicated that the office remained vacant once notification was made of the acceptance to the person resigning, and that the person resigning should remain in office until receiving certain notice of the acceptance. These provisions are not set forth expressly in the parallel canon of the *CIC*, but this does not mean that they do not remain in force. Manzanares thinks that the notification of acceptance is no longer necessary for validity because "one cannot merely assume the existence of invalidating clauses, one must prove it (c. 10)." He is thus inclined "that it is not necessary for validity, even when respect for the persons and the very principle of juridical security itself would seem to demand it."[18] However, in our understanding, the peremptory requirement of this notification is still set forth in the section regarding singular administrative acts (c. 47). This is done in such a way that the initial administrative act of provision of the office cannot be considered revoked until notification of such revocation has been legitimately made (whether through notification of the acceptance of a resignation or notification of a decree of removal, etc.) and, therefore, the vacancy of the office is not produced until that time.

On the other hand, today it is not necessary to indicate the obligation to remain in office until receipt of certain notification of the acceptance of the resignation, given the new requirements for this notification. Effectively, according to the current regulations, in order to produce a vacancy of the office, "certain notification" of the acceptance is not enough. Rather, "lawful notification" (c. 47) is necessary. In addition to being certain, lawful notification must be formal or official, thus resolving any question put forth with respect to the text of the former canon.[19] Thus, although informal notice of the acceptance has been received, if it has not yet been communicated officially, it can be retracted and the resignation denied. It could appear, nonetheless, that in both the *CIC*/1917 (c. 430 § 1) and in the current Code (cc. 416–417) the vacancy of the office of diocesan bishop by resignation is granted upon receipt of only "certain notification" of the acceptance by the Roman Pontiff. However, affirming this is difficult, since, keeping in mind that c. 47 does not contain clauses that permit exceptions, it should be deduced that in this case official notification is also required.

18. J. MANZANARES, commentary on c. 189, in *Salamanca Com.*

19. Cf. M. CABREROS, commentary on c. 190, in *Código*..., cit; A. ALONSO LOBO, "Oficios eclesiásticos," cit., pp. 484–485.

In spite of having been deleted from the Code, by reasons pointed out above, the *Regolamento generale della Curia Romana* still informs persons resigning of the obligation to continue to carry out the duties of the office until acceptance of the resignation has been communicated (*RGCR*, 68).

ART. 2
De translatione

ART. 2
Transfer

190 **§ 1. Translatio ab eo tantum fieri potest, qui ius habet providendi officio quod amittitur et simul officio quod comittitur.**

§ 2. Si translatio fiat invito officii titulari, gravis requiritur causa et, firmo semper iure rationes contrarias exponendi, servetur modus procedendi iure praescriptus.

§ 3. Translatio, ut effectum sortiatur, scripto intimanda est.

§ 1. A transfer can be made only by the person who has the right to provide both for the office which is lost and at the same time for the office which is being conferred.

§ 2. A grave reason is required if a transfer is made against the will of the holder of an office and, always without prejudice to the right to present reasons against the transfer, the procedure prescribed by law is to be observed.

§ 3. For a transfer to have effect, it must be notified in writing.

SOURCES: § 1: c. 193 § 1
§ 2: c. 193 § 2

CROSS REFERENCES: cc. 184 § 1, 362, 416–418, 437 § 3, 624 § 3, 1336 § 1, 4°, 1748–1752

COMMENTARY
Pablo Gefaell

I. The concept of transfer

The transfer consists of the change of the titleholder from one office to a different office, imposed or permitted by the competent authority for

legitimate reasons. It is included in the section regarding loss of offices because it involves the loss of the first office, although it also implies—at least in the logical order—the provision of the other simultaneously.

II. THE PASSIVE SUBJECT

Outside of the Roman Pontiff, all holders of ecclesiastical offices are subject to transfer, since the figure of the immovable office has been deleted (*CD* 31; see commentary on c. 193 § 1). However, some offices possess more stability than others (cf. cc. 193 § 1 and 522).

In § 2 of this canon, the word "cleric" has been removed because what is established in these canons should serve also for the laity.[1] However, as we can observe in some legislation, in the cases of clergy and of religious the legislator supposes a greater availability than in the case of the laity (cf. *RGCR*, 45 § 1).

The transfer carries with it not only the loss of office *a quo*, but also the canonical provision of office *ad quod*. Therefore, it is logical that the passive subject of the transfer must meet the conditions of suitability for the new office.

III. THE COMPETENT AUTHORITY

As transfer assumes the removal from an office and the provision for another, § 1 establishes that only that authority who is competent to provide for both offices in question is able to carry out the transfer. This clear order was already noted in c. 193 § 1 of the *CIC*/1917. However, important canonical commentators—although leaving the principle firm—did not question the inclusion in the category of "transfer" the case where a person left office in a diocese to receive an office in another diocese. In this case, the consent of both interested ordinaries was required.[2] Nonetheless, it appears that the clear sense of c. 190 § 1 indicates that a transfer can only be given among bodies of the same entity (e.g., the diocese). It also indicates that when dealing with offices pertaining to different ecclesiastical bodies it cannot be called "transfer," but only the loss of the first office and, independently, reception of the new office.[3] In spite of all this,

1. Cf. *Comm.* 21 (1989), p. 229.
2. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, t. II (Rome 1943), p. 416, no. 355, II.
3. Cf. R.A. HILL, commentary on c. 190, in CORIDEN-GREEN-HEINTSCHEL (Eds.), *The Code of Canon Law, a Text and Commentary* (New York 1985).

in certain legal texts confusion regarding terminology is still noted. In the *Regolamento generale della Curia Romana*, 44 § 2, for example, it is stated that the Apostolic See can order the transfer of a priest that occupies an office in the Roman Curia to another service in the priest's diocese of origin. It even appears to be understood that this can be carried out without the consent of the diocesan bishop, since the text requires only "putting oneself in contact" with the bishop. It would be clearer if it stated that the Holy See could "remove" in these cases, but saying "transfer" indicates the concession of the other office in the diocese. This is a provision outside of the competence of the Holy See. In reality, this presumed transfer could not be done without damage to the principle of decentralization of the ecclesiastical bodies and the proper character, not vicarious, of the power of the diocesan bishop.

The persons who chose, requested, or presented the current holder of the office, do not by this fact have the power to transfer him or her to another office. This indication of c. 195 of the *CIC*/1917, has disappeared from the *CIC*, since it was no longer necessary, keeping in mind the general principle established by the current c. 190 § 1.

IV. Types of Transfer, Reasons, and Modes of Procedure

The types of transfer are distinguished by the causes that justify the transfer, and by the manner in which the transfer is conducted. Since these factors are intrinsically related, we will discuss them together. In general terms, the transfer can be voluntary or forced.

1. *Voluntary transfer*

This transfer, which is accepted freely and even requested, is similar—at least in terms of the loss of the first office—to conditional resignation,[4] and therefore can be carried out for any just cause[5] and even without any apparent cause.[6] This is true since the agreeing wills of the authority and of the affected person appear sufficient for its validity. Effectively, it is a rule of prudence in the government that those persons demonstrating their suitability in inferior offices will gradually advance to ecclesiastical offices of greater importance. This is called "promotion," al-

4. Cf. M. Conte a Coronata, *Compendium Iuris Canonici*, vol. I (Taurine-Rome 1950), p. 309, no. 521. (See commentary on c. 187).
5. Cf. B. Ojetti, *Commentarium in Codicem iuris canonici*, t. IV (Rome 1931), p. 147.
6. Cf. F.X. Wernz-P. Vidal, *Ius Canonicum*, cit., p. 417, no. 356. Cf. also *Comm.* 23 (1991), p. 265.

though transfers can also be presented to offices of equal category, or even to inferior categories. However, these last transfers are difficult to make voluntarily.

In the drafting of the canon, the mention of voluntary transfer was deleted because it was not considered necessary, but obvious.[7]

The manner of proceeding in these voluntary transfers does not require any particular form. It is sufficient to observe the requirements for resignation of office *a quo* and the general norms for provision of office *ad quod*,[8] as well as the rules of particular law, if applicable. That is, at the time of conceding the office *ad quod*, the rights of those under whose jurisdiction falls—by common or particular law—the conferral, election, presentation, or request of the titleholder for the office should not be neglected or omitted. This is also true in the case of forced transfers.

2. *Forced transfer*

Forced transfer is imposed by the authority against the will of the person concerned. This coerced transfer does not always have a strictly punitive character, nor is it always similar to removal, as was stated in c. 193 § 2 of the *CIC*/1917[9] (which spoke of "privatio," but in this text signified "removal" in the generic sense: see commentary on c. 192).

When distinguishing the types of forced transfer, nonetheless, it is useful to follow the types of removal, at least in terms of the causes and proceedings. During the works of revision of this canon it was discussed whether it was necessary to specify in the text the different manners of proceeding for each type of transfer. It was decided to make only general mention, referring to the requirements of law for the procedure in each case.[10]

The coerced transfer can be *punitive* or *administrative*. According to the canon, in all cases it must be imposed only for grave reasons.

a) The *punitive transfer* is imposed for an offense. Its cause, then, must be an action classified as punishable. In c. 1336 forced transfer is noted as a possible expiatory penalty, but in the common law no crime exists that demands this penalty. Consequently it deals only with one of the possibilities offered to the superior for offenses that call for an undetermined penalty (*iusta poena puniatur*) or to lessen the penalty of deprivation of office if, in the judgment of the superior, some extenuating circumstance exists.[11]

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7. Cf. *Comm.* 23 (1991), p. 264.
8. Cf. M. CONTE A CORONATA, *Compendium*..., cit., p. 310, no. 525.
9. Cf. *Comm.* 23 (1991), p. 265.
10. Cf. ibid.
11. Cf. A. ALONSO LOBO, "Oficios eclesiásticos," in *Comentarios al Código de Derecho Canónico*, t. I (Madrid 1963), p. 488, no. 486.

The manner of proceeding for the imposition of a punitive transfer will be that which is outlined in penal law. Therefore this type of transfer can be carried out through a judicial proceeding or through an extra-judicial decree (c. 1342 § 2), although it never can be a penalty *latae sententiae* (c. 1336 § 2). In the case in which a "perpetual" transfer can be made, it cannot be imposed through an extra-judicial decree (c. 1342 § 2).

b) The *administrative transfer* is imposed for "grave" reasons, which are understood as causes "proportionate" to the transfer the authority wishes to impose.[12] The gravity of the cause should be major or minor according to the type of office or the circumstances. An example is the transfer of a titleholder from an office conferred for an indeterminate period of time, which possesses *a iure* a special stability (c. 193 § 2). In this case, the causes should be more serious than if the office were conferred for a determinate time or a time left to the prudent discretion of the bishop.[13] In the tenor of this canon, it is somewhat surprising that the motive for forced transfer of offices conferred for a time left "ad prudentem discretionem auctoritatis" should be grave and cannot be simply any "just cause," which is indicated, on the other hand, for removal from these offices (see commentary on c. 193). We believe that the clarification made by the Commission of revisors, in reference to the interpretation of the "grave cause" as a cause proportionate to the type of transfer, can reduce this difference and equate the "proportionately grave cause" to simply "just cause." Similarly, if the transfer is made to an office less advantageous—for whatever reason—to the holder, the cause should be graver than a transfer to a similar office with the same circumstances in terms of place, schedule, etc.

The manner of proceeding will also depend on the type of administrative transfer and its causes. Thus, the authority that is going to proceed to the transfer should previously have been assured of the degree of stability of the office the transferee occupies.[14] The imposition of a transfer on holders of more stable offices—such as a parish priest—normally requires a special administrative proceeding (cc. 1748–1752).[15] These are called strictly "administrative transfers." The transfer that is forced, but not punitive, from offices that possess minor stability (cf., e.g., *RGCR*, 23) are generally called "simple" and can be made without special proceedings, according simply to the general prescriptions of the law and natural equity. It was preferred not to include this last requirement regarding equity—originating from the requirements in *CIC*/1917, for "simple" removal—in this section of the Code because it is a general principle that

12. Cf. *Comm.* 23 (1991), p. 264.
13. Cf. R.R. CALVO-N.J. KINGLER (Eds.), *Clergy Procedural Handbook* (Washington 1992), p. 118.
14. Regarding the stability of the office, see commentary on cc. 193 and 522.
15. Cf. R.R. CALVO-N.J. KINGLER (Eds.), *Clergy*..., cit., p. 118.

should always be kept in mind.[16] Nonetheless, it appears anew in the last canon of the Code in relation to transfers (c. 1752).

For the transfer of parish priests, as we have said, there are special rules (cc. 1748–1752). Particular ordinances also exist for papal legates, although, in this case, their particular ordinances are due to their special mobility (c. 362). Their particular law regulates the transfer of religious superiors (c. 624 § 3). The transfer of diocesan bishops is specifically addressed in cc. 416–418. Although the Roman Pontiff could by decree force the transfer of a diocesan bishop, the practice of considering the bishop's consent is ancient.[17]

V. THE RIGHT TO OPPOSE TRANSFER

The canon, as we have stated, mentions the method of proceeding only in a general manner. However, during the work of revision, there was a desire to reaffirm expressly that the person who was going to be transferred had the right to present his or her arguments against the transfer.[18] Furthermore, once the transfer is decreed, the Code recognizes the right to take recourse *in suspensivo* (cc. 1734 § 1, 1736 § 1, 1747 § 3, 1752)—not only *in devolutivo*, as stated in *CIC*/1917—against the administrative act imposing the transfer (cc. 1732–1739). Also, when dealing with a punitive transfer imposed through sentencing, the appeal suspends the execution of the sentence (c. 1353) and the power of the office *a quo* is also suspended (similar to c. 143).

Regarding the matter of opposition to transfer, the new *Regolamento generale della Curia Romana* may well be responding to the criticism by some authors of the prior procedure.[19] Under old articles 23 and 45 § 2, a party who opposed a possible transfer could present his or her argument only before the decision was made by the competent authority; once the authority decreed the transfer, the opposing party had no right to lodge an argument. New articles 24 and 44 have eliminated this explicit denial of the right to oppose following a decree; such a right now exists by way of appeal before the "Ufficio del Lavoro della Sede Apostolica" (art. 95).

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16. Cf. *Comm.* 14 (1982), p. 153, c. 189.
17. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 418, no. 358; B. OJETTI, *Commentarium...*, cit., p. 149.
18. Cf. *Comm.* 23 (1991), p. 265.
19. Cf. J.I. ARRIETA, "Funzione pubblica e attività di governo nell'organizzazione centrale della Chiesa: Il Regolamento Generale della Curia romana," in *Ius Ecclesiae* 4 (1992), pp. 597–598.

VI. THE SUMMONS IN WRITING

Paragraph 3 of c. 190 is new in relation to the respective canon of the *CIC*/1917.

It requires, for the transfer to be effective, that the summons be given in writing. This may be by a simple written summons or by sending a copy of the decree of transfer. Thus, the mere oral notification that the transfer has been decided does not have any juridical force. Canon 418, nonetheless, speaking of the transfer of a diocesan bishop, appears to recognize the effectiveness of a simple "certain notification" of the transfer. However, if we turn to c. 382 § 2, we see that the terms used in c. 418 should make reference to the reception of the "apostolic letters," and not to simple oral notification. The *Codex canonum Ecclesiarum orientalium* is more explicit on this point. In effect, in its c. 223—parallel to 418 of the *CIC*—it does not utilize the expression "certa notitia," as does the *CIC*, but "intimatio," which is technically more exact and clarifies the sense of the expression used in the *CIC*.

191 **§ 1. In translatione, prius officium vacat per possessionem alterius officii canonice habitam, nisi aliud iure cautum aut a competenti auctoritate praescriptum fuerit.**

§ 2. Remunerationem cum priore officio conexam translatus percipit, donec alterius possessionem canonice obtinuerit.

§ 1. In the process of transfer, the first office is vacated by the taking of canonical possession of the other office, unless the law or the competent authority has prescribed otherwise.

§ 2. The person transferred receives the remuneration attached to the previous office until the moment of obtaining canonical possession of the other office.

SOURCES: § 1: c. 194 § 1
§ 2: c. 194 § 2

CROSS REFERENCES: cc. 380, 382, 404, 418, 527 §§ 2 and 3, 534 § 1, 542, 3°

COMMENTARY

Pablo Gefaell

1. *"Iter" of the canon*

This canon originates from c. 194 of the *CIC*/1917. The only notable differences with respect to the previous text refer to the extension of the canon to the laity[1] and the elimination of the terminology proper to the benefice system.[2]

2. *Reason for the effective loss of the preceding office*

According to the general rules regarding provision for offices, in the transfer, the full provision for the new office is given with the taking of possession of it. This act finalizes the loss of the previous office, provok-

1. Cf. *Comm.* 21 (1989), p. 230.
2. Cf. *Comm.* 21 (1989), p. 250; 22 (1990), p. 115.

ing its vacancy by law. But this general rule can have two exceptions: *a*) if the law—common or particular—orders otherwise; *b*) if the competent authority prescribes otherwise. We will look at these two cases.

a) In the common law, c. 418, for example, establishes that the diocesan bishop, during the interval between notification of the transfer and the taking of possession of the new diocese, no longer possesses all of the rights of office in the preceding diocese. As we can see, this is, in some way, an exception to the general rule of c. 191 that establishes the vacancy when possession of the new office is taken. We have said that this is an exception "in some way," because today this case is not actually considered one of "vacancy," but of limitation of the competencies of the bishop who is ordered to leave one diocese for another. In this respect, the *CIC*/1917, left a different sense in its c. 430 § 2, stating that the diocese *a quo* remained "fully" vacant with the taking of possession of the new diocese. Therefore in the interval the office was vacant, although not fully.[3] This possibly originated with the ancient *stylus Curiae romanae* that anticipated the loss of office *a quo* not on the day possession of the new office is taken, but on the day of the promotion in consistory.[4]

In the law proper of the Roman Curia we also find an example of an exception to the principle of c. 191 § 1. *Regolamento generale della Curia Romana*, 66, establishes the figure of "collocamento in disponibilità." This is a particular situation that assumes a certain loss of office—in reality it remains in suspension—that can terminate in transfer or removal.

b) "The intent behind the clause 'unless the law or the competent authority has prescribed otherwise' is to overcome problems that could result from c. 153 § 1, especially when different transfers take place simultaneously."[5] The authority also can, for example, establish that the transferee—already in possession of the new office—remains in the previous office until a replacement is found. In our judgment, the competent authority, in order to prescribe a different time of vacancy of the previous office, is the same authority that can order the transfer.

In some case the transferee may decline to take possession of the new office. In this case, upon the passing of the time limit fixed in the decree of transfer or established later for the taking of possession, the authority should declare the first office vacant, following by analogy the criteria of c. 1751 § 2.[6]

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3. Cf. M. CABREROS, commentary on c. 194, in *Código de Derecho Canónico, y legislación complementaria (texto latino y versión castellana, con jurisprudencia y comentarios)* (Madrid 1957).

4. Cf. M. CONTE A CORONATA, *Compendium Iuris Canonici*, vol. I (Taurine-Rome 1950), p. 310, no. 526, note 7; B. OJETTI, *Commentarium in Codicem iuris canonici*, t. IV (Rome 1931), p. 150–151, note 4.

5. J. MANZANARES, commentary on c. 191, in *Salamanca Com.*

6. Cf. J.I. ARRIETA, *Organizzazione ecclesiastica, lezioni di Parte generale (ad usum scholarum)* (Rome 1991–1992), p. 259.

3. *Remuneration during the period of transfer*

Paragraph 2 of the canon sets forth the same rule as c. 194 § 2 of the *CIC*/1917. The interpretive difficulties of the old text arose from the office-benefice system then prevailing. The new system of remuneration of holders of ecclesiastical offices has simplified notably the rule of law. The transferee receives the remuneration of the office *a quo* until possession of the new office has been taken.

The rules directly derived from this paragraph are c. 418 § 2 (regarding transfer of a diocesan bishop) and the *Regolamento generale della Curia Romana*, 66 § 2, that orders that "durante il periodo della disponibilità è corrisposta l'intera retribuzione."

ART. 3
De amotione

ART. 3
Removal

192 **Ab officio quis amovetur sive decreto ab auctoritate competenti legitime edito, servatis quidem iuribus forte ex contractu quaesitis, sive ipso iure ad normam can. 194.**

One is removed from office either by a decree of the competent authority lawfully issued, observing of course the rights possibly acquired from a contract, or by virtue of the law in accordance with canon 194.

SOURCES: c. 192 § 1

CROSS REFERENCES: cc. 193, 194, 682 § 2

COMMENTARY

Pablo Gefaell

Removal is the forced loss of an ecclesiastical office, in which the conferral of a new office to the person removed is not necessarily required.[1] It is established by decree of the competent authority or by the same law as the taxative cases seen previously.

Removal does not necessarily have a punitive character—thus the distinction between removal and privation—so its primary motive is not punishment for a crime but seeking the public good. In fact, removal may be imposed for circumstances that do not imply any guilt in the person removed. Instead, for the good of the community, the removal of the holder of the office may be required.[2]

1. Cf. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, t. II (Rome 1943), p. 419, no. 360.
2. Cf. F. BOLOGNINI, *Lineamenti di Diritto Canonico* (Turin 1992), p. 148.

The *CIC*/1917, spoke of this case in only one canon (c. 192) with three paragraphs that the new Code has split into two canons (cc. 192 and 193). It has also added c. 194 regarding the causes for removal *ipso iure*, which is a re-statement of the former canon regarding tacit resignation (c. 188 *CIC*/1917), which has now disappeared as such.

The legislation of 1917 did not speak of "removal," but rather of the term "privation" (cf. c. 192) with generic significance that was not only penal. But, in fact, the doctrine limited the use of the term "privation" to punitive cases, while it used the term "removal" for those cases in which the proceedings were not judicial, but administrative. The diversity in terminology between the *CIC*/1917, and the doctrine can be understood if one keeps in mind that these administrative proceedings had not been officially introduced in canon law until 1910,[3] in the full process of elaboration of the Code.

Removal, as we have said, can be *ipso iure* (c. 194) or *ab homine* (c. 193). One of the practical differences between these two types of removal lies in the fact that the effects of the *ipso iure* are *ex tunc.* That is, they are retroactive to the moment of the commission of the act that constitutes the case for the removal. On the other hand, the removal imposed by an act of the authority has effects *ex nunc.* In this way, the remuneration for the office, the acts placed by the officeholder, etc., from the time of the commission ought to be restored or sanated once the removal *ipso iure* is declared.[4]

In the canon under discussion there exists an innovative norm with respect to the *CIC*/1917. It deals with the juridical protection of the rights acquired by contract if the removal is effected through decree (not so for those *ipso iure*). These rights are acquired by both the officeholder and by third parties.[5] The acquired rights protected by this canon are only those arising from the contract (e.g.: health insurance, pension, home, etc.). The text of the canon appears, then, to assume that the removal that harms the rights acquired during exercise of the office though other means (prescription, custom, etc.) should not be considered invalid, thus constituting one of the exceptions put forth in c. 38. The issue in this case deserves an authentic interpretation.

It is advisable that in the conferral of offices, overall in the case of the laity, the working relationship with the Church be established through a contractual title.[6] This is often formalized through a civil contract (cf. c. 494), and "in such a case it would seem advisable to insert a clause

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3. Cf. *SCCong*, Decr. *Maxima cura*, August 20, 1910, in *AAS* 2 (1910), p. 636ff.
4. Cf. B. OJETTI, *Commentarium in Codicem iuris canonici*, t. IV (Rome 1931), p. 136, note 6.
5. L. CHIAPPETTA, *Il Codice di Diritto Canonico, commento giuridico-pastorale*, vol. I (Naples 1988), p. 253, no. 1132.
6. Cf. *Comm.* 21 (1989), p. 230.

in the contract which would enable the canonical prescriptions of this chapter to acquire legal force in the field of secular law also."[7]

Nonetheless, if the holder of a diocesan office is a religious, the removal can be made freely, whether by the bishop of the diocese or by the competent religious superior. This can be done even without the consent of the other, with the simple notification being sufficient (c. 682 § 2; cf. *RGCR*, 44 § 2).

The removal of an advocate during a judicial proceeding, anticipated in c. 1486 § 1, does not strictly correspond to the concept we utilize here, since it is not a loss of ecclesiastical office but its exercise in a specific case.

The authority competent to remove will be the same one that is competent to confer the office (similar to c. 189).[8] His or her power to remove is autonomous and does not need anyone's consent. This is true not only in removal from offices conferred by free conferral, but also in those conferred by presentation or election.[9]

"Removal" should be adequately distinguished from the figure of "rescinding of the provision" of the office (c. 149 § 2). The difference is in that, for the rescinding, the provision of the office should still be recent. It would be better if the rules regarding rescinding were more specific, particularly, for example, the causes and procedures for the rescinding. Perhaps these could be referred to rules for removal from offices. Otherwise, it would fall to the will of the authority to rescind the provision of any office, which, in substance, would be the equivalent of removal "*ad nutum auctoritatis*" and, as we have seen, could be applied only for specific offices.

7. J.I. ARRIETA, commentary on ch. II. "De ammissione officii ecclesiastici," in *Pamplona Com*, p. 158.
8. Cf. J. MANZANARES, commentary on c. 192, in *Salamanca Com*.
9. CHIAPPETTA, *Il Codice*..., cit., p. 253, no. 1130.

193 **§ 1. Ab officio quod alicui confertur ad tempus indefinitum, non potest quis amoveri nisi ob graves causas atque servato procedendi modo iure definito.**

§ 2. Idem valet, ut quis ab officio, quod alicui ad tempus determinatum confertur, ante hoc tempus elapsum amoveri possit, firmo praescripto can. 624 § 3.

§ 3. Ab officio quod, secundum iuris praescripta, alicui confertur ad prudentem discretionem auctoritatis competentis, potest quis iusta ex causa, de iudicio eiusdem auctoritatis, amoveri.

§ 4. Decretum amotionis, ut effectum sortiatur, scripto intimandum est.

§ 1. No one may be removed from an office which is conferred on a person for an indeterminate time, except for grave reasons and in accordance with the procedure defined by law.

§ 2. This also applies to the removal from office before time of a person on whom an office is conferred for a determinate time, without prejudice to can. 624 § 3.

§ 3. When in accordance with the provisions of law an office is conferred upon someone at the prudent discretion of the competent authority, that person, may upon the judgment of the same authority, be removed from the office for a just reason.

§ 4. For a decree of removal to be effective, it must be notified in writing.

SOURCES: § 1: c. 192 § 2
§ 3: c. 192 § 3

CROSS REFERENCES: cc. 192–195, 253 § 3, 318 § 2, 477 § 1, 430 § 2, 485, 494 § 2, 552, 554 § 3, 563, 572, 624 § 3, 682 § 2, 805, 810 § 1, 1420 § 5, 1422, 1436 § 2

COMMENTARY

Pablo Gefaell

Canon 193 deals with removal imposed by an act of the competent authority. In principle it recalls the norms of c.192 § 2 of the *CIC*/1917, but contains other innovations that we will discuss below.

1. *History of the canon*

In the *CIC* all references to movable and immovable offices have been suppressed (see commentary on c. 522), since in Vatican II (*CD* 31) it was decided that immovable offices did not appear very relevant. Nonetheless, the editorial process of this canon emphasized that, in spite of the fact that today one can be removed from any office, a certain stability is necessary in these offices—at least for the laity, due to their families. Therefore the stability should be equal to that possessed by the functionaries in the civil legislation of the states.[1]

As there exist among the ecclesiastical offices some that are more stable than others, the revision commission proposed to distinguish the rule for removal for those conferred *ad nutum auctoritatis*—which are the less stable—from those anticipated to be "lifelong" offices. In addition, it was decided that removal from offices conferred for a determined time period should equate—in causes and procedures—to the removal from lifelong offices. This would be in the case where there was a wish to proceed to the removal before the completion of the anticipated term for cessation of the title.[2] Later the expression *ad nutum* was changed to the current *ad prudentem discretionem*, with a less arbitrary connotation.[3] Nonetheless, c. 682 § 2 continues to use the old expression. Finally, given that in the common legislation the only office *ad vitam* that exists today is that of the Roman Pontiff, the expression was changed to the office *ad tempus indefinitum*, which is the term that has remained. The term *indefinitum* is preferred over *indeterminatum* because it expresses greater stability.[4]

1. Cf. *Comm.* 21 (1989), p. 230.
2. Cf. ibid., pp. 230–231.
3. Cf. *Comm.* 22 (1990), p. 98.
4. Cf. *Comm.* 23 (1991), p. 266.

With respect to the stability of offices conferred for a determined time, it could be said that "la stabilità può coesistere con il concetto di tempo definito, perché 'stabilitas' significa non che debba essere nominato per un tempo indefinito, ma che 'eo durante non debet amoveri.'"[5]

2. *Stability of offices and removal*

Keeping in mind what is stated above and examining the content of the current c. 193, a new classification has been established for offices based on their stability. These are the following: *a*) offices conferred for an indefinite time (§ 1); *b*) offices conferred for a determined time (§ 2); *c*) offices whose duration is left to the prudent discretion of the authority (§ 3).

For examples of the first two types, one can look at the commentary on c. 186. On the other hand, offices of the third type are those whose holders can be freely removed by the competent authority, in spite of being conferred for a determined or indeterminate time—note that we do not say "indefinite." Some examples of this type in the *CIC* are the office of the vicar general and the episcopal vicar, if they are not bishops (c. 477 § 1); the chancellor and other notaries of the diocesan curia (c. 485); the parochial vicar (c. 552); the archpriest (c. 554); the rector of a church (c. 563); the chaplain (c. 572); and any diocesan offices that are occupied by a religious or a member of a society of apostolic life (cc. 682 § 2, 738 § 2).[6]

At first glance, the rule of the *CIC* regarding removal of these three types of office appears parallel, if not equal, to that of the *CIC*/1917, relative to administrative removal from immovable offices, movable parochial offices, and movable non-parochial offices.[7] Nonetheless, the rule of the previous code has been notably simplified, and important changes have been introduced.

In effect, if we analyze the rule of the former code, we can see that, all things considered, the holder of an office can be removed for any just cause and without special procedures ("simple removal") from any ecclesiastical office. The only exceptions are parochial offices, which—whether they were removable or irremovable—always required an administrative procedure regulated by the *CIC*/1917, in cc. 2147ff and 2157ff. All other immovable offices could only be removed by a judicial procedure.[8]

5. Cf. *Comm.* 13 (1981), p. 272. (See commentary on c. 522).
6. Cf., e.g., the references to c. 682 § 2 which are made in cc. 1742 § 2, 552, and 563.
7. Cf., e.g., F.X. WERNZ-P. VIDAL, *Ius Canonicum*, t. II (Rome 1943), p. 422, no. 363.
8. Canon 192 § 2 *CIC*/1917. Cf. B. OJETTI, *Commentarium in Codicem iuris canonici*, t. IV (Rome 1931), p. 137; A. ALONSO LOBO, "Oficios eclesiásticos," in *Comentarios al Código de Derecho Canónico*, t. I (Madrid 1963), p. 486, no. 482.

In the current code, on the other hand, the "simple removal" only applies for offices conferred "at the prudent discretion of the competent authority" (c. 193 § 3). All other offices—temporary or for an indeterminate time—require grave cause and the procedure required by law (c. 193 §§ 1 and 2).

3. *The reason for removal*

a) For "simple" removal, sometimes also called "dismissal" or "resignation," applicable to the less stable offices, c. 193 § 3 specifies that *any just cause* is sufficient. Although the word "any," initially present, has been omitted from the text,[9] no cause that is truly "just" can be excluded. The cause of this removal can be simply utility or convenience, keeping in mind that the reason for stability of the offices is none other than the good of souls.[10]

The justice of the cause is determined by the same authority that can make the removal, and in any case, this judgment should assure *natural equity,* as was stated in the former canon 192 § 3. This duty implies that the superior acts with an understanding of sufficient caution so that, if possible, the reputation of the person being removed is not damaged or that he or she is not left indigent (cf. c. 195). Natural equity also requires that the person being removed be informed of the reasons for the removal, facing a possible recourse. Nonetheless, in any case, the same natural equity can require that the causes for removal not be made public. The reference to equity was omitted from the text because it is understood as a principle applied throughout canon law (see commentary on c. 190).

b) Removal from offices of indefinite time, and of those conferred for a determined time if the removal occurs before the end of the term, requires *grave cause.*

The further developments of this canon have maintained the former rule that, for this type of administrative removal, only allowed causes *a iure determinatas*. The common law indicates a series of causes in c. 1741 (see c. 2147 § 2 *CIC*/1917), but in the current Code, as in the previous, these canons indicate causes in a non-taxative manner (*praesertim*).[11] Therefore, in order to avoid falling into a rigid enumeration of the causes for administrative removal, in the last schema of the revision of the Code in place of the former expression, it was decided to use the current version, which is more generic.[12] Thus, not only can new causes be established through particular law, but also in each specific situation the authority can deter-

9. Cf. *Comm.* 22 (1990), p. 98.
10. Cf. *CD*, 31. (See commentary on c. 522).
11. Cf. B. OJETTI, *Commentarium...*, cit, p. 138, note 12.
12. Cf. *Comm.* 23 (1991), p. 266.

mine if the cause is sufficiently grave for removal of these offices. Generally the cause will be one of those noted in the law, but the canon permits the possible identification of other grave causes.[13] However, it appears to us that, if the grave causes are not taxative, the equivalent rule for "simple" removal could almost be considered.

Nonetheless, when c. 1422 requires causes not only grave but also "legitimate," we believe that—in light of the former rule—removal can only be made by causes indicated as taxative in the law. Since the common law does not indicate specific causes for the removal of judges, particular law should indicate these. Otherwise they would not have the sense of the required "legitimate" cause. The *Codex canonum Ecclesiarum orientalium*, c. 1088 § 1—parallel to c. 1422 of the *CIC*—avoids the phrase found in the *CIC* regarding causes for removal of judges, applying simply the general rule.

4. *The procedure for removal:*

a) *"Simple" removal*

In the removal of conferred offices *ad nutum auctoritatis* no special procedure is set forth. The fact that a special procedure does not exist does not mean that the act can be carried out in any manner.[14] "Simple" removal is not "arbitrary" removal. It requires, in any case, the general procedure set forth in the law; and, in addition, as we have indicated, the duty to protect natural equity requires a procedure with certain cautions.

This is not simply a question of providing information to the person to be removed regarding the removal. The act should always proceed through decree of the removal, and, therefore, should follow the canons outlining administrative acts in general (cc. 35–47) and particularly for singular decrees (cc. 48–58). Therefore:

a) The authority should become carefully *informed* in order to determine whether *just cause* for the removal exists. Anonymous accusations and suspicion do not suffice (c. 50).

b) When possible, a *hearing* should be conducted of those whose rights may be damaged by the removal (c. 50) and, logically, in the first place the person whose removal is in question should be heard *before* the decision to remove him or her is made. The Eastern Code also indicates the obligation of the authority to present to the interested party, before giving the decree, the notices and proofs that give motive for the removal.

13. Cf. R.R. CALVO-N.J. KINGLER (Eds.), *Clergy Procedural Handbook* (Washington 1992), p. 124.
14. Cf. ibid., p. 122.

This gives the interested party an ability to defend him or herself, responding within a time period fixed by the authority (cf. c. 1517 § 2 *CCEO*).

c) The decree should include—at least in summary—the *motives* for the removal (c. 51), although we see that equity protects the reputation of the person being removed as much as possible. Therefore, the decree may allege secondary reasons, concealing the principal reason, although it should not be concealed from the interested party. The Eastern Code, very insightfully, establishes that "si vero periculum publici vel privati damni obstat, ne motiva patefaciat, haec in libro secreto exprimantur atque ei, qui de recursu forte adversus decretum interpositum videt, ostendantur, si ipse petit" (c. 1519 § 2 *CCEO*).

d) In the case of removal of offices, the decree—in order to provide effect—should be *communicated in writing* (c. 193 § 4). Canons 37 and 51 require that the act in itself be issued in writing, and, in order to be effective, that its notification also be given in writing (c. 54 § 2), although we see that, in some cases, this can be done orally (c. 55). Thus, in the case of removal oral notification is never appropriate.

e) In any case, the decree and the document of notification should be signed, dated, and attested.

The law, in addition, can specify, within the general framework, causes and procedures that should be followed for the removal of offices that, in principle, do not require a special procedure.[15] This is done, for example, in the *Regolamento generale della Curia Romana* for offices of the Roman Curia that—by general rule—would be removable *ad prudentem discretionem auctoritatis*. Articles 44, 56 § 3, 64, 65, 66 § 6, and 74-83 indicate diverse manners of carrying out the removal, although they deal, almost always, with simple specifications of common law. Articles 74-83 speak of removal for disciplinary reasons, which when dealing with offices *ad nutum auctoritatis* can also be completed through "simple" removal, but its special gravity requires more specific procedures.

b) *Strictly "administrative" removal*

In removal of offices conferred for an undefined time and temporary offices before their natural termination, the administrative procedure that should be followed will be what the law prescribes.

The common law prescribes a special procedure for the removal of parish priests (cc. 1740–1747). This law is not applied to parish priests who are members of religious institutes or societies of apostolic life, since these can be removed freely (cf. cc. 682 § 2 and 738 § 2). A special procedure is also indicated in the *CIC* for the removal of a diocesan administrator, if there is a desire to carry out the removal before the end of the term of his obligation (c. 494 § 2). Religious superiors can be removed from

15. Cf. ibid., p. 122.

office before the expiration of their term according to the causes established by the institute's own law (c. 624 § 3). This rule also apples to societies of apostolic life (c. 734).

If we apply what is established in c. 1747 § 3—in reference to the removal of parish priests[16]—to removal in general, it follows that there may be recourse *in suspensivo* against any decree of removal. It may be argued that this is an arbitrary extension of a specific case, since in the *CIC*/1917 (c. 192) recourse is only indicated *in devolutivo* (cf., also, c. 2146 *CIC*/1917). Nonetheless today there is no doubt that the effect of recourse is *in suspensivo* against *any* removal, if we keep in mind that the current c. 143 legislates in this case the suspension of the ordinary power of the office in question. If the execution of the decree of removal is not suspended, the ordinance of c. 143 has no force.

16. Regarding the issue, cf. A. MENDOZA, "The effect of the Recourse against the Decree of Removal of a Parish Priest," in *Studia Canonica*, 25 (1991) pp. 139–153.

194 **§ 1. Ipso iure ab ecclesiastico amovetur:**

1° qui statum clericalem amiserit;

2° qui a fide catholica aut a communione Ecclesiae publice defecerit;

3° clericus qui matrimonium etiam civile tantum attentaverit.

§ 2. Amotio, de qua in nn. 2 et 3, urgeri tantum potest, si de eadem auctoritatis competentis declaratione constet.

§ 1. The following are removed from ecclesiastical office by virtue of the law itself:

1° one who has lost the clerical state;

2° one who has publicly defected from the Catholic faith or from communion with the Church;

3° a cleric who has attempted marriage, even a civil one.

§ 2. The removal mentioned in nn.2 and 3 can be insisted upon only if it is established by a declaration of the competent authority.

SOURCES: § 1: c. 188,4° et 5°

CROSS REFERENCES: cc. 192, 290, 527 § 3, 1336 § 1, 5°, 1336 § 2

COMMENTARY

Pablo Gefaell

1. *The concept*

Removal *ipso iure* is that decreed by the law itself. Based on doctrine, it is maintained that this is possible only in those taxative cases determined in this canon,[1] although later we will indicate some cases not set forth in the canon.

The canon addresses the administrative removal of the office, not a penal sanction (in cases like this the penalty *latae sententiae* does not apply: cf. c. 1336 § 2). It does not seek punishment for the holder of the office due to a crime committed. Rather, it seeks the protection of public

1. Cf. J. MANZANARES, commentary on c. 192, in *Salamanca Com*; J.I. ARRIETA, *Organizzazione ecclesiastica, lezioni di Parte generale (ad usum scholarum)* (Rome 1991–1992), p. 260; L. CHIAPPETTA, *Il Codice di Diritto Canonico, commento giuridico-pastorale*, vol. I (Naples 1988), p. 255, no. 1138; etc.

administration in the gravest cases in which the holder of the office—guilty or not guilty—has been placed in a situation that is incompatible with the public services that correspond to the office. In addressing automatic removal, it is logical that the law be restrictive and reduce to a minimum the cases of removal *ipso iure*.

2. *The origin of the canon*

At the beginning of the work of revision, it was decided to transfer the content of c. 188 of the *CIC*/1917, addressing tacit resignation of office, to the current section.[2] This decision probably resulted in excessive simplification, since it implied the suppression—at least in the common law—of the category of "tacit resignation" of office, which in our judgment is necessary to recognize in specific cases. This is because, on the contrary, it would become overly rigorous to declare "canonical removal"—with the resulting damage to the reputation of the person removed—in cases of conduct that, in themselves, only call for the "resignation" of the office (see commentary on c. 187).

Canon 188 of the *CIC*/1917, listed up to eight taxative cases of "tacit resignation": that is, cases in which the voluntary act made by the holder of the office implied—with presumed *iuris et de iure*—the will of the titleholder to resign, giving occasion to the automatic acceptance of the resignation. The office is then vacant *ipso facto* without need for a final declaration.[3]

In any case, the current c. 194 does not originate exclusively from the revision of the former canon regarding tacit resignation. Rather, it lists three cases of removal *ipso iure*: two of these originate from the former c. 188 (nos. 4° and 5°) and the third corresponds to c. 213 § 1.

Since the first version of the present canon, the requirement that contained the declaration of the authority to enforce the urgency of a removal was established. Also, the causes for removal that affect only the clergy and those that are general for all were differentiated.[4]

During the work of revision all the proposed causes, one by one, were critiqued, arriving at a question of the need for the canon itself, since—it was said—almost all of the cases require, and can be decided, by decree of the authority. Finally it was decided to leave only the actual assumptions, among other reasons because the suppressed cases were already addressed in penal law.[5]

2. Cf. *Comm.* 21 (1989), p. 229.
3. Cf. B. OJETTI, *Commentarium in Codicem iuris canonici*, t. IV (Rome 1931), p. 128; A. ALONSO LOBO, "Oficios eclesiásticos," in *Comentarios al Código de Derecho Canónico*, t. I (Madrid 1963), p. 482, no. 476.
4. Cf. *Comm.* 21 (1989), p. 231.
5. Cf. *Comm.* 23 (1991), pp. 267–268.

3. *Suppressed cases*

We will look at the cases contained in the former c. 188 that have been suppressed in the present rule. It is useful to specify, first of all, that only the *automatic* character of the loss of office for said causes was suppressed, since these same cases normally constitute just cause for removal by decree.

a) *Religious profession* (c. 188, 1° *CIC*/1917). This was suppressed as a cause for removal *ipso iure* because, in the first place, it did not deal with removal, but with tacit resignation. Secondly, such a legal deposition did not apply to members of secular institutes. Finally, it was suppressed because the issue is already regulated in the law of the religious[6] (cf. cc. 671, 682).

b) *Negligence in taking possession* (c. 188, 2° *CIC*/1917). This was suppressed because it appeared too difficult to establish as a cause for automatic removal, since its reason for existence was only understood within the system of benefices, since repealed.[7] Nonetheless, the present Code establishes that negligence in taking possession of the office of parish priest can give cause for the ordinary to declare the parish vacant (c. 527 § 3). Given that this case does not refer to the constitutive act of removal, but the declarative act of vacancy of the parochial office, should it be understood as a case of removal *ipso iure*? If not, it could be understood as a case of "tacit resignation" (see commentary on c. 187). It has also been noted in the *Regolamento generale della Curia Romana*, 69, 1°, which declares as renouncing the person who, without a justifying motive, does not assume service on the date indicated in the letter of appointment.

c) *Incompatibility of offices* (c. 188, 3° *CIC*/1917; see the current c. 152 and commentary). The present understanding is that the person who should judge the incompatibility and the state of need in each case is only the superior, and not the law itself, which has been suppressed.[8] Some authors, based on the prohibition of c. 152, continue to affirm the automatic cessation of the first office if it is incompatible with the new one, even considering the person who retains the first office "a usurper" (cf. c. 1381 § 2).[9] The opinion of Erdö appears more certain to us. He sustains that in the present rule automatic cessation for this reason has disappeared.[10] The superior, then, would be the one to declare incompatibility and decree—if it is considered necessary—the removal from the first office. Therefore, the

6. Cf. *Comm.* 23 (1991), p. 267.
7. Ibid.
8. Cf. *Comm.* 22 (1990), pp. 99–100.
9. Cf. J. MANZANARES, commentary on c. 152, in *Salamanca Com.*
10. Cf. P. ERDÖ, "De incompatibilitate officiorum, specialiter paroeciarum. Adnotationes ad cann. 152 et 526," in *Periodica de re canonica*, 80 (1991), p. 506.

declaration of incompatibility will only be a legitimate motive for proceeding to removal, but not a cause for removal *ipso iure*. The *CIC*/1917, foresees the automatic privation of both offices if the titular, with obstinacy, desired to retain both offices simultaneously (c. 2396 *CIC*/1917).

d) *Voluntary enrollment in a secular militia* (c. 188, 6° *CIC*/1917). This cause disappeared in the present Code without any motives having been indicated. This may be because the prohibition affected only clerics and religious (cf. cc. 289 § 1 and 672), and, in these cases, the proper ordinary can—and perhaps should—act directly. Although the Code does not anticipate this as a cause for automatic cessation, in the *Regolamento generale della Curia Romana*, 63, 2°, it was considered tacit resignation of the office of a person "non intenda, se italiano, fruire della esenzione dal servizio militare o da altre prestazioni di carattere personale verso lo Stato Italiano ..."

e) *Abandoning ecclesiastical garb. Communicationes* does not indicate the reasons for the suppression of this case, considered in c. 188, 7° of the *CIC*/1917. In any case, it addresses a disciplinary issue that would require the direct intervention of the authority, but not the automatic nature of the law.

f) *Abandoning the obligatory residence* (c.188,8° *CIC*/1917). This cause was suppressed as a motive for automatic removal because it was already considered in penal law[11] as a case for possible privation of office and not as a cause for automatic removal (cf. c. 1396).

Initially there was a proposal to also include the *public abandonment of the office* as a new motive for removal *ipso iure*, but later this idea was abandoned because it required investigation and a declaration by the authority and, therefore, could be a cause of removal by decree.[12] Nonetheless, the *Regolamento generale della Curia Romana*, 69 § 4° considered the subject of tacit resignation to "chi senza giustificato motivo: ... risulti arbitrariamente assente dall'ufficio per cinque giorni consecutivi e non riprenda servizio entro il termine di cinque giorni dal ricevimento dell'ingiunzione di presentarsi, che il Superiore gli debe comunicare per iscritto." In the *CIC*/1917, some cases of penal privation imposed by the law itself were noted.[13]

As we have said, according to the doctrine, the cases of removal *ipso iure* should be those taxatively noted in the Code. Nonetheless, we see that there are other situations not foreseen by this legal body that, through their significance, require the declaration of automatic loss of office. Therefore, we can say that the law establishes causes of "tacit resignation," as was

11. *Comm.* 23 (1991), p. 267.
12. Cf. *Comm.* 21 (1989), p. 231, c. 10 § 1, 6°; ibid., 22 (1990), p. 99–100, c. 45 § 1, 5°; ibid., 23 (1991), p. 267.
13. Canons 2266, 2396, 2397, 2398 *CIC*/1917.

done in the *Regolamento generale della Curia Romana*. However, no such note exists in the Code as such. In this way, respect was achieved for the doctrine regarding the restrictive character of removal *ipso iure*, although shortly we will see other cases that directly contradict this.

4. *The foreseen cases of removal "ipso iure"*

a) *One who has lost the clerical state*. Loss of the clerical state is produced by decree, rescript, or sentence (cf. cc. 290, 1336 § 1, 5°). This does not necessarily indicate a sanction or punishment, since it could also be due to invalidity of the ordination or to motives of grave nature that are not penal. Although some believe the contrary,[14] the removal in this canon has no penal character. Rather, it is administrative. It is merely an effect reflective of a situation of unsuitability for the discharge of ecclesiastical offices that is produced by loss of the clerical state.[15] Thus, the verb "deprive," used in c. 292, does not have the strict sense of penal removal (see commentary on c. 196).

b) *One who has publicly defected from the Catholic faith or ecclesiastical communion*. The fundamental difference between this case and the one considered in c. 188, 4° of the *CIC*/1917, is that the present rule, in addition to the abandonment of the Catholic faith, has added abandonment of ecclesiastical communion.

The problem in this case will be to interpret when there is "public" abandonment of the faith or of communion. Some authors maintain that the abandonment must be public, but not necessarily "formal."[16] But if "public" is understood as "susceptible to proof in the external forum," and not only "formally and publicly declared," it will be difficult to establish the moment of the loss of office. The theme has its relevance since, if the requirement of "public abandonment" is given without yet having been declared by the authority (see below, no. 5), the office is in reality lost—although the removal is not able to be urged. Therefore the acts carried out in the exercise of the office would be null and void (see commentary on c. 192).

Penal law, in order to classify the abandonment of faith or communion as criminal, requires that such abandonment be made "external," therefore "public" in that it be "susceptible to proof in the external forum," not necessarily "well-known to everyone" or "publicly declared." It should be assumed that, in administrative removal *ipso iure* because of public abandonment of the faith or ecclesiastical communion, the term "public" is used in this sense.

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14. Cf. L. CHIAPPETTA, *Il Codice...*, cit., p. 253, no. 1129.
15. Cf. B. GANGOITI, commentary on c. 194, in *CIC* (Valencia 1993), p. 115.
16. V. DE PAOLIS-A. MONTAN, "Normae Generali," in *Il Diritto nel mistero della Chiesa*, vol. I (Rome 1988), p. 427–428. L. CHIAPPETTA, *Il Codice...*, cit., p. 255, no. 1140.

It is well known that the crimes of heresy, apostasy, and schism are punished with the penalty *latae sententiae* of excommunication (c. 1364 § 1; cf. c. 751). This, before being declared, causes only the penal prohibition of the "exercise" of office (c. 1331 § 2, 3°). The ultimate authoritative declaration of the excommunication produces, on the other hand, the inability to "obtain" new offices (c. 1331 § 2, 4°). Keeping in mind that in this case—contemporaneously with the undeclared penalty *latae sententiae*—the titleholder has been removed *ipso iure* from office, it can be affirmed that this not only "prohibits the exercise" of the office but that it is strictly "lost." This loss (administrative) is not configured as an added penalty, but as an inadequacy for the development of the administrative function due to the personal juridical situation produced by the excommunication.[17]

c) *A cleric who has attempted marriage, even a civil one*. The clause "even a civil one" is not superfluous, as it establishes that even a civil marriage could be considered an attempt at marriage. Effectively, in principle, the civil marriage is not juridically relevant in the canonical order. Therefore, if in the *CIC* it were not expressly indicated, the cleric that celebrated civil marriage would not incur an attempt at marriage.[18]

This cause—the attempt of civil marriage—does not apply to the laity, nor to religious that are not clerics. During the work of revision a proposal was made to include mention of the laity that attempt civil marriage, but this was rejected as not appropriate, since removal *ipso facto* should be restricted to the most grave cases.[19] In such cases, although the attempt at marriage is invalid, the loss of office is not *ipso iure*, although, logically, the act could be considered as sufficient cause for removal *ab homine*, through decree. To include, through particular law, the civil marriage of the laity as a cause for automatic loss of office, as proposed by some authors,[20] would contradict the taxative character of those causes for removal *ipso iure* indicated in this canon (see *supra*).

In the case of clerics that attempt marriage, the reason for the removal is neither "sanctionary" nor "penal." Rather it is due to the lack of suitability of the person to carry out the authoritative functions of public administration because of a situation of public scandal.

The *Regolamento generale della Curia Romana*, 79, offers us a clear case of removal (dismissal) *ipso iure* not foreseen in the Code: "Si incorre nella destituzione di diritto, escluso il procedimento disciplinare, per condanna passata in iudicato concernente delitto doloso ..." This ordinance puts in question, again, the doctrine regarding the taxative character of removal *ipso iure* foreseen in c. 194.

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17. Cf. B. OJETTI, *Commentarium...*, cit., p. 130.
18. Cf. V. DE PAOLIS-A. MONTAN, "Normae Generali," cit., p. 428.
19. *Comm.* 14 (1982), p. 153.
20. Cf. R.R. CALVO-N.J. KINGLER (Eds.), *Clergy Procedural Handbook* (Washington 1992), p. 121.

It is advisable to note that some cases, although it could appear at first glance that automatic loss of office has been obtained, are not removals *ipso iure*, but invalid provision (e.g., the simoniac provision of c. 149 § 3). The office, possessed *de facto*, is never possessed *de iure*.

5. *Intervention of ecclesiastical authority for the effective loss of office*

Consideration of the general requirements for the loss of ecclesiastical office has indicated that the intervention of the authority is always required for the effective cessation of the titleholder (see commentary on c. 184). The loss *ipso iure* appears to contradict this hypothesis, but that is not the case.

Effectively, c. 194 § 2 establishes that, in the cases indicated in numbers 2° and 3° of § 1, in order for the removal to be juridically effective, certain intervention of the competent authority is necessary. The act of the authority, in these cases, is not directly considered to constitute removal. Rather, it only declares that the situation has in fact been produced that carries the removal *ipso iure*. This declaration should be made—for juridical security—through a written document,[21] dated, signed, and certified where possible. If the intervention is not done in the external forum, the cessation of an office will not be effective. This is because the appointment of the new titular cannot take place. Furthermore, the current office holder cannot be kept from carrying out the acts proper to the office and receiving the corresponding remuneration. Therefore, the intervention of the authority is absolutely necessary. Once the act is declared, and the removal is effected, the procedure to remedy those acts possibly carried out in an invalid manner (see above) should be completed. It should also require—where possible and in pure theory—the return of remuneration received during the period during which the office whose title had been lost was retained. However, in some cases this remuneration is perhaps justly owed to the former titleholder because, in fact, he had worked during this interval and exercised the proper functions of the office.

For removal by loss of the clerical state, c. 194 § 2 does not require the intervention of the authority, which would appear to contradict the absolute necessity of such intervention. In fact, the authority also intervenes in this case in a determinate manner, since in order to produce the case in question—loss of the clerical state—a proceeding and a decision of the competent authority are necessary. This makes unnecessary the ultimate declarative intervention.

21. Cf. *Comm.* 23 (1991), p. 267.

195 **Si quis, non quidem ipso iure, sed per decretum auctoritatis competentis ab officio amoveatur quo eiusdem subsistentiae providetur, eadem auctoritas curet ut ipsius subsistentiae per congruum tempus prospiciatur, nisi aliter provisum sit.**

If by a decree of the competent authority, and not by the law itself, someone is removed from an office on which that person's livelihood depends, the same authority is to ensure that the person's livelihood is secure for an appropriate time, unless this has been provided for in some other way.

SOURCES: c. 2299 § 3

CROSS REFERENCES: cc. 538, 281 § 2, 1274 §§ 1 and 2, 1350

COMMENTARY

Pablo Gefaell

The social doctrine of the Church has always maintained the obligation to watch over the reasonable sustenance of those who work. Thus, c. 1286 establishes that those administrators of goods must also carefully observe the civil laws relating to labor and social security. These same civil laws, normally, foresee economic compensation at the time of retirement. Canon 195 makes concrete this application for those who have fulfilled some function in service of the Church. It indicates the necessity to care for the reasonable sustenance of those removed from office, even though the civil law, in some cases, does not indicate this.

Although this is a new canon, we can find analogous precedents in the *CIC*/1917.[1] Effectively, the old c. 2299 § 3 did not permit the privation of a benefice whose holder had been ordained a cleric, if no provision were made for reasonable sustenance by some other means. Similarly, when the *CIC*/1917, addressed the penalty of deposal of a cleric, it added that the bishop ought to attend to this out of charity, if it were truly necessary (c. 2303 § 2).

The conciliar decree *Presbyterorum Ordinis*, in number 20, reminded bishops of their obligation to establish rules to provide for the reasonable livelihood of priests. The new canon, nonetheless, is not limited to clerics, but to any office holder, understood in the broad sense.

1. P.G. MARCUZZI, "Gli uffici ecclesiastici nel nuovo Codice di Diritto Canonico," in *Apollinaris*, 56 (1983), p. 430.

During the work of revision there was an attempt to address this duty in terms of a strict juridical obligation: "obligatione tenetur curandi ut ..."[2] But this revision was rejected because it could not be applied to the laity: "stricta obligatio providendi subsistentiae admiti tantum debet pro iis qui ab officio clericali amoventur—soli enim clerici oneri sunt Ecclesiae; pro laicis, enim, non potest stricta imponi obligatio."[3] Therefore, the current text, revised in a simple imperative form ("auctoritas curet ut ..."), does not indicate a strict juridical obligation, as it would appear.[4] Consequently, no right of procedural action is conceded to the removed person if the authority does not comply.

Although c. 195 does not impose juridical obligation, it should be noted that c. 1286 certainly requires that the civil labor laws that generally protect those carrying out the job be observed. Keeping in mind, then, that the clergy does not maintain a mere contractual relationship with the ecclesiastical office and, therefore, does not customarily possess a civil contract,[5] this fact could produce a paradox insofar as the laity would be better protected than the clerics. Thus, it appears fitting to look for guarantees for clerics in these situations as well.

Reflections of the current canon can be found in some provisions of the *Regolamento generale della Curia Romana*: "*la Commissione [disciplinare della Curia romana] qualora decreti il licenzamento dall'ufficio, ne stabilisce gli effetti, tenuto conto dell'art. 29 del Regolamento Pensioni vigente*" (art. 77; cf. also art. 75).

Although the text of the canon applies the rule only in cases of "removal" by decree, the spirit of the norm is applicable to other ways of losing ecclesiastical office, except for loss of office *ipso iure.*[6]

Some authors believe that the exclusion of cases of removal *ipso iure* (c. 194) in the obligation of c. 195 is perhaps due to the fact that this type of removal, by general rule, is based on conduct that is illegal or contrary to the general good. This conduct makes the perpetrator undeserving of favorable treatment. For the same reason, cases of penal deprivation of office are also excluded from this obligation.[7] Nonetheless, as a consequence of what we have seen above, c. 1350 § 1 imposes upon the ecclesiastical authority the strict obligation to provide reasonable sustenance to clerics that have been deprived of their office, except for those who have lost the clerical state (see commentary on c. 194, 1°). However, the authority

2. Cf. *Comm.* 22 (1990), p. 100.
3. Cf. *Comm.* 23 (1991), p. 268.
4. Cf. R.R. CALVO-N.J. KINGLER (Eds.), *Clergy Procedural Handbook* (Washington 1992), p. 122; J.I. ARRIETA, commentary on c. 195, in *Pamplona Com.*
5. Cf. P. ERDÖ, "Quaestiones de oficiis ecclesiasticis laicorum," in *Periodica*, 81 (1992), p. 208–209.
6. Cf. J.I. ARRIETA, commentary on c. 195, in *Pamplona Com.*
7. Cf. ibid.

should take care even in this last case if as a consequence of the penalty the person is found to be truly indigent (c. 1350 § 2). In addition, if addressing a removal *ipso iure* due to nonculpable loss of the clerical state (e.g., by null ordination), it would be neither equitable nor reasonable for the authority to consider itself free from the obligation to resolve the situation according to the spirit of c. 195.

Some authors also exclude religious removed from office from the case of c. 195, because by the nature of religious life (they say) this is already foreseen in a different manner.[8] However it remains to be seen, case by case, if this is true.

Although in cases of removal *ipso iure* c. 195 does not apply, c. 1286 must always be kept in mind with reference to the acquired rights of social security, pension, etc. Cases of loss by tacit resignation (see commentary on c. 194), due to their circumstantial similarity with removal *ipso iure*, could perhaps be compared to these in that they are excluded from the obligation of c. 195 (cf. *RGCR*, 69 § 2). In order to avoid laborious litigation, there must be an attempt to provide a labor contract that clarifies the causes of automatic loss of office and the economic treatment of these cases after the cessation from office.

Apart from cases of removal, cc. 231 § 2 and 281 § 2 foresee solutions for the situations of illness, disability, and old age.

How long should reasonable sustenance be provided to the person removed from office? It was preferred to leave this question to the prudence of the authority.[9] The obligation will cease, in principle, when the person removed acquires another means of dignified sustenance. But if, by bad faith or culpable negligence, the removed person has not taken any initiative in finding other solutions and takes advantage of the situation, the authority may freely halt the economic assistance so that a situation of abuse of the right does not occur.[10]

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8. Cf. R.A. HILL, commentary on c. 195, in CORIDEN-GREEN-HEINTSCHEL (Eds.), *The Code of Canon Law, a Text and Commentary* (New York 1985).

9. Cf. *Comm.* 14 (1982), p. 154.

10. Cf., by analogy, the decision of the Signatura of July 6, 1971, in X. OCHOA, *Leges Ecclesiae*, vol. IV (Rome 1974), no. 3988.

ART. 4
De privatione

ART. 4
Deprivation

196 **§ 1. Privatio ab officio, in poenam scilicet delicti, ad normam iuris tantummodo fieri potest.**

§ 2. Privatio effectum sortitur secundum praescripta canonum de iure poenali.

§ 1. Deprivation of office, that is, as a punishment for an offence, may be effected only in accordance with the law.

§ 2. Deprivation takes effect in accordance with the provisions of the canons concerning penal law.

SOURCES: § 1: cc. 2298,6°, 2299 § 1

CROSS REFERENCES: cc. 292, 1336 § 1, 2°, 1336 § 2, 1338, 1353, 1381 § 2, 1387, 1389 § 1, 1396, 1457

COMMENTARY

Pablo Gefaell

The term "privation" is restricted in the present Code to the removal from office with a penal character. The new legal terminology, which was decided from the very beginning of the revision process (there has been no modification since the first revision),[1] attempted to adapt to that used in the doctrine. In effect, the *CIC*/1917, utilized a terminology in which the concept of privation included both penal and administrative removal (see commentary on c. 192). However, all of the commentators have declared penal removal as the strict sense of deprivation.

1. Cf. *Comm.* 21 (1989), p. 232.

Upon consideration as one of the expiatory penalties (c. 1336 § 1, 2°), its juridical regulation remains strictly reserved to penal law. If it is mentioned here, it is out of the systematic necessity to include it as one of the forms of loss of ecclesiastical office.

Paragraph 1 of the canon establishes that the penalty of privation of office can only be imposed *ad normam iuris*. This appears to be a superfluous affirmation, because any removal—even non-penal removals—should be carried out according to the rule of law. We think the only reason for this paragraph is to give rise to a clause that formulates the new definition of "privation." Paragraph 2, nonetheless, specifies which rules govern the imposition, effects, and cessation of the penalty of privation of offices: the rules of penal law.

Now we will look at the causes and proceedings foreseen by the penal law for the imposition of the penalty of privation of office.

1. *Reasons for inflicting privation of office*

Wernz and Vidal taught that, according to c. 2299 § 1 of the *CIC*/1917, privation of an immovable office could not be decided except in cases of *iuris expressis*. On the other hand, movable offices could be deprived as a penalty for some offense also in cases not expressly foreseen in the law (that is, as a discretional penalty).[2] Today immovable offices no longer exist (see commentary on c. 193), and the present penal law maintains the principle "nulla poena sine lege poenali praevia" (cf. c. 1321 § 1), which—save for the exception of c. 1399—should be strictly observed.[3]

The causes of privation foreseen in the *CIC* are the following:

— *Causes of facultative privation.* The penalty of privation of office can be inflicted for some offenses in the scope of the exercise of judicial power (c. 1457). Canon 1394 § 1, in addition, indicates other possible indeterminate privations for the cleric who persists in his attempt at matrimony. However, such "privations" cannot refer to the privation of offices held by the cleric, as these have already been lost according to c. 194 § 1, 1°.

— *Causes of mandatory privation.* While the *CIC*/1917, anticipated eleven cases of obligatory privation of office,[4] the *CIC* does not establish—at least not clearly—any cause that obligatorily demands privation. Some cases established in the *CIC* indicate an obligatory penalty, but it is left indeterminate, although the possibility of arriving at privation is given.

2. F.X. WERNZ-P. VIDAL, *Ius Canonicum*, t. II (Rome 1943), p. 420, no. 361, A.
3. Cf. the decision of the Signatura of October 27, 1984, in *Il Diritto Ecclesiastico* 1985/II, p. 260–270.
4. Cf. B. OJETTI, *Commentarium in Codicem iuris canonici*, t. IV (Rome 1931), p. 137, note 8; F.X. WERNZ-P. VIDAL, *Ius Canonicum*, cit., p. 421, no. 362.

These offenses should be punished with penalties adequate for the gravity of the offense, without excluding privation of office. These penalties include the "sollicitatio ad turpia" (c. 1387); abuse of office (c. 1389 § 1); failure to observe the obligation of residence (c. 1396); the intent to commit homicide or other crimes against the physical integrity or liberty of another (c. 1397).

The penalty of privation can never be *latae sententiae* (c. 1336 § 2). Therefore, the privation that, according to c. 292, is attached *ipso facto* to loss of the clerical state cannot be considered a true privation, but rather a removal *ipso iure*, due to a personal state incompatible with the discharge of public functions (see commentary on c. 194). What is set forth in c. 1331 § 2, 4°, is also not a penalty of privation of office attached to excommunication, but an inability to obtain new offices (in this case, the office possessed is lost by removal *ipso iure*, according to c. 194 § 1, 2°, not by privation).[5]

Some authors affirm that, when penal law indicates simply the imposition of an indeterminate "just penalty," the authority cannot apply the penalty with a determination of privation of office. This can only be done if the penal law specifies that a just penalty can be imposed "without excluding the possible loss of office."[6] This opinion finds solid support in c. 1349, according to which, if the penalty is not determined, the judge should not impose the gravest penalties.

According to c. 1315 § 3, it would be possible to establish other causes of privation through particular law, but the same canon warns that it should not be done in this way, except for the gravest necessity. It would not be so problematic, nonetheless, to admit that indeterminate penalties in the common law were determined to be privations through particular law (this is different from where the judge, on applying indeterminate penal law, should not make a determination in this sense, as we have already seen).

Canon 1319 § 1 establishes that perpetual expiatory penalties should not be threatened through penal precept. Although in the *CIC* it does not expressly state that privation is a perpetual penalty, it is impossible to consider a temporary privation of office. This is because the loss of entitlement is perpetual by its own nature (it cannot be confused with suspension) and it can only be reacquired through a new provision of office. Therefore, privation of office cannot be threatened through penal precept.[7]

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5. Of the contrary opinion is L. CHIAPPETTA, *Il Codice di Diritto Canonico, commento giuridico-pastorale*, vol. I (Naples 1988), p. 257, no. 1149.
6. L. CHIAPPETTA, *Dizionario del Nuovo Codice di Diritto Canonico. Prontuario teorico-pratico* (Naples 1986), *privazione*.
7. Cf. V. DE PAOLIS-A. MONTAN, "Normae Generali," in *Il Diritto nel mistero della Chiesa*, vol. I (Rome 1988), p. 429.

2. *Procedures for imposing the privation*

The procedures for imposing the penalty of privation of office follow the rules foreseen for the imposition of any ecclesiastical penalty (cc. 1341–1353), but with the specificity of addressing a perpetual expiatory penalty.

In these cases it is clear that the ecclesiastical authority cannot impose privation of office on anyone who is not under their authority (c. 1338 § 1).

If we consider privation as a perpetual penalty, according to c. 1342 § 2 it cannot be imposed through an extra-judicial decree, as some have certainly affirmed.[8] This is not expressly stated in the *CIC*, and due to this lack of clarity, there is no lack of authors who sustain the contrary.[9] But the Eastern Code explicitly affirms that "delictum puniri potest per decretum extra iudicium ... dummodo non agatur de privatione oficii" (c. 1402 § 2 *CCEO*). Admitting that the Eastern rule serves to reaffirm our interpretation, the penal process remains the only applicable judicial process (cc. 1717–1731 *CIC*). In this sense, the *Codex canonum Ecclesiarum orientalium* reserves these cases to the collegial tribunal of three judges (c. 1084 § 1, 3° *CCEO*).

The appeal of a sentence that has caused the privation of office has an effect *in suspensivo* (c. 1353; cf. cc. 1728 § 1 and 1638). That is, the sentence is not executed, and the office holder retains title until *res iudicata* exists. But the ordinary power attached to this office remains suspended at the same time (c. 143 § 2).

The penalty of "deposition," not legislated in the current Latin Code, but present in the *CIC*/1917, and in the current Eastern Code (c. 1433 § 2), does not suppose only the privation of offices, but also equates it with the loss of the clerical state (c. 292 *CIC*). The inability to obtain new offices is also added. Nonetheless, privation does not constitute an impediment for obtaining a new office in the future.[10] By 1908 the penalty of deposition was rarely inflicted and, normally, in its place simple resignation was imposed together with perpetual suspension.[11] Perhaps for this reason, it disappeared in the *CIC*.

The retention of office after having been deprived of it is considered a crime of usurpation (c. 1381 § 2).

8. Ibid.
9. Cf., e.g., P.V. PINTO, commentary on c. 196, in *Commento al Codice di Diritto Canonico*, Pontificia Università Urbaniana, Facoltà di Diritto Canonico (Rome 1985), p. 105.
10. B. OJETTI, *Commentarium...*, cit., p. 135, note 1.
11. S. LUZIO, "Deposition," in *The Catholic Encyclopedia*, vol. IV (London 1908).

TITULUS X
De praescriptione

TITLE X
Prescription

INTRODUCTION

Jesús Miñambres

Prescription[1] originated as a method for acquiring or losing goods or rights and for being freed of obligations through the passage of time. Historically it appears tied to the acquisition of real rights—rights over things—called usucapion or acquisitive. An essential element of this method of acquisition is the passage of time. The Justinian Digest recognized, besides usucapion in the strict sense, also those called "longi temporis" and "longissimi temporis praescriptio," the latter differing from the former by the requirement of a longer time of possession and, especially, because originally there was the possibility of usucapions by those who did not possess Roman citizenship. Nevertheless, in the time of Justinian his system had already been established, and accomplished transference of rights by means of continuous possession for a certain time (three years for usucapion, now only referring to personal property; ten or twenty years for the "longi temporis praescriptio"; and thirty for the "longissimi temporis praescriptio").[2]

Prescription has procedural importance, presented as an exception against the person bringing the action to claim a right or the fulfillment of an obligation. But by correlation with the objective law, it genuinely likewise attributes—or removes—the prescribed right.[3] Nevertheless, such transferring effect does not occur by sanation of the title that permitted the acquisition of the situation of "possession," but it confers a new title. The right is consolidated in favor of the possessor by title of prescription.

1. Cf. F. R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia. Legislación universal y particular española* (Salamanca 1984), p. 118ff; P. A. BONNET, "Prescrizione (dir. can.)," in *Enciclopedia del Diritto*, XXXV (Milan 1986), pp. 99–124; F.M. CAPPELLO, "De praescriptione," in *Jus Pontificium* 5 (1925), pp. 16–23.
2. Cf. A. D'ORS, *Derecho privado romano* (Pamplona 1983), pp. 231–242.
3. Cf. F. X. WERNZ-P. VIDAL, *Ius canonicum*, t. IV, vol. II, pp. 300ff.

Therefore it is a method of acquisition and not only a method of the sanation of unstable situations.

Originated and developed especially in the purview of the Roman Empire, canon law incorporates prescription and applies it to the Church, although with important limitations.[4] The *CIC*/1917, dealt with the subject precisely among the methods of acquiring goods, that is, in the book "De rebus" (cf. cc. 1508–1512 *CIC*/1917). During the revisionary work on the *CIC*/1917, it fell to the *coetus* "De bonis Ecclesiae temporalibus" to examine this subject. From the first working sessions it was emphasized that the most appropriate systematic situation for legislation regarding prescription was not in the part dealing with the temporal goods of the Church, but rather in the part reserved for general norms.[5] Nevertheless, some canons were preserved (cf. cc. 1268–1270) relative to prescription as a method of acquiring goods.

The new location of the canons regarding prescription better reflects their nature in modern law. Currently, in effect, prescription is an institution of a general character that is applied to the acquisition or loss of any kind of rights or obligations by means of the passage of time. In the canonical concept of prescription what many other legal systems recognize as legal expiry is likewise applicable.[6]

Its principal elements are the following:

a) *A suitable subject matter*, that is, rights or obligations subject to acquisition or loss and not expressly excluded by the legislator (c. 199 excludes from prescription a number of rights).

b) *Continuous possession*. In line with the historical origin of prescription, *possession* is still spoken of as one of its requirements, although it does not deal with holding in the strict sense of something susceptible of ownership. The term possession is used here in an improper sense to indicate the situation of the person who exhibits a right purporting to be entitled to it. Such a situation of purported entitlement must be continuous.

c) *Time*, that is, a certain period during which all the other elements of prescription must endure so that the right is acquired or the obligations freed. It is a matter of useful time, not continuous (cf. c. 201); therefore suspension of the prescription for a time is permitted, after which time continues running.[7]

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4. Cf. S. SANZ VILLALBA, "Los elementos éticos de la prescripción romana y su aceptación en el fuero eclesiástico hasta el Decreto de Graciano," in *Revista española de Derecho canónico* 3 (1948), pp. 35–59.
5. Cf. *Comm.* 5 (1973), pp. 94–103.
6. Cf. A. STANKIEWICZ, "De *canonizatione* decadentiae legalis in ambitu praescriptionis exstinctivae in iure canonico," in *Periodica* 75 (1986), pp. 337–360.
7. Cf. G. VROMANT, *De bonis Ecclesiae temporalibus* (Brussells 1953), pp. 118ff.

d) *Title* or cause of the situation that we have called possession. Normally it is a juridical act capable of transferring the right or extinguishing the obligation. In principle it must be proven. The title need not be real, but at least must be based on the good faith of the possessor (thus, e.g., if the seller was not the owner, the transferee possesses a bill of sale which justifies his possession, even though the effective transfer of ownership of the thing is not perfected while there is no prescription in favor of the transferee against the real owner).

e) *Good faith* (see commentary on c. 198).

For a better idea of this requirement, by mandate of the legislator, recourse must be had to civil legislation (see commentary on c. 197). Reference to the civil law thus established does not imply a loss of competence over the subject, and it is justified by several reasons: legislative economy; the advisability of providing unanimous regulation of the prescription in the canonical forum and in the civil forum; in the case of prescriptive acquisition of immovable goods, respect for international law pursuant to which the law of the "locus rei sitae" must be applied; etc.

Prescription thus delimited intends, on one hand, to give certainty to juridical trade, so that obligation or situations do not remain pending relative to a different right for an indeterminate time; it places a time limit on such indetermination: it is necessary so that the right or obligation is prescribed in favor of the *possessor*. On the other hand, it provides for the possible abuse of this method of acquisition or release, through the requirement of a juridical basis—the title—and of an ethical element: good faith. It also avoids the irremediable fear that the thing possessed may not belong to the person who possesses it; as well as the possibility that third parties can maintain legal actions for centuries.

197 **Praescriptionem, tamquam modum iuris subiectivi acquirendi vel amittendi necnon ab obligationibus sese liberandi, Ecclesia recipit prout est in legislatione civili respectivae nationis salvis exceptionibus quae in canonibus huius Codicis statuuntur.**

Prescription, as a means of acquiring or of losing a subjective right, or as a means of freeing oneself from obligations, is, apart from the exceptions prescribed in the canons of this Code, accepted by the Church in the manner in which it is adopted in the civil legislation of each country.

SOURCES: c. 1508; SA Sententia, 12 dec. 1972

CROSS REFERENCES: cc. 22, 82, 199, 1268–1270, 1362, 1492, 1512, 4°, 1621, 1623

COMMENTARY

Jesús Miñambres

Although the *CIC* is not the place proper for the formulation of doctrinal definitions, the canon upon which we comment practically defines prescription. Nevertheless, its fundamental objective consists in providing a recourse to civil laws on this subject as the *CIC*/1917 already had done (cf. cc. 1508–1512 *CIC*/1917).[1] The legislator is thinking principally about usucapion—acquisitive prescription of things—and therefore the determination of the law in question is limited to the expression *respectivae nationis*. (Canon 1540 of the *Codex canonum Ecclesiarum orientalism*, parallel to the one upon which we are commenting, does not, however, give any indication in this regard.[2]) For acquisition of subjective rights that do not involve real property or relief from obligations, it is for the judge to determine prudentially the "respective country" whose law will be applicable to the specific case.[3]

1. Cf. M. CUYÁS, "El c. 1512 y la *canonización* del Derecho del Estado," in *Ius Populi Dei* (Rome 1972), pp. 573–604.
2. Cf. SACRA CONGREGAZIONE ORIENTALE-PONTIFICIA COMMISSIONE PER LA REDAZIONE DEL CODICE DI DIRITTO CANONICO ORIENTALE, *Ventesima plenaria. Proposte di modifica del testo del 'Codex Iuris Canonici.' Nuove proposte preparate dal prof. Pio Ciprotti* (Vatican City 1944), p. 43.
3. Cf. C. WYNEN, June 7, 1936, in *SRR Dec* 28 (1936), pp. 295–302; c. FILIPIAK, July 9, 1963, in *SRR Dec 55* (1963), pp. 595–600; c. DE JORIO, March 26, 1969, in *SRR Dec* 61 (1969), pp. 325–337; c. PALAZZINI, 1973, in *SRR Dec* 65 (1973), pp. 671–682; c. POMPEDDA, 1976, in *SRR Dec* 68 (1976), pp. 200–207.

In this field of having recourse to laws different from canon law, the legislator of *CIC* has stated a general norm—c. 22—applicable to all the cases found throughout the Code.[4] It is provided in that canon that the law in question will be applied to canon law with the same effects as in the system of origin. Nevertheless, several limits are placed on such reception, which will also have to be kept in mind when applying the canon that concerns us.

The general limitations on recourse were established by the legislator in terms that do not contradict divine law—a logical limitation, always present in any juridical activity, especially in the Church—and of safeguarding what has been expressly ordered by the canonical legislator himself. This second limitation sought to avoid the possibility of dual laws regarding a subject applicable by virtue of canonical mandates, as would happen in the case of prescription, if the judge or administrator were faced with prescription allowed by the civil law of the respective country, but relative to a law or obligation of those that the canonical legislator expressly excludes in c. 199. There would be two contrary laws regarding the same subject emanating from the same legislator—the canonical legislator—that could produce great juridical insecurity. Perhaps because of the last possibility, the legislator has incorporated the limit once again, already expressed generally in c. 22, at the end of the canon upon which we comment: *salvis exceptionibus quae in canonibus huius Codiciis statuuntur.* On this point the drafting of c. 1540 of the *Codex canonum Ecclesiarum orientalium* is technically better, which refers to the limits provided by canon law (cf. c. 1504 *CCEO*).

Thus, in the canonical order, when resolving any problem of prescription, recourse must be had to the legislation of the various societies with the capacity to make laws, as long as they respect the divine law and the canonical legislator has not expressly provided otherwise.

The codifier of 1983 has given a specific canon on the subject of prescription in the following cases: c. 82 relative to privileges that encumber third parties; c. 1268, which applies the general law upon which we are commenting to the specific case of prescription of goods; c. 1269 relative to sacred things; c. 1270, which is an exception to the general rule of the prescription of the goods of the Apostolic See and those belonging to another public ecclesiastical juridical person; c. 1362 provides the law regarding prescription in a penal action; c. 1492 regulates the prescription of actions and excludes the possibility of prescription for those actions that

4. Cf. J. MIÑAMBRES, *La remisión de la ley canónica al derecho civil*, Rome 1992; P. CIPROTTI, "Canonizzazione delle leggi civili," in *Novissimo Digesto Italiano* (Turin 1988); idem, "Le *leggi civili* nel nuovo Codice di diritto canonico," in *Il nuovo Codice di diritto canonico, novità, motivazione, significato* (Rome 1983), pp. 523–535; idem, *Contributo alla teoria della canonizzazione delle leggi civili* (Rome 1941); O. CASSOLA, *De receptione legum civilium in iure canonico* (Rome 1944); V. DEL GIUDICE, "Il diritto dello Stato nell'ordinamento canonico," in *Archivio giuridico* 91 (1924), pp. 3–27.

refer to the status of persons; c. 1512, 4° states the interruption of the prescription that is caused by notification of summons or by an appearance by the parties before a judge; cc. 1621 and 1623 regulate the prescription for a plaint for nullity of a judgment, stemming respectively from a defect of remediable or irremediable nullity. This specific legislation on the subject of prescription prevents the recourse to civil law ordered by c. 197 on the point to which it refers.

When specifically applying these limitations, it must be kept in mind that the civil law in question is only made inapplicable to the extent that it contradicts divine law or the canonical specification that we have just examined and not for the rest of the case; that is, nothing prevents the application to a case of those aspects referred to in a law that are not contrary to divine law, though in the same law there are other aspects that might be contrary.

198 Nulla valet praescriptio, nisi bona fide nitatur, non solum initio, sed toto decursu temporis ad praescriptionem requisiti, salvo praescripto can. 1362.

No prescription is valid unless it is based on good faith, not only in its beginning, but throughout the whole time required for the prescription, without prejudice to can. 1362.

SOURCES: c. 1512

CROSS REFERENCES: cc. 24 § 2, 1049 § 1, 1061 § 3, 1333 § 4, 1362, 1515

COMMENTARY

Jesús Miñambres

Good faith[1] can be defined as the situation in which one prudently considers that the right one has rightfully belongs to him. Thus, it is a matter of an element of an ethical kind though juridically relevant; therefore, it must be demonstrable in the external forum. Canon law has required good faith traditionally not only for prescription but also for the introduction of customs *contra legem* (included in the requirement of being reasonable, cf. c. 24 § 2), for the existence of a putative marriage (cf. c. 1061 § 3), etc.

Roman law already required a certain good faith to perfect usucapion, at least at the beginning of possession. Nevertheless, an advance of canon law is its requirement of good faith to continue during the entire time of prescription, a requirement specifically incorporated into the current legislation, the canon upon which we comment. It is a traditional requirement in the legal system of the Church—present both in the decree of Gratian and the *Glossa ordinaria*,[2] and in several decretals[3]—frequently relating to the absence of sin regarding the possessed situation. Modern doctrine tends to remove the requirement of good faith from the purview of the internal forum, in which by assimilation it is placed with the absence of sin, and rather to put it in relation to several objective elements that can be

1. Cf. L. SCAVO LOMBARDO, "Buona fede (dir. can.)," in *Enciclopedia del Diritto*, V (Milan 1986), pp. 664–677; idem, *Il concetto di buona fede nel diritto canonico* (Rome 1944); A. TOSO, "De bona fide in praescriptionibus," in *Jus Pontificium* 12 (1932), pp. 203–211; S. RICCOBONO, "Mala fides superveniens nocet," in *Apollinaris* 12 (1948), pp. 25–35; F.X. WERNZ-P. VIDAL, *Ius canonicum*, II (Rome 1935), pp. 310ff.
2. Cf. *C* 16, q. 3, gl. *quod autem praescriptione*, and *dict. p. c.* 15, § 3, *quod si mala fide*.
3. Cf., *X* II, 26, cc. 5 (of Alexander III) and 20 (of Lateran Council IV).

proven in the external forum (which is the field more proper to juridical matters). Specifically, how every truly juridical action must be reasonable has been emphasized, in the sense that it must fit the circumstances to obtain justice in a specific case; and in this perspective good faith is configured as the subjective side of such necessary reasonableness in every situation according to justice.[4]

So that prescription can be employed in canon law, it is thus necessary that this requirement exists whenever the law requires it for perfection, which converts the situation in fact into an objectively reasonable situation and, therefore, just. Since it is logical, the loss of good faith after the necessary prescribed time is not juridically relevant. In a case of acquisitive prescription, for example, in which the applicable law requires a period of three years, once the three years of good faith are up, the matter enters into the sphere of dominion of the acquirer with full title and no one can deny the person's right to it, not even the prior lawful owner who perhaps never knew of its transfer of possession.

Logically the legislator has expressly excluded the requirement of good faith for prescription of a penal action (c. 1362), whose time runs independently of the objective damage to the juridical order caused by the offense that impedes the good faith of the one who committed it. The same exclusion is also found in the *Codex canonum Ecclesiarum orientalium*, whose c. 1541 is practically identical to the one upon which we are commenting.

The same concept of good faith incorporated into the commented-upon canon is utilized in other parts of the Code; its comparison can shed some light on the subject of the content of the concept itself. Thus, c. 1049 § 1 also includes in the general dispensation of impediments and irregularities for ordination those who have not shown good faith; the already cited c. 1061 § 3 relative to putative marriages; c. 1333 § 4, which obliges one suspended to return the benefits, salaries, or pensions received, though he might have acted in good faith; or c. 1515, which impedes the possession of good faith of another person's thing from the beginning of the *litis contestatio*.

4. Cf. J. ARIAS, "Racionalidad y buena fe en la introducción de la costumbre," in *Ius Canonicum* 4 (1964), pp. 65–100; A. DE MIER, *La buena fe en la prescripción y la costumbre hasta el siglo XV* (Pamplona 1968).

199 **Praescriptioni obnoxia non sunt:**

1° iura et obligationes quae sunt legis divinae naturalis aut positivae;

2° iura quae obtineri possunt ex solo privilegio apostolico;

3° iura et obligationes quae spiritualem christifidelium vitam directe respiciunt;

4° fines certi et indubii circumscriptionum ecclesiasticarum;

5° stipes et onera Missarum;

6° provisio officii ecclesiastici quod ad normam iuris exercitium ordinis sacri requirit;

7° ius visitationis et obligatio oboedientiae, ita ut christifideles a nulla auctoritate ecclesiastica visitari possint et nulli auctoritati iam subsint.

The following are not affected by prescription:

1° rights and obligations which are of divine law, whether natural or positive;

2° rights which can be obtained only by apostolic privilege;

3° rights and obligations which bear directly on the spiritual life of Christ's faithful;

4° the certain and undisputed boundaries of ecclesiastical territories;

5° Mass offerings and obligations;

6° the provision of an ecclesiastical office which, in accordance with the law, requires the exercise of a sacred order;

7° the right of visitation and the obligation of obedience, so that Christ's faithful could not be visited by an ecclesiastical authority and would no longer be subject to any authority.

SOURCES: c. 1509, 1°–5° et 7°

CROSS REFERENCES: cc. 150, 214–215, 396ff, 436 §1, 2°, 628, 683 §1, 945ff, 1247, 1301 §2

COMMENTARY

Jesús Miñambres

This canon refers to the first requisite of the prescription, that is, apt matter. Here, the legislator enumerates certain rights and obligations that cannot be subject to prescription due to their very nature (1° and 3°) and others that this positive regulation does not subject to prescription. Essentially, the content of this canon comes directly from c.1509 of the *CIC*/1917, differing significantly in 3°, and is also included in c.1532 of the *Codex canonum Ecclesiarum orientalium*. Let us briefly examine the rights and obligations that the legislator has excluded from prescription.

First, rights and obligations belonging to divine law are not subject to prescription. Bearing in mind the nature of divine law, this exclusion is obvious, although it is worthwhile remembering as a way of effectively protecting specific situations created according to this law which would otherwise remain less protected. The rights that may only be obtained through apostolic privilege are then indicated. It would seem that the legislator aimed to set this limitation on the acquiring of these rights as opposed to their potential loss.

Number 3° excludes the rights and obligations that bear directly on the spiritual life of Christ's faithful that do not appear in divine law. While the specific borderline between the content of this number and the first number is not always easy to draw, 3° guarantees certain rights and obligations regarding spirituality that would be very difficult to include under divine law, for instance the obligation to attend Mass on days of obligation (cf. c. 1247), the right to change confessors, etc. Many other rights bearing directly on the spiritual life of Christ's faithful fit better under rights belonging to divine law, for instance the right to associate for spiritual purposes (cf. c.215), the freedom to choose one's own spirituality (cf. c. 214), etc.

Number 4° ensures the certain and undisputed boundaries of ecclesiastical territories which cannot acquire additional territories or lose the ones they have by means of prescription. This is a good government measure. The following number aims to protect against potential abuses in receiving Mass offerings or obligations (cf. c. 945ff). The obligation acquired when receiving them can never prescribe although the ownership could change.

The sixth material exclusion of potential prescription refers to the acquiring of offices requiring the exercise of sacred orders. Here, the legislator aims to provide special protection for this type of office (cf. c. 150). This, however, does not preclude the possibility of acquiring, by means of prescription, ecclesiastical offices that do not demand this exercise of sa-

cred orders. It would nevertheless be hard to imagine which law would govern these instances. Lastly, the right of visitation (cf. cc. 396ff; 436 § 1, 2; 628; 683 §1; 1301 §2) and the obligation of obedience are mentioned. While the doctrine considers that prescription can allow visitation rights to be transferred from one ecclesiastical authority to another, it does not allow a person to be completely free from this right or from subjection to the competent ecclesiastical authority. In other words, 7° would prevent prescription for the purposes of freeing but not for the purposes of acquisition.

TITULUS XI
De temporis supputatione

TITLE XI
The Reckoning of Time

INTRODUCTION

Jesús Miñambres

1. In the classic philosophical definition time is the measurement of a movement according to a before and an after—*numerus seu mensura motus secundum prius et posterius*[1]—affecting everything that is human. This is why, as is often stated, juridical systems can also be considered in the context of the passage of time, either because time leads to historical developments in the system itself, or because time is the dimension in which juridically relevant facts and acts take place in its passage.[2]

Yet this juridical view of the element of time does not make time a *juridical fact* in and of itself.[3] In other words "time in and of itself does not produce juridical effects."[4] But juridically relevant human interests, juridical facts or acts, and realities containing reasons for justice are naturally inscribed in specific moments in human history. Law cannot ignore this reality. There are, however, certain circumstances, for instance the entitlement of the fundamental rights of Christ's faithful, in which the time factor is secondary since the juridical substance being protected, fundamental rights, belongs to Christ's faithful on account of their condition as such and not because they are Christ's faithful at a given point in time (cf., for example, the condition of equal dignity among Christ's faithful, cf. c. 208; or the right to worship God and follow their own form of spiritual life, cf. c. 214). However, even in the case of these fundamental rights,

1. ST. THOMAS, *IV Phis.*, lect. 17, cit. by G. MICHIELS, *Normae generales juris canonici*, II (Paris–Tournai–Rome 1949), p. 223.
2. Cf., e.g., TRIMARCHI, art. "Termine (diritto civile)," in *Novissimo Digesto italiano* XIX (Turin 1973), p. 95ff; E. SCAVO LOMBARDO, art "Termine (dir. can.)," in *Enciclopedia del diritto* XLIV (Milan 1992), p. 263; A. BERNARDEZ CANTON, *Parte general del Derecho canónico* (Madrid 1989), p. 201.
3. Cf. E. SCAVO LOMBARDO, "Termine...," cit., ibid.
4. A. BERNÁRDEZ CANTÓN, *Parte general...*, cit., ibid. Cf. also M. PETRONCELLI, *Diritto canonico (ottava edizione aggiornata con il nuovo codice)* (Naples 1983), p. 113.

the time factor may have a bearing when what is taken into consideration is not the mere ownership but rather the exercise of a right. Bearing all this in mind, it becomes clear that juridically relevant facts and acts could be classified by their time factor, in other words, depending on whether the moment in which they occur has juridical relevance or not.[5]

2. In any event, history in fact shows us that from antiquity, the different legal systems have taken the time factor into account. In his monograph on the reckoning of time, Van Hove puts forward several examples of how Roman jurists considered time.[6] Canon law has inherited institutions from the Roman law—such as prescription or consolidation of a custom (see commentaries to the respective titles)—that in fact operate by means of the passage of a given amount of time. This does not mean that time, in and of itself, can force the prescription of a right or obligation or can consolidate a custom. A substantial situation—possession—or a specific action—normative in the case of customs—is required, sustained over the course of a given period of time.[7] But for the law the lapse of this period of time does have a relevant bearing on the consolidation of the situation or activity.

The juridical consideration of time in the canonical system is obviously not limited to the aforementioned cases (prescription and custom). It also plays a primary role in many other cases, such as the entry in force of laws (cf. c. 8), setting the age of majority (cf. c. 97 § 1) or other ages required to perform specific acts or obligations (cf. cc. 11, 378 § 1, 3°, 425 § 1, 478 § 1, 643, 656, 658, 721, 874, 891, 893, 913, 914, 989, 1083, 1252, 1323, 1°, 1420 § 4); regulating procedural acts which always imply an ordering in time; establishing the indicated periods for exercising some rights and obligations (cf. c. 203); etc.

3. So there are many cases in which time takes on juridical relevance. This is why certain authors have classified legal references to time factors according to different criteria. Ciprotti's classification,[8] which has become commonly accepted among canonists, makes a distinction throughout the Code between references to time for the purposes of *fixing* some acts in time and those which merely indicate their *duration* (e.g., c. 648 § 1 indicates that the novitiate must last twelve months; c. 919 § 1 provides for a eucharistic fast of one hour), and time for the purposes of establishing a given *order* among different acts giving an indication of their relative precedence or succession (i.e., according to c. 656, 2°, the validity of a temporary profession requires the novitiate to have been made validly; according to cc. 1033 and 1065 § 1, to be lawfully promoted

5. Cf. E. SCAVO LOMBARDO, "Termine...," cit., *ibid.*

6. Cf. A. VAN HOVE, *De consuetudine, de temporis supputatione* (Malines-Rome 1933), p. 240.

7. Cf. M. PETRONCELLI, *Diritto canonico...*, cit., p. 113.

8. Cf. P. CIPROTTI, *Lezioni di diritto canonico. Parte generale* (Padova 1943), p. 161ff.

to orders or to marry, one must have received the sacrament of confirmation). Ciprotti also indicated that the *fixing* of the act at a given point in time can be established 1) by *coincidence* with other acts or facts (i.e., when c. 1010 establishes that "an ordination is to be celebrated ... on a Sunday or holy day of obligation"); 2) by indicating a certain *distance* from some with respect to others. This distance may be: *a) maximum* (for instance, c. 153 § 2, in which provision of an office can be made within six months before the expiry of the previous provision) or *b) minimum* (for example, according to c. 57 §§ 1 and 2, three months must pass before administrative silence can be presumed negative). In any event, the *position* of an act, fact, or affair with juridical relevance can always be fixed at a given point or in a period of time.[9]

On the other hand, there are periods of time in the canonical system which take on their own special and intrinsic importance: sacred times, to which the legislator devotes title II of part III of book IV on the function of sanctifying the Church (the *munus sanctificandi*).

4. In most cases, the setting of periods and fixing of points in time as well as of precedents or of successions is done for *juridical security.* A case in point is acquired prescription of goods on behalf of the owner in good faith. An extreme example could clarify how this title of the Code performs this function of security for legislative traffic. Ownership of immovable goods belonging to a *diocese* prescribes after thirty years (cf. c. 1270) on behalf of the owner with aims of ownership, a just title, and in good faith. Should the diocesan bishop realize that the true ownership is in favor of the diocese on the day before thirty years of possession elapses, then the ownership could be claimed at that time and the diocese would continue to be the owner of the immovable good in question. If the bishop discovers this on the day after the thirty years of possession elapses, the situation would be the same, but to favor security in trade, the law would grant a new ownership title to the owner——prescription or usucapion—that would consolidate his situation *erga omnes*. Moreover, before a claim was made by the diocesan bishop, the owner could oppose the prescription of the property in his favor regardless of all other considerations.

In cases like this, the judicial issue hinges mainly on the reckoning of the established period (thirty years in the example given). That is why the legislator has devoted this title of the book, as was done with the *CIC*/1917, on the general rules, to establish criteria to regulate this reckoning. Therefore, the following canons legally determine the principles that the interpreter must apply in all cases in which the time factor has a bearing on determining what is just—"unless the law expressly provides otherwise" (c. 200). In short, this confers juridical security on the system.

9. Cf. P. CIPROTTI, art. "Atto giuridico (dir. can.)," in *Enciclopedia del diritto* IV, pp. 218.

5. The title under discussion is placed at the end of book I, *De normis generalibus*. In the *CIC*/1917 the regulation of the reckoning of time was put forward in title III, also in book I (cc. 31–35), after addressing ecclesiastical and customary laws and before rescripts, privileges, and dispensations. Though none of the interpreters of that legal corpus could raise any controversy regarding the systematic placement of the title,[10] almost all of them acknowledged they could not exactly account for the choice made by the legislator in this regard.[11] Notwithstanding, we feel that the change in the placement from that of the *CIC*/1917 to the current Code does not indicate anything essential for the interpretation of the canons in this title. In Eastern canon law, the reckoning of time occupies the last title of the *CCEO*.

The explanation of the different systems for reckoning time, i.e., astronomical, local (which could be solar, medial, regional, or by zone) and legal or civil time (which could, in turn, be one of the previously mentioned examples or something else, e.g., as in daylight savings time in many countries)[12] is also frequent in the commentaries of the 1917 legal corpus. The explanation was occasioned by c. 33, which allowed for the use of different systems, thereby greatly complicating the matter.[13] The current law has simplified things and avoided the host of examples which occupied the canons of the *CIC*/1917.

6. The only criterion for measuring time that the legislator puts forward is the calendar used by nearly all legal systems (the Chinese and other such calendars that do not follow the system usually used in the West would have to be examined). This must refer to the Gregorian or Julian calendar reformed by Gregory XIII.[14]

In the whole issue on the reckoning of time, it is important to bear in mind that the legislator wanted to take into account the provisions on time contained in the civil codes.[15] In this way an attempt was made to avoid creating the complications for the faithful that could arise from a divergence in criteria between the civil society in which they live and ecclesial society. In any event, the problem was not solved *a radice* through remission to civil law (cf. c. 22), which would have been the appropriate technical solution. Instead, the desire was to provide specific canonical regulations to be followed in the Church's juridical system.

10. Cf. various references in A. VAN HOVE, *De consuetudine*..., cit., p. 238–239.

11. Cf. ibid., which refers to the position of A. TOSO; G. MICHIELS, *Normae generales*..., cit., p. 222, which cites OJETTI.

12. Cf. G. MICHIELS, *Normae generales*..., cit., p. 223–229; A. VAN HOVE, *De consuetudine*..., cit., p. 251–255.

13. Cf. R.A. HILL, commentary on cc. 200–203, in *The Code of Canon Law, A Text and Commentary* (New York 1985), pp. 113–114.

14. Cf. A. VAN HOVE, *De consuetudine*..., cit., p. 241, with note 1, which explains the whole system and gives bibliographical references.

15. Cf. *Comm.* 19 (1987), p. 194.

7. Two concepts that are very frequently used when speaking of the reckoning of time are period and term. In practice, the two expressions are often used interchangeably; in the technical sense, period should be understood as the span of time allotted for the performance of a given act, while terms would be the defining points of time for these periods: the beginning and the end, though often reference is only made to the end point.[16]

16. Cf. E. SCAVO LOMBARDO, art. "Termine (dir. can.)," cit., p. 266.

200 **Nisi aliud expresse iure caveatur, tempus supputetur ad normam canonum qui sequuntur.**

Unless the law provides otherwise, time is to be reckoned in accordance with the following canons.

SOURCES: c. 31; Pius PP. XI, Const. *Infinita Dei misericordia*, 29 maii 1924 (*AAS* 16 [1924] 212)

CROSS REFERENCES: cc. 2, 22, 920 § 2, 1175, 1244ff, 1290

COMMENTARY

Jesús Miñambres

This first canon of the title established the general principle whereby (unless otherwise indicated expressly by law) time, insofar as it affects the canonical system, should be reckoned according to the following canons, that is cc. 201–203. Canons 1543–1546 of the *Codex canonum Ecclesiarum orientalium* include identical regulations on this subject matter.

Canon 31 of the *CIC*/1917, which included the same regulation as the canon currently under discussion, established one further express exception: that regarding liturgical laws. Mention of this exception, however, was eliminated in the first works of revision.[1] Despite the fact that it was eliminated, the system of reckoning in liturgical laws remains an exception to the general system indicated here by the legislator, which is in accord with the provision in c. 2.[2] One can also draw this conclusion from other precepts such as c. 1175 which, when establishing that in the celebration of the liturgy of the hours "each particular hour is, as far as possible, to be recited at the time assigned to it," refers to liturgical hours and not to those in c. 202 § 1. The same can be said for c. 920 § 2, which orders compliance with the norm of annual communion "during paschal time," a time which certain liturgical laws shall determine.

Other precepts of the Code regarding sacred times (cf. cc. 1244ff) seem to have a "mixed" liturgical-canonical nature. Sundays, for example, shall be determined (cf. c. 1246 § 1) according to the calendar, in other

1. Cf. *Session V del coetus De normis generalibus* (September 29–October 4, 1969), in *Comm.* 19 (1987), p. 193–194.

2. Cf. G. MICHIELS, *Normae generales juris canonici* (Paris-Tournai-Rome 1949), pp. 230–231; contra, A. VAN HOVE, *De consuetudine, de temporis supputatione* (Malines-Rome 1933), p. 245–246 and note 1 on p. 246.

words following both the liturgical laws and c. 202 § 1. The determination of other holy days of obligation, particularly movable holy days (some of which are enumerated in c. 1246 § 1), or of liturgical seasons (cf., for example, "the season of Lent" in c. 1250), depends exclusively on liturgical law.

One of the cases in which, relatively frequently, a juridical obligation is determined in time through recourse to the liturgical reckoning of time is the *vacatio legis*, prescribed by c. 8 § 1. For instance, the *CIC* itself, enacted on January 25, 1983 according to an express prescription in the *Sacrae disciplinae leges*, attained "binding force as of the first day of Advent of 1983." This date obviously had to be determined according to the liturgical laws but posed a certain problem of interpretation: one was left in doubt as to whether the prescription came into effect at first vespers of the previous day (liturgical reckoning) or at 00.00 hrs. (midnight) of the day in question.

The commentators on the *CIC*/1917, also included another express exception to the regulation of this canon, that is, the general norms of the *CIC* on the reckoning of time regarding the "time for contractual obligations to have force" in 33 § 2 of the *CIC*/1917.[3] In this canon it was established that "if nothing else was expressly agreed on" then "what is stipulated in the civil law in force in that territory" would be applied. Although perhaps a bit redundant, this regulation was in accord with the general remission to civil law which c. 1529 prescribed on the matter of contracts and fulfillment of obligations. In fact, during the preparation work for the new Code, c. 33 § 2 was considered to be reiterative and was eliminated since it was included in the general reference to civil law for contracts and obligations (now included in c. 1290; cf. also c. 22).[4]

This canon indicates that the regime established in the following canons shall be followed unless the law expressly indicates otherwise. Such "law" that may expressly provide otherwise may be outside the Code. Thus, there may be other systems for the reckoning of time in customary norms regarding a particular juridical act in a specific place; by particular legislation; or by statutory or regulatory legislation, etc. It suffices that the system be noted *expressly* and not treat matters for which a legislator of a higher rank has authoritatively defined another system.[5] In any event, the exception—a customary, particular, or statutory regime, etc.—must be proven.[6]

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3. Cf. G. MICHIELS, *Normae generales...*, cit., p. 232–234; A. VAN HOVE, *De consuetudine...*, cit., pp. 246–247; etc.
4. Cf. *Comm.* 19 (1987), p. 196.
5. Cf. G. MICHIELS, *Normae generales...*, cit., p. 231.
6. Cf. A. VAN HOVE, *De consuetudine...*, cit., p. 246.

201 § 1. **Tempus continuum intellegitur quod nullam patitur interruptionem.**

§ 2. **Tempus utile intellegitur quod ita ius suum exercenti aut per sequenti competit, ut ignoranti aut agere non valenti noncurrat.**

§ 1. Continuous time means unbroken time.

§ 2. Canonical time is time which a person can so use to exercise or to pursue a right that it does not run when one is unaware, or when one is unable to act.

SOURCES: § 1: c. 35
§ 2: c. 35

CROSS REFERENCES: cc. 165, 177 § 1, 179 § 1, 1634 § 2

COMMENTARY

Jesús Miñambres

Although the legislator has eliminated many types of reckoning that differed from one to the other (see commentary on the title), which were included in c. 33 § 1 of the *CIC*/1917, he did maintain the division between continuous and useful (canonical) time indicated in c. 35 of the *CIC*/1917. Canon 201 of the present Code includes this distinction—and even literally its words—but rearranges the canon into two paragraphs.

This distinction in question indicates that it is continuous time which elapses without interruption despite any impediment that may affect the subject. It is therefore a singular, indivisible space and cannot be reckoned in parts. Canonical time, by contrast, is time that can suffer interruptions.[1]

The criterion for the legal distinction consists, therefore, in the possibility of whether or not the prescribed period of time can be interrupted. Nevertheless, the effective interruption can only be proven once the time has begun to elapse. This legal criterion therefore does not offer the basis for knowing ahead of time which type of reckoning should be applied in a given instance. The ideal difference fundamentally lies in that canonical

1. Cf. A. VAN HOVE, *De consuetudine, de temporis supputatione* (Malines-Rome 1933), p. 278; G. MICHIELS, *Normae generales juris canonici* (Paris-Tournai-Rome 1949), pp. 274–275.

time is reckoned by quotas—which is why any one of them may be missing—while continuous time is considered indivisible. This means, in this specific case, that the criterion cannot be situated in the effective interruption of the indicated period; it must be placed in a preceding logical point in time. Moreover, canonical time can be considered continuous if it cannot suffer interruption.

The practical difficulty lies in that, when making reference to time, the legislator does not always explicitly indicate whether the period in question must be reckoned as canonical or continuous time. The principle is therefore usually taken as a general rule, provided that the contrary is not proven, that time must be considered continuous.[2] In addition, Van Hove offers some specific criteria for pinpointing the cases in which time should be considered continuous: *a)* when it is designated by proper name (e.g., if it is determined that an obligation must be performed in the month of February); *b)* when the beginning of the period indicated is either implicitly or explicitly designated (e.g., when stating: in six months as of February); *c)* when juridical prescription establishes time as continuous (e.g., if the legislator prescribes that an act must be performed within six continuous months); or *d)* in the case of a matter which, by its very nature, cannot suffer interruption (e.g., one month suspension of office).[3]

In accordance with the previously mentioned general rule, the principle is that, should there be a doubt, time is to be considered continuous and not canonical. This is a *iuris tantum* presumption that allows for proof to the contrary. An *essential* argument is adduced in order to bolster this principle: time, by its very nature, elapses continuously.[4]

Insofar as canonical time is concerned, the general criterion is that it must be expressly indicated by the legislator. The *CIC* offers some examples: c. 165 prescribes that election to an office is not to be deferred "beyond three canonical months"; c. 177 § 1 establishes a period of "eight canonical days" for accepting the election; c. 179 § 1 stipulates that when an election requires confirmation, that the person elected request this confirmation "in a period of eight canonical days"; the same period, with identical characteristics, is established in c. 182 § 1 for the president of the electoral college to send the postulation to the competent authority; c. 1634 § 2 indicates for appeals that "if the party is unable to obtain a copy of the appealed judgment from the originating tribunal within the canonical time limit, this time limit is in the meantime suspended";

2. Cf. A. VAN HOVE, *De consuetudine...*, cit., p. 268; G. MICHIELS, *Normae generales...*, cit., p. 275; E. SCAVO LOMBARDO, art. "Termine (dir. can.)," in *Enciclopedia del diritto* XLIV (Milan 1992), p. 268.

3. Cf. A. VAN HOVE, *De consuetudine...*, cit., pp. 268–269.

4. Cf. A. VAN HOVE, *De consuetudine...*, cit., p. 280; G. MICHIELS, *Normae generales...*, cit., p. 275.

etc. Other express prescriptions for reckoning canonical time may be stipulated in specific, statutory, or regulatory legislation.

Some authors have made distinctions between time that is canonical at the outset and time that is canonical on a permanent basis. The former is for cases in which the period indicated does not begin to elapse until there is news of a given fact (cf., e.g., cc. 158 § 1, 165, 418 § 1, 421 § 1; etc.) while the latter refers to the continuation of the period.[5] As Van Hove affirms, nothing prevents both computations from being termed canonical and from a distinction being made between canonical time regarding *exercising* rights and canonical time referring to their *continuation*. Van Hove also indicates that if canonical time is granted due to *ignorance*, it will have been granted as canonical in terms of the outset, while if it is due to *incapacity*, it will refer to both the outset and the elapsing of time.[6]

The specific norms according to which both useful and continuous time are to be reckoned are established in the next canon.

5. Cf. A. VAN HOVE, *De consuetudine...*, cit., p. 279; G. MICHIELS, *Normae generales...*, cit., p. 275 and note 2.
6. Cf. A. VAN HOVE, *De consuetudine...*, cit., p. 279.

202 **§ 1. In iure, dies intellegitur spatium constans 24 horis continuo supputandis, et incipit a media nocte, nisi aliud expresse caveatur; hebdomada spatium 7 dierum; mensis spatium 30 et annus spatium 365 dierum, nisi mensis et annus dicantur sumendi prout sunt in calendario.**

§ 2. Prout sunt in calendario semper sumendi sunt mensis et annus, si tempus est continuum.

§ 1. In law, a day is understood to be a space of twenty-four hours, to be reckoned continuously and, unless expressly provided otherwise, it begins at midnight; a week is a space of seven days; a month is a space of thirty days, and a year a space of three hundred and sixty-five days, unless it is stated that the month and the year are to be taken as in the calendar.

§ 2. If time is continuous, the month and the year are always to be taken as in the calendar.

SOURCES: § 1: c. 32
§ 2: c. 34 §§ 1 et 2

CROSS REFERENCES: cc. *day*: cc. 649, 697, 2° et 3°, 1039, 1138 § 2, 1460 § 3, 1463 § 1, 1507 § 2, 1609 § 2, 1630 § 1, 1637 § 3, 1644 § 1, 1649 § 2, 1655 § 2, 1659 § 1, 1661, 1668 §§ 2 et 3, 1677 §§ 2 et 4, 1682 § 1, 1735, 1737 § 2, 1742 § 1; *week*: cc. 533 § 2, 1609 § 5; *month*: cc. 8, 57, 72, 102 § 2, 153 § 2, 158 § 1, 161, 177 § 2, 189 § 3, 268 § 1, 379, 382 § 2, 395 §§ 2 et 4, 410, 418 § 1, 437 § 1, 533 § 2, 648 § 1, 649 § 1, 653 § 2, 1031 § 1, 1035 § 2, 1116 § 1, 2°, 1152 §§ 2 et 3, 1357 § 2, 1453, 1506, 1520, 1610 § 3, 1623, 1633, 1644 § 1, 1646 §§ 1 et 2, 1655 § 2; *year*: cc. 26, 78 § 3, 120 § 1, 253 § 1, 236, 272, 399, 493, 494 § 2, 501 §§ 2 et 3, 525, 2°, 665 § 1, 684 § 2, 1031 § 4, 1270, 1383, 1453, 1621

COMMENTARY

Jesús Miñambres

The present canon offers specific criteria that govern the reckoning of time, both canonical and continuous, in the general law of the Church "unless the law provides otherwise" (c. 200). It is here that the greatest

simplification of the 1917 norms was effected, at which time the examples which it offered were eliminated (cf. cc. 32 and 34 *CIC*/1917).

Without getting into disquisitions on astronomy or other subjects as other authors have,[1] the notion of the *day* is established as the basis for this reckoning. The legislator uses the traditional measurement of time included back in Roman law,[2] which defines a day as the space of twenty-four hours ranging from one midnight to the following. This concept was included in the Decretals[3] and has remained unchanged up to the present. Whether or not to include a legal definition of day, week, etc. was debated during the drafting of the norms of the Code, but the decision was made not to do so.[4]

The twenty-four hours comprising a day are reckoned as continuous, without the possibility of being interrupted, unless expressly indicated to the contrary, from 00:00 hrs. to 24:00 hrs., in other words from midnight to midnight. In principle, midnight is determined according to the legal local time.

Yet the use of the concept of a day is not unambiguous in the Code. On certain occasions, a day is clearly spoken of in the liturgical sense and must be interpreted according to liturgical laws which are certainly different from the juridical concept mentioned here. Thus, for instance, the days mentioned in c. 388 § 2, when the bishop must personally offer the Mass for the people, do not necessarily begin at midnight. The norm can also be fulfilled the evening prior to a holy day (cf. c. 1248 § 1). The same line of reasoning can be applied to the days mentioned in cc. 395 § 3, 534, and 905.

However, strictly juridically speaking, all of the other periods of time are defined based on the basic concept of a day, without getting into astronomy here either. Thus, a *week* is a space of time of seven days. When regarding canonical time, the week will be considered a space of seven full canonical days, meaning that it would not be unusual for it to last eight, nine, or more calendar days. A *month* is a space of thirty days, and the same considerations that were made about the canonical week also apply here. There is therefore nothing to prevent a month from lasting forty calendar days if only thirty of those days are canonical. For the same reason, if a month of canonical time is granted for exercising a right or fulfilling an obligation as of January 31, although in fact there may be no interruptions, the period would not expire on the 28th or 29th of February, which is what would be in the case time were to be reckoned as continu-

1. Cf. G. MICHIELS, *Normae generales Juris canonici* II (Paris-Tournai-Rome 1949), p. 223–224.
2. D. 2, 12, 8 (Paulo); cf. A. VAN HOVE, *De consuetudine, de temporis supputatione* (Malines-Rome 1933), p. 240.
3. *X* I, 29, c. 24 (Innocent III); cf. A. VAN HOVE, *De consuetudine*..., cit., p. 241.
4. Cf. *Comm.* 19 (1987), pp. 194–195.

ous (cf. § 2 in this canon), but rather during the first few days of March. The same criterion would apply for reckoning a canonical *year*, which would be 365 full days, although it may have 366 according to the calendar in question.

For instance, the "three canonical months" mentioned in c. 165 to proceed to elect a candidate to an office is a space of ninety canonical days from the receipt of notification of the vacancy of the office. The ninety days shall be reckoned completely irrespectively of the calendar months they fall in. In other words, ninety days (if all are canonical) from July 1 through September 28, or the same number of days from the February 1 through May 1 or 2. Canonical time is counted by quotas, in this case by full days.

Nevertheless, should the legislator establish that the time must be considered continuous—or not make any mention of the fact at all, when it is presumed to be continuous (see commentary on c. 201)—then the month and the year are taken as in the calendar. Thus, if the three months in the previously mentioned example were to be reckoned as continuous, then they would finish on September 30 if they began on July 1, and on April 30 if they began on February 1.

203 **§ 1. Dies *a quo* non computatur in termino, nisi huius initium coincidat cum initio diei aut aliud expresse in iure caveatur.**

§ 2. Nisi contrarium statuatur, dies *ad quem* computatur in termino, qui, si tempus constet uno vel pluribus mensibus aut annis, una vel pluribus hebdomadis, finitur expleto ultimo die eiusdem numeri aut, si mensis die eiusdem numeri careat, expleto ultimo die mensis.

§ 1. The first day is not to be counted in the total, unless its beginning coincides with the beginning of the day, or unless the law expressly provides otherwise.

§ 2. Unless the contrary is prescribed, the final day is to be reckoned within the total; if the total time is one or more months, one or more years, one or more weeks, it finishes on completion of the last day bearing the same number or, if the month does not have the same number, on the completion of the last day of that month.

SOURCES: § 1: c. 34 § 3, 2° et 3°; CodCom Resp. II, 12 nov. 1922 (*AAS* 14 [1922] 661)
§ 2: c. 34 § 3, 3° et 4°; CodCom Resp. II, 12 nov. 1922 (*AAS* 14 [1922] 661)

CROSS REFERENCES: cc. 8, 57, 72, 158, 165, 166, 177, 179 § 1, 182 § 1, 184 § 1, 235 § 1, 236, 1°, 378 § 1, 4°, 395 § 2, 492 § 2, 502 § 1, 494 § 2, 648, 649, 653, 655, 657 §§ 2 et 3, 686 § 1, 745, 867, 955 § 2, 972, 1031 § 1, 1032 § 2, 1035 § 2, 1145 § 1, 1270, 1336 § 1, 1347 § 1, 1357, 1362–1363, 1453, 1465–1467, 1492 § 1, 1506, 1507 § 2, 1513 § 2, 1520, 1596 § 3, 1599 § 2, 1601, 1603 § 1, 1609 § 5, 1610 § 3, 1621, 1623, 1625, 1626 § 2, 1630 § 1, 1635, 1637 § 3, 1646, 1655 § 2, 1659 § 1, 1660–1661, 1668, 1677 §§ 2 et 4, 1682, 1703 § 2, 1723 § 1, 1734 § 2, 1735–1736, 1737 § 2, 1742 § 1, 1744 § 1, 1751

COMMENTARY

Jesús Miñambres

This last canon in the title on the reckoning of time includes norms on the beginning and end of periods established by the legislator. This regulation has repercussions throughout the entire juridical corpus since on many occasions, the legislator indicates periods for exercising rights or fulfilling obligations.

To dwell only on a few examples from book I of the *CIC*, c. 8 establishes the *vacatio legis* period; c. 57 prescribes that the authority that must issue a decree must do so within a period of three months, and goes on to indicate that if this is not done in this way, the request must be considered to be denied due to negative administrative silence. Canon 72 establishes that rescripts granted by the Apostolic See may be extended for a period of three months.

Several examples can also be found in other books of the *CIC* (see related canons above) and particularly in book VII "De processibus."[1] In all of these cases, time is reckoned as established in this canon unless expressly provided otherwise.

The legislator proceeded to simplify the reckoning of periods of time found in the *CIC*/1917, particularly insofar as the *terminum ad quem*.

Midnight, either on the same day if the period begins to elapse at 00:00 hrs, or the following day if it begins at any other time, is always chosen as the beginning of the period—*a quo* term. Thus, the reckoning of periods "from moment to moment" provided for in c. 34 § 2 *CIC*/1917 disappeared and a single precept is established from numbers 2° and 3° of § 3 of that same canon. In the current Code, unless the "law expressly provides otherwise" the periods always begin to elapse at midnight.

On the other hand, the end of the period—the *ad quem* day—is always included in the period that ends at 24:00 hrs on that day. If the time is continuous and the period is expressed in months or years, the period is considered to conclude at 24:00 hrs on the day bearing the same number, or if it does not exist, on the same day of that month. Although the canon does not expressly indicate so, the latter prescriptions may only refer to continuous time since canonical time, by definition, is reckoned in units and what is most often the case is that two calendar months do not coincide with sixty canonical days. This second paragraph of c. 203 synthesizes, simplifies, and unifies what the *CIC*/1917 established in numbers 2–5 of § 3 of c. 34.

1. Cf. E. SCAVO LOMBARDO, "Termine (dir. can.)," in *Enciclopedia del diritto* XLIV (Milan 1992), pp. 265–267.

In summary, insofar as the reckoning of periods, the *CIC* does not take into consideration the initial day of the period and does count the last day. This applies to both canonical and continuous time since the legislator, with the exception of what is mentioned above, does not make any distinction between the two.